

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA**

BEATRICE B. McWATERS, et al.,

CIVIL ACTION NO. 05-5488

VERSUS

SECTION "K" (3)

**FEDERAL EMERGENCY MANAGEMENT
AGENCY, et al.**

RESPONSE TO PLAINTIFFS' POST HEARING BRIEF

PETER D. KEISLER
Assistant Attorney General

MICHAEL SITCOV
Assistant Director

W. SCOTT SIMPSON
Senior Trial Counsel

ELISABETH LAYTON
Trial Attorney

OF COUNSEL:

BARBARA D. MONTOYA
KRISTEN E. SHEDD
Trial Attorneys
Office of the General Counsel
Federal Emergency Management Agency
Department of Homeland Security

Attorneys, Department of Justice
Civil Division, Room 7210
Post Office Box 883
Washington, D.C. 20044
Telephone: (202) 514-3495
Facsimile: (202) 616-8470
E-mail: scott.simpson@usdoj.gov

COUNSEL FOR DEFENDANTS

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INTRODUCTION

Plaintiffs' post-trial brief continues their pattern of asserting new causes of action not contained in the pleadings. In addition to pressing the "fair market rent" claim that plaintiffs alleged for the first time in their pre-trial position statement (docket #101), their post-trial brief argues, for the first time, that FEMA has failed to establish "written ascertainable standards" for its "agency decisions," and that FEMA should be required to allow applicants to use Section 408 assistance to pay for utilities. A substantial portion of plaintiffs' post-trial brief is devoted to these claims, of which the defendants have not received fair notice and which the plaintiffs should not be permitted to pursue.

As shown in Defendants' Post-Trial Brief, the causes of action alleged in plaintiffs' Third Amended Complaint are without merit. As described below, moreover, nothing in plaintiffs' post-trial brief is to the contrary. The Administrative Record and the evidence at trial establish that judgment should be entered for the defendants on all of plaintiffs' properly-pled claims.

Even assuming there were any merit to plaintiffs' claims, the relief that they seek would be far beyond the bounds of reason. In seeking extensive changes in the administration of federal disaster relief, the monitoring of FEMA's ongoing performance by an "independent" person, and continuing jurisdiction for "at least" six months to allow judicial monitoring and the submission of "post judgment motions," plaintiffs would install themselves and this Court as absentee directors of the Federal Emergency Management Agency. The administration of federal disaster assistance does not lend itself to ongoing judicial control, and nothing in this action justifies such extraordinary relief.

Perhaps the epitome of plaintiffs' effort to manage FEMA through this lawsuit is their complaint that defendants are not properly taking into account that some disaster victims "have

mental disabilities, are illiterate, or are elderly." See See Plaintiffs' Post Hearing Brief at 19 (docket #125) [hereinafter Pls' Brief].¹ These persons, plaintiffs complain, "may not be able to read the forms or understand automated messages . . . sent to them. . . ." Id. Other than assigning a FEMA-funded team consisting of a psychologist, a teacher, and a social worker to live with each applicant, there does not seem to be much that the agency can (or should) do to remedy these individual difficulties. Plaintiffs apparently believe, not only that federal disaster assistance is an entitlement program of general welfare assistance, but also that FEMA is responsible for improving the overall lot of all victims of Hurricane Katrina. Neither proposition is correct.

The permissible scope of this action, to the extent the Court has jurisdiction at all, is not to remedy every potential claim that occurs to plaintiffs' attorneys each time they file another brief, nor to correct every shortcoming described in congressional and executive reports on the federal government's response to Hurricane Katrina. Nor is this action the proper forum to address the adequacy or inadequacy of FEMA's budget. Rather, the Court's role is to resolve any viable causes of action the plaintiffs have pled against the defendants in their Third Amended Complaint. Inasmuch as there are no such viable causes of action, judgment should be entered for the defendants, and this action should be dismissed in its entirety.

ARGUMENT

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

The first, second, fifteenth, and seventeenth causes of action in plaintiffs' Third Amended Complaint allege that FEMA has not resolved quickly enough certain requests for assistance

¹ Although plaintiffs make this complaint in discussing their new, post-trial contention that FEMA has failed to establish "written ascertainable standards," it does not seem to be logically related to that claim. Indeed, an "illiterate" person would be unable to read "written ascertainable standards."

from victims of Hurricane Katrina. Plaintiffs' post-trial brief says very little about these claims, presumably because FEMA's progress in processing applications has mooted them. Plaintiffs assert that FEMA has denied many of the applications that were pending in December 2005. See Pls' Brief at 14-15. If any of those denials were improper, however, they can and should be overturned on appeal; that is why the appeal right exists. See 42 U.S.C. § 5189a(a); 44 C.F.R. § 206.115. Every determination letter informs the applicant of that right, and FEMA's news releases in the wake of Hurricane Katrina have also described it. See Admin. Record, Vol. 18, CD #1 (form letters to applicants); Vol. 18, CD #8, News Release: "A Letter of Denial from FEMA May Not Be the Last Word: Missing Information Is One of the Main Reasons for Denial" (Dec. 29, 2005); News Release: "FEMA Denial Letters May Not Be Last Word" (Jan. 7, 2006).

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

The third through ninth causes of action in plaintiffs' Third Amended Complaint allege that FEMA failed to provide various types of notice regarding assistance under the Stafford Act.² As discussed in Defendants' Post-Trial Brief, the Administrative Record and evidence adduced at trial show that FEMA has provided, as appropriate, the various types of notice sought in the Third Amended Complaint. See Defendants' Post-Trial Brief at 10-13 (docket #123). Although plaintiffs' post-trial brief argues generally that FEMA must provide "adequate notice" and has

² Since it is not addressed in their post-trial brief, plaintiffs seem to have abandoned their 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. See Defendants' Post-Trial Brief at 13-15 & n.12.

failed to do so, see Pls' Brief at 14, the brief does not, with only two exceptions, state specifically in what respects they believe the agency has failed to provide such notice.³

Plaintiffs assert, first, that FEMA must provide notice to applicants who were "wrongfully denied" assistance because another member of the same pre-disaster household has received assistance, regarding how to obtain "reconsideration of eligibility." See id. at 27. As reflected in the Administrative Record and in testimony at trial, however, FEMA has already provided such notice. 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 unsuccessful applicant could submit documentation showing that he had relocated separately from other pre-disaster household members. See Admin. Record, Vol. 3, Tab 91, AR00560; Vol. 3, Tab 99, AR00738. The agency also disseminated this information 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. And at trial, the Acting Deputy Director of FEMA's Recovery Division testified that FEMA has taken the actions reflected in these documents from the Administrative Record. See Trial Transcript, Vol. 4, 406:3-407:22.

³ All of these claims regarding notice should be dismissed for the additional reasons that (1) the Stafford Act does not require FEMA to provide any particular type of notice, so the agency is not liable on any such claim, 42 U.S.C. § 5148, and (2) there is no constitutionally protected "property" interest in federal disaster assistance, so the Due Process Clause does not apply.

Second, plaintiffs assert that "FEMA must make clear for evacuees, by appropriate notices, when and for what period re-certification for continuing Assistance is necessary." See Ps' Brief at 30. Material in the Administrative Record and testimony at trial indicate, however, that the agency already provides such notice. For example, the letter sent to Katrina victims regarding their first tranche of rental assistance stated, "Rental Assistance This money is to be used to rent a different place to live. Additional assistance may be awarded in 3 month increments." See Admin. Record, Vol. 18, CD #1 ("Katrina FEMA ETH Housing Letter (Just Rent) (4).doc," in "Eligibility Letters" folder). Certain of the PSAs that FEMA disseminated to media outlets in the fall of 2005 indicated that the initial tranche of assistance "should last three months." See Admin. Record, Vol. 18, CD #9, mix_MS_LA_housing30.mp3, mix_MS_LA_housing60.mp3; Vol. 20, Tabs 641-43 (communication with media outlets regarding PSAs).⁴ The letter sent to Katrina evacuees asking them to recertify for their second tranche of assistance said: "If you are approved for additional rental assistance, the amount provided will be intended to cover a three-month period set at a rental rate typical for your current location (Fair Market Rental Rate)." See Admin. Record, Vol. 3, Tab 91, AR00568.

Additionally, Donna Dannels, Acting Director of FEMA's Recovery Division, testified at trial that the agency advises disaster victims, each time they receive a tranche of assistance, what will be required in order for them to be recertified for the next tranche. See Trial Transcript, Vol. 4, 395:14-396:16. In relation to victims of Hurricane Katrina, FEMA also sends a letter on the fortieth day of each three-month period, again informing the applicant what they must do to receive the next tranche of assistance, and asking the applicant to submit that information or

⁴ The PSAs referred to at Tab 641 in Volume 20 of the Administrative Record are the files named "mix_MS_LA_housing30.mp3" and "mix_MS_LA_housing60.mp3" on compact disk number 9 in Volume 18 of the Record.

documentation within ten days. See Trial Transcript, Vol. 4, 396:17-397:2. Generally, therefore, the agency provides either the next tranche of assistance or a determination of ineligibility approximately seventy-five days into the ninety-day period of assistance. Id.⁵

III. FEMA's Modification of the Policy on Separated Households Is Thoroughly Reasonable and Has Been Consistently Applied

The tenth, eleventh, and fourteenth causes of action in plaintiffs' Third Amended Complaint allege improper application of FEMA's modification of its policy on separated households. Plaintiffs' reference to the "illegal 'shared housing' rule," see Pls' Brief at 3 (emphasis added), is obviously a misnomer, given that the Stafford Act prohibits "duplication of benefits" and that FEMA's regulations state that the agency can provide assistance only "for one temporary . . . residence" for each "pre-disaster household," unless the "size or nature" of the household requires otherwise. 42 U.S.C. § 5155(a); 44 C.F.R. § 206.117(b)(1)(i)(A), (ii)(B). Plaintiffs have not, moreover, challenged the constitutionality of this statutory provision or the legality of the regulations. FEMA's modification of this rule for Katrina victims — for which plaintiffs now attack the agency — was an exercise of FEMA's statutory discretion to facilitate the provision of assistance.

At trial, the Acting Director of FEMA's Recovery Division testified that the agency is, in fact, providing assistance separately to different members of a single household who 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. Plaintiffs' only response to this testimony is to refer to several declarations that were submitted during pre-trial proceedings in this case, to the effect that FEMA has

⁵ Plaintiffs cite 42 U.S.C. § 5165c(c), which provides that "[t]he President shall promote public access to policies governing the implementation of the public assistance program." See Pls' Brief at 9. That statute, however, applies to "public assistance," not to the Individuals and Households program under Section 408 of the Stafford Act.

denied assistance "to separated members of a household." See Pls' Brief at 24. Those declarations, however, are hearsay; also, none of the listed individuals testified at trial, plaintiffs did not seek to introduce the declarations into evidence, and they have cited no hearsay exception that would permit their consideration.

In any event, the declarations do not contradict the Administrative Record, to the effect that FEMA will provide separate assistance for a second member of a household if the applicant shows that the household was separated as a result of the disaster and that the applicant is separately incurring housing expenses (by submitting either rent receipts or a separate lease). See Admin. Record, Vol. 1, Tab 8, AR00290; Vol. 2, Tab 67, AR00474; Vol. 3, Tab 91, AR00560; Vol. 3, Tab 99, AR00738; Vol. 3, Tab 106, AR00750.⁶ The declarations indicate that the declarants were denied assistance, but none of them indicate that they were again denied after submitting the required documentation.

Next, plaintiffs contend that someone who has been denied assistance because of linkage to another applicant from the same pre-disaster household should not have to submit rent receipts in order show a need for separate assistance. See Pls' Brief at 25-26. First, plaintiffs' argument inaccurately stereotypes Katrina victims who have sought federal disaster assistance: not every pre-disaster resident of the Gulf Coast was destitute of personal funds to pay his or her post-evacuation housing expenses for a time; thus, many of them could have paid rent themselves initially, then produced receipts. Second, this argument incorrectly represents FEMA's modifica-

⁶ Plaintiffs argue there is no evidence that anyone actually heard FEMA's auto-dial messages regarding the modification of the rule on separated households. See Pls' Brief at 25. They do not, however, controvert defendants' evidence that the auto-dial messages were transmitted — that is, that the calls were made to applicants' telephone numbers. See Admin. Record, Vol. 1, Tab 8, AR00290; Vol. 3, Tab 91, AR00560; Trial Transcript, Vol. 4, 406:3-407:22. FEMA should not be required to have each applicant sign an acknowledgment that he or she has heard each message transmitted by the agency.

tion of the policy on separated households. As reflected in the letter sent to every applicant who was initially denied on this basis, they could receive separate assistance by submitting either rent receipts or a "separate lease," along with a letter explaining why the household had been separated as a result of the disaster.⁷ See Admin. Record, Vol. 3, Tab 91, AR00560; Vol. 3, Tab 99, AR00738; Trial Transcript, Vol. 4, 406:3-407:22. Not requiring any documentation of a need for separate assistance would have been an invitation to commit fraud. See Trial Transcript, Vol. 4, 400:23-403:2.

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

The twelfth, thirteenth, and fourteenth causes of action in plaintiffs' Third Amended Complaint allege that FEMA has illegally required victims to apply for a loan from the Small Business Administration as a condition for receiving housing assistance. As shown in Defendants' Post-Trial Brief, FEMA has sent a letter to all applicants who were referred to the SBA for a loan, stating, in bold-face type, that they are not required to apply for a loan to receive housing assistance; FEMA has called all such applicants to convey the same information; and the agency has distributed public service announcements that include this information. See Admin. Record, Vol. 1, Tab 8, AR00289; Vol. 3, Tab 91, AR00564; Vol. 18, CD #9, 15_Housing_SBA.mp3, 30_Housing_SBA.mp3; Vol. 20, Tabs 641-43 (communication with media outlets regarding PSAs);⁸ Trial Transcript, Vol. 4, 355:19-357:8; 357:9-358:8. The letter sent to applicants asking

⁷ The auto-dialer script may have been somewhat less clear in that regard, because of the need to convey information quickly in a recorded telephone message. In any event, to the extent the script was less clear, the letter spelled out precisely what was required.

⁸ The PSAs referred to at Tab 642 in Volume 20 of the Administrative Record are the files named "15_Housing_SBA.mp3" and "30_Housing_SBA.mp3" on compact disk number 9 in Volume 18 of the Record.

them to recertify for their second tranche of assistance also stated that no SBA loan application is required. See Admin. Record, Vol. 3, Tab 91, AR00569.

Nevertheless, plaintiffs still complain that "FEMA has not eliminated the confusion." See Pls' Brief at 28. At trial, plaintiffs presented hearsay evidence to the effect that some evacuees still think they need to apply for an SBA loan to receive housing assistance.⁹ See Trial Transcript, Vol. 2, 174:11-20. The fact remains, however, that there was nothing more the agency could (or should) have done to make people understand they did not need to seek an SBA loan to obtain FEMA assistance, besides the letters, telephone calls, and public service announcements that made this point explicitly. Moreover, there is no basis for compelling FEMA to "eliminate the confusion" by allowing applicants to receive "other needs" assistance without applying for an SBA loan, as one of the regulatory criteria for "other needs" assistance is denial or inadequacy of an SBA loan. See 44 C.F.R. § 206.119(a); see also 42 U.S.C. § 5174(a)(2).

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

Plaintiffs' attempt to advance their late, unpled claim regarding the amount of FEMA housing assistance consists of factual mischaracterizations, unsupported invective, and irrelevant hearsay testimony. Plaintiffs argue, first, that "FEMA has adopted an arbitrary standard of a national average, and then has refused to properly adjust these payments." See Pls' Brief at 3. This argument ignores the limited extent of FEMA's use of a national average, the reasons for its

⁹ Plaintiffs' evidence on this point was third-hand information: the witness, Patricia Mauldin, testified regarding what other people (certain applicants) had told her about their understanding of what FEMA had communicated to them. See Trial Transcript, Vol. 2, 173:15-174:20. Although, as the Court observed during trial, the applicants' perceptions regarding whether they had to apply for a loan may have been admissible, Ms. Mauldin's testimony regarding what those persons told her was itself hearsay, and not properly admitted. See Trial Transcript, Vol. 2, 175:3-8. While the applicants' perceptions may have been relevant to explain their own conduct, Ms. Mauldin's "understanding" of those perceptions was not.

use, and the fact that FEMA has, in fact, adjusted that payment to reflect an applicant's actual location.

In the hectic days immediately after Hurricane Katrina, many applicants who had to evacuate did not know where they were going, and FEMA was initially unable to determine their ultimate post-evacuation locations. See Trial Transcript, Vol. 2, 136:1-21. In order not to delay assistance, therefore, FEMA waived its usual pre-assistance inspection requirement for applicants from the most devastated areas and gave those applicants instead an amount of rental assistance equal to the national average of all fair market rents nationwide.¹⁰ See Trial Transcript, Vol. 2, 106:4-24; 132:18-133:2; Vol. 4, 341:8-19; 385:15-387:23. All Katrina applicants from outside those 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. Moreover, those who received the national average amount for their initial assistance received a supplemental payment for that period after advising FEMA that they were in a more expensive area during that period, see Trial Transcript, Vol. 4, 382:8-383:15; 388:8-17; 479:24-480:3, and then received the appropriate amount based on their post-Katrina location upon recertifying for continued assistance. 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. Thus, FEMA had perfectly valid reasons, favorable to the applicants, for initially giving them a national average rent amount.

Plaintiffs also misrepresent the facts in asserting that FEMA "forced" people out of hotels with an amount of assistance that was "inadequate" for their areas. See Pls' Brief at 11. In

¹⁰ The national average used by FEMA was the average of the fair market rental rates published by the Department of Housing and Urban Development. See Admin. Record, Vol. 19, Tab 617, 06010; see also 70 Fed. Reg. 57,654 (Oct. 3, 2005).

reality, when an applicant who was sheltering in a hotel room 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 applicant's intended location. See Trial Transcript, Vol. 4, 480:17-481:15.

To the extent plaintiffs contend that FEMA's fair market rent amounts are inadequate overall, either throughout the entire country or in the Gulf Coast region, they have failed to support that claim with satisfactory evidence. As described in Defendants' Post-Trial Brief, the testimony of Patricia Mauldin (cited in plaintiffs' brief) regarding the contents of an Internet site was hearsay not covered by an exception to the hearsay rule. See Pls' Brief at 7. Additionally, Ms. Mauldin testified as to the availability of apartments in the New Orleans area that were within the national average on February 15, 2006, whereas the national-average figure was used only for the first tranche of assistance, which, for most evacuees, would have ended on or about December 1. Also, most evacuees would not have been in New Orleans while using the first tranche of assistance in any event, and an evacuee receiving the national average as his first tranche could have received a supplement based on his actual location. See Trial Transcript, Vol. 2, 175:16-177:14.

Plaintiffs also misuse the rental figures for certain areas in California. See Pls' Brief at 7-8; see also Trial Transcript, Vol. 1, 64:20-66:16. They complain that "[t]he fair market rent in Alameda County, for example, was \$557 higher than the FEMA allowance, and in San Francisco, the fair market rent was \$754 higher." See Pls' Brief at 8. This comparison is misleading, however: the FEMA assistance amount to which they compare the "fair market rates" in those areas are not the amounts routinely paid by FEMA, but rather the national average amount paid only for the first tranche of assistance, only to those applicants from the most devastated areas of the Gulf Coast, and only until the applicants advised FEMA of their post-evacuation location and

requested an adjustment. See Admin. Record, Vol. 6, Tab 309, AR01466 (Pls' Trial Ex. 2).

And, on the other hand, the "fair market rents" to which they refer are not some purported rental rates set forth by a local government or independent housing expert , but rather the very rental rates published by the Department of Housing and Urban Development and routinely used by FEMA in providing assistance.¹¹

Thus, the disparities to which plaintiffs refer merely illustrate what an average means: it is below the actual rate for some areas, and above the actual rate for other areas. Indeed, the "fair market rent" figures on which plaintiffs rely demonstrate the overall fairness of initially using an average: even in certain of the cited areas of California, such as Riverside, those who received the national average received more than they needed. Id. As FEMA's witness testified at trial, the agency could have waited to determine the post-evacuation location of each applicant and paid the appropriate amount for that location starting with the first tranche, but that would have greatly delayed their initial receipt of assistance. See Trial Transcript, Vol. 4, 479:3-11.

VI. Plaintiffs Should Not Be Permitted to Pursue Claims Not Pled in Their Complaint

Rule 8 of the Federal Rules of Civil Procedure requires that a complaint set forth "a short and plain statement of the claim." See Fed. R. Civ. P. 8(a). The Supreme Court has held that this Rule requires the plaintiff to "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." Conley v. Gibson, 355 U.S. 41, 47 (1957) (emphasis added). Although the plaintiff need not recite every legal theory upon which his claims are based, he must, at least, identify the claims. See Hubbard v. All States Relocation Servs., Inc., 114 F. Supp. 2d 1374, 1377 (S.D. Ga. 2000). The Fifth Circuit has held, for example, that a

¹¹ Ironically, therefore, plaintiffs are using as a benchmark of fairness the very published rates that they apparently contend (without evidentiary support) are inadequate across the board.

substantive due process claim is not adequately pled by reciting the applicable legal standard but not alleging the factual predicates; "such generality," the court held, "fail[s] to give fair notice." Vulcan Materials Co. v. City of Tehuacana, 238 F.3d 382, 387-88 (5th Cir. 2001); see Murphy v. White Hen Pantry Co., 691 F.2d 350, 352 (7th Cir. 1982) (holding that complaint is "too inspecific" to allege breach of contract).

Under these rules, plaintiffs' Third Amended Complaint in this action cannot be read as pleading three claims argued in their post-trial brief, and plaintiffs should not be permitted to pursue these claims. Specifically, plaintiffs sought, shortly before trial, to pursue the claim regarding "fair market rent" discussed above. The Court permitted plaintiffs to present evidence regarding that claim at trial, over defendants' objection. See Trial Transcript, Vol. 1, 79:23-87:16. Additionally, plaintiffs' post-trial brief claims, for the first time in this litigation, that FEMA's standards for decisionmaking are inadequate and inadequately stated, and that FEMA must allow applicants to use Section 408 assistance to pay utilities. Each of these three claims is addressed below.

First, in responding to defendants' objection to evidence on the "fair market rent" claim at trial, plaintiffs asserted that the claim was adequately pled as part of the first and fifth causes of action in their Third Amended Complaint. See Trial Transcript, Vol. 1, 81:3-83:22. The focus of the first cause of action, however, is FEMA's "delay" in providing housing assistance to victims of Hurricane Katrina. See Third Amended Complaint ¶¶ 165-69 (docket #105).¹² It says

¹² Plaintiffs' counsel argued at trial that the "first cause of action says people have been denied temporary housing assistance, temporary housing assistance is defined in Section 5174 of the act. 5174 of the act . . . says the amount you're going to receive is fair market rent." See Trial Transcript, Vol. 1, 81:16-19. Even assuming that such an oblique, roundabout reference could constitute "fair notice" to the defendants, the first cause of action does not, in fact, even cite Section 5174 of the Stafford Act.

nothing about the adequacy of the amount of assistance. The focus of the fifth cause of action is FEMA's alleged "failure to provide notice" that applicants can receive an amount of assistance based on "the size of the applicant's household or other circumstances." Id. ¶¶ 189-90 (section heading). This cause of action does not allege that the amount of FEMA's assistance is inadequate; indeed, it does not even refer to "fair market rent" or to varying the amount of assistance based on an applicant's location, but only to unspecified "other circumstances."

Second, plaintiffs' post-trial brief describes a claim that FEMA has failed to establish "written ascertainable standards" for its "agency decisions"; that is, in fact, a major focus of the brief. Plaintiffs seek to challenge the adequacy of FEMA's decisionmaking standards, and the adequacy of the agency's embodiment of those standards. The phrase "written ascertainable standards" appears seven times in plaintiffs' brief, and "ascertainable standards" appears another five times. See Pls' Brief at 14, 16, 17, 19, 20, 30. Plaintiffs assert that such "written ascertainable standards" are necessary to prevent the abuse of "unbridled bureaucratic discretion." Id. at 15-17, 30.

No such claim is contained in the Third Amended Complaint, however. Neither "written ascertainable standards" nor "ascertainable standards" appears anywhere in the complaint. Nor did either phrase appear in plaintiffs' rather lengthy opening statement at the start of trial on February 23, 2006. See Trial Transcript, Vol. 1, 53:6-77:4. Indeed, not even the word "standards" is in the Third Amended Complaint.¹³ The complaint also does not use the word "discretion," except in paraphrasing the APA standard (i.e., arbitrary, capricious, or an abuse of discretion), and in asserting that FEMA's duties are "mandatory, and not discretionary." See Third Amended

¹³ The singular word "standard" appears five times, but never in reference to FEMA's decisionmaking standards. See Third Amended Complaint ¶¶ 2, 68, 130, 199.

Complaint ¶¶ 25, 277; see also Northern States Power Co. v. Federal Transit Admin., 358 F.3d 1050, 1057 (8th Cir. 2004) (noting, in holding that complaint did not challenge reasonableness of regulations, that "[t]he Complaint . . . does not even contain the word 'unreasonable'").

Third, another major focus of plaintiffs' post-trial brief is a claim that FEMA should be required to allow applicants to use Section 408 assistance to pay for utilities. The word "utilities" appears twenty-two times in their brief. See Pls' Brief at 3, 4, 11-14, 29, 31. No such claim is stated anywhere in the Third Amended Complaint, however. The word "utilities" appears twice in the complaint — once in asserting that one of the plaintiffs, in her pre-disaster residence, paid rent to her "daughter's father" in the form of "utilities, home repairs and food bills," and later in alleging that Katrina victims "were not told . . . the extent to which [FEMA rental assistance] may used for security deposits, utilities, and other essential needs." See Third Amended Complaint ¶¶ 59, 121. Nowhere in the Third Amended Complaint do plaintiffs allege that applicants are not permitted to use Section 408 assistance for utilities, nor that they should be permitted to do so. See Northern States Power Co., 358 F.3d at 1057 ("There is simply nothing alleged in the Complaint that would have notified the Defendants of this claim.").

Thus, the Third Amended Complaint clearly does not provide the necessary "fair notice" that plaintiffs would assert these three claims. Conley, 355 U.S. at 47; see Vulcan Materials Co., 238 F.3d at 387-88. Nor is there any reason why plaintiffs could not have pled these claims before trial. Plaintiffs themselves knew how much they were receiving in housing assistance; simple pre-filing investigation would have revealed whether such assistance can be used for utilities;¹⁴ and the factual premises of plaintiffs' claim regarding FEMA's standards — to the

¹⁴ See 44 C.F.R. § 206.117(b)(1)(i)(C) ("All utility costs and utility security deposits are the responsibility of the occupant except where the utility does not meter utility services

(continued...)

extent any such premises exist at all — should have been apparent, at the latest, when the Administrative Record in this matter was filed on February 7, 2006 — which was, incidentally, more than a week before plaintiffs submitted their Third Amended Complaint.

Nor can plaintiffs take advantage of Rule 15(b) of the Federal Rules of Civil Procedure, providing for amendment of pleadings to conform to the evidence presented at trial. That rule applies only where issues not raised in the pleadings are tried by "express or implied consent of the parties," and no such consent has occurred here. Although plaintiffs' counsel briefly questioned a FEMA witness at trial about the agency's written "standards . . . for continuing rental assistance," see Trial Transcript, Vol. 2, 142:20-143:6, those few questions did not impliedly inject plaintiffs' new "written ascertainable standards" claim into this case, since they related only to the criteria for recertification, not to FEMA's decisionmaking in general, and were apparently directed at plaintiffs' claims that defendants have failed to provide notice of the availability of continued rental assistance and of the criteria for securing continued assistance. See Third Amended Complaint ¶¶ 176-88. As the Fifth Circuit has held, "the introduction of evidence relevant to an issue already in the case may not be used to show consent to trial of a new issue absent a clear indication that the party who introduced the evidence was attempting to raise a new issue." International Harvester Credit Corp. v. East Coast Truck & R.V. Sales, Inc., 547 F.2d 888, 890 (5th Cir. 1977).

In any event, an amendment under Rule 15(b) cannot substitute for "fair notice" to the defendant; as the Fifth Circuit has held, even where consent may be inferred, "an implied amendment of the pleadings will not be permitted where it results in substantial prejudice to a

¹⁴(...continued)
separately and utility services are a part of the rental charge.").

party" Id. Considering any of these three claims, especially those regarding "written ascertainable standards" and the use of housing assistance for utilities, would severely prejudice the defendants. Since the "written standards" and utilities claims were not pled in the Third Amended Complaint, defendants did not consciously include material in the Administrative Record that would permit the Court to evaluate any such claims. Further, since plaintiffs did not otherwise signal the existence of those two claims before or during trial, defendants did not present any evidence at trial regarding the adequacy of FEMA's decisionmaking standards or why disaster assistance cannot be used for utilities. Even as to the "fair market rent" claim, on which defendants at least received notice shortly before trial, plaintiffs' failure to plead the claim deprived defendants of an adequate opportunity to defend against the claim, such as by not allowing them 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. In short, plaintiffs' attempt to pursue these three claims constitutes "stealth litigation" at its worst. Considering any of these claims, and ordering relief thereon, would constitute manifest injustice.

VII. The Relief that Plaintiffs Seek Is Overly Broad and Unduly Intrusive

The relief sought in plaintiffs' proposed order, and described in their post-trial brief, would radically change the administration of federal disaster assistance, and install plaintiffs' counsel and this Court as absentee directors of the Federal Emergency Management Agency. The provision of disaster assistance is not amenable to judicial administration. As the course of this action has illustrated, responding to disasters and managing FEMA's resources involves too many details, too many permutations, and too many shifting circumstances to permit efficient

administration by a court. The following is a partial listing of the most serious problems presented by plaintiffs' requested relief.

Most significantly, most of the provisions in plaintiffs' proposed order are not limited to Katrina victims, but would extend to all presidentially-declared disasters, past and future.¹⁵ Plaintiffs have no standing to seek relief beyond the claims they have pled as victims of Hurricane Katrina, and the Court, therefore, lacks jurisdiction to order relief as to persons who are not Katrina victims. See Third Amended Complaint ¶ 75; Memo. in Supp. of Pls' Motion for Class Cert. at 4 (docket #80).

Another highly inappropriate aspect of plaintiffs' requested relief is their demand that FEMA establish new, "post-disaster" fair market rent levels — apparently throughout the entire country — "within a reasonable date certain." See Pls' Brief at 29. Implicit in this demand is a contention that none of HUD's published rental rates constitute "fair market rents." This request, therefore, would require FEMA to undertake market research in all 2,704 of the areas covered by HUD's published rates — presumably subject to this Court's approval or disapproval of each such rate. See Fair Market Rents: Overview, available at <http://www.huduser.org/datasets/fmr.html> (content updated Mar. 13, 2006). And plaintiffs seek an order that FEMA submit a plan for establishing "updated, post-disaster fair market rents" within 15 days after entry of the Court's order. See Pls' Brief at 31. This demand is both far beyond the scope of this case, and far beyond anything that might be feasible.¹⁶ Moreover, an order requiring FEMA to undertake such research would require the expenditure of very significant amounts of federal funds. Plaintiffs

¹⁵ Plaintiffs' proposed order is appended to Plaintiffs' Post Hearing Brief (docket #125).

¹⁶ Other aspects of plaintiffs' demand for the submission of a "plan" within fifteen days are also utterly impossible, such as the inclusion of "standards and procedures for providing retroactive relief to evacuees wrongfully denied or delayed Assistance." See Pls' Brief at 31-32.

also seek mandatory retroactive increases in the housing assistance paid to all Katrina victims. See Pls' Brief at 31.

Additionally, plaintiffs seek to confer upon every applicant "the right to adjust FMRs further due to high housing costs and bedroom sizes." See id. at 29. In other words, plaintiffs envision a regime in which any applicant who is dissatisfied with the amount of her FEMA assistance can petition the agency to increase the amount — and presumably seek a court order if dissatisfied with the outcome, since plaintiffs characterize that ability as a "right." Such a regime would be entirely unworkable in practice and entirely without foundation in the law.

Furthermore, the relief that plaintiffs seek regarding separated households would violate the governing regulations. As noted earlier, FEMA's regulations state that the agency can provide assistance only "for one temporary . . . residence" for each "pre-disaster household," unless the "size or nature" of the household requires otherwise. 44 C.F.R. § 206.117(b)(1)(i)(A), (ii)(B). This accords with the statutory prohibition against "duplication of benefits." 42 U.S.C. § 5155(a). Nevertheless, plaintiffs seek to prohibit FEMA from "presum[ing] that pre-disaster shared households will remain intact post-disaster," see Pls' Brief at 29, and their proposed order would enjoin the agency from "denying Assistance to a qualified evacuee member of a pre-disaster shared household who was displaced by Hurricane Katrina and is living apart from another member of the household." Thus, plaintiffs would require FEMA to provide separate assistance to multiple members of the same pre-disaster household, regardless of the reason for the separation, and regardless of the members' actual need for separate assistance.

Finally — and very significantly — plaintiffs seek an order that would require FEMA to submit a "plan" for making all of the changes they propose, and that would confer continuing jurisdiction on this Court for "at least six months to ensure that defendants comply with the

relief" that plaintiffs demand. See Pls' Brief at 32. According to plaintiffs' proposed order, this would also "allow the Court to hear post judgment motions." Plaintiffs also seek to "monitor" FEMA's compliance with any orders that the Court issues, through the submission of periodic reports by the agency and the provision of a "random selection" of evacuees' files "for review by plaintiffs or their designated representatives." See id. And they ask the Court to "appoint an independent monitor, paid by defendants, to carry out these review functions. Id.¹⁷

Plaintiffs "plan" for monitoring, continuing judicial oversight, and the possibility of "post judgment motions" would install plaintiffs' counsel and this Court as the administrators of FEMA. For "at least" that six-month period, the agency would be unable to make any changes in response to changing circumstances, in any area covered by the Court's final order, without seeking and obtaining the express approval of plaintiffs' counsel and the Court. Such a result would be both unworkable and beyond the limits of an appropriate remedy under the Administrative Procedure Act. See Cobell v. Norton, 392 F.3d 461, 475 (D.C. Cir. 2004) (APA "empowers a court only to compel an agency . . . to take action upon a matter, without directing how it shall act") (emphasis in original) (quoting Norton v. Southern Utah Wilderness Alliance, 542 U.S. 55, 64 (2004)). The vast detail in plaintiffs' proposed order, and its extreme intrusiveness into the administration of federal disaster assistance, illustrate, yet again, the wisdom of the Stafford Act's preclusion of judicial review of the matters at issue in this litigation.¹⁸

¹⁷ The proposed order, however, says that the Court "may" appoint an independent monitor, "[d]epending upon circumstances."

¹⁸ After noting that the APA reaches only "discrete agency action" and precludes "broad programmatic attack[s]," the Supreme Court explained in Southern Utah Wilderness Alliance:

The principal purpose of the APA limitations we have discussed . . . is to protect agencies from undue judicial interference with their lawful discretion, and to

(continued...)

CONCLUSION

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

* * *

¹⁸(...continued)

avoid judicial entanglement in abstract policy disagreements which courts lack both expertise and information to resolve. If courts were empowered to enter general orders compelling compliance with broad statutory mandates, they would necessarily be empowered, as well, to determine whether compliance was achieved — which would mean that it would ultimately become the task of the supervising court, rather than the agency, to work out compliance with the broad statutory mandate, injecting the judge into day-to-day agency management.

542 U.S. at 64, 66-67.

Respectfully submitted,

PETER D. KEISLER
Assistant Attorney General

/s/ W. Scott Simpson

MICHAEL SITCOV
W. SCOTT SIMPSON
ELISABETH LAYTON

OF COUNSEL:

BARBARA D. MONTOYA
KRISTEN E. SHEDD
Trial Attorneys
Office of the General Counsel
Federal Emergency Management Agency
Department of Homeland Security

Attorneys, Department of Justice
Civil Division, Room 7210
Post Office Box 883
Washington, D.C. 20044
Telephone: (202) 514-3495
Facsimile: (202) 616-8470
E-mail: scott.simpson@usdoj.gov

COUNSEL FOR DEFENDANTS

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 31st day of March, 2006.

/s/ W. Scott Simpson

W. SCOTT SIMPSON