

UNITED STATES COURT OF APPEALS
FOR DISTRICT OF COLUMBIA CIRCUIT

DEC 16 2002

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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

GUADALUPE L. GARCIA, et al.)
Plaintiffs-Appellants,)

v.)

ANN VENEMAN, Secretary)
UNITED STATES DEPARTMENT OF)
AGRICULTURE,)
Defendant-Appellee.)

No. **02-8014**

(Civ. No. 00-2445(JR))

**PETITION OF PLAINTIFFS GUADALUPE L. GARCIA, ET AL.
FOR PERMISSION TO TAKE AN INTERLOCUTORY
APPEAL UNDER FED. R. CIV. P. 23(f)**

Plaintiffs Guadalupe L. Garcia, et al. ("plaintiffs") respectfully petition, pursuant to Fed. R. Civ. P. 23(f) and Fed. R. App. P. 5, for permission to appeal an interlocutory order of the district court (entered on December 2, 2002) denying plaintiffs' motion for class certification. (Addendum A)¹

PRELIMINARY STATEMENT

To date, the District Court for the District of Columbia has ruled on motions for class certification in three cases, which the government has described as essentially identical: Pigford v. Glickman, 185 F.R.D. 82 (D.D.C. 1999) (Friedman, J.), brought on behalf of African American farmers; Keepseagle v. Veneman, C.A. No. 99-03119 (Sullivan, J.), brought on behalf of Native American farmers; and the instant case brought on behalf of Hispanic farmers. In two of the three cases (Pigford and Keepseagle), the classes were certified. Subsequently, in Pigford, this Court approved the consent decree entered in that case that resulted in the government paying to date approximately \$800,000,000 to approximately 13,000 African American farmers.

¹ In addition to the material contained in the Addendum, memoranda and exhibits submitted to the district court and referred to herein are available for the Court's convenience on the internet at <http://www.garciaclassaction.org> by clicking on "Docket and Filings."

See Pigford v. Glickman, 206 F.3d 1212 (D.C. Cir. 2002). Similarly, in Keepseagle, this Court recently dismissed the government's appeal pursuant to Rule 23(f) challenging class certification. In re Veneman, 309 F.3d 789 (D.C. Cir. 2002).²

In the wake of Pigford and Keepseagle, the district court, reviewing the identical Garcia complaint, denied the Hispanic farmers' motion for class certification. First, the district court concluded, without any apparent analysis, that Judges Friedman and Sullivan in Pigford and Keepseagle, respectively, were wrong in basing certification on the USDA's failure to investigate discrimination complaints arising out of its credit and non-credit farm benefit programs and that such a claim could not serve as the basis for class certification -- a conclusion at odds with this Court's recent holding in In re Veneman, 309 F.3d at 794. Second, the district court concluded that plaintiffs had failed to make a compelling showing of commonality or typicality. The district court also faulted plaintiffs' statistical evidence gleaned from publicly available sources for not linking the statistically significant disparity in the ability of Hispanic farmers in comparison to white farmers to obtain USDA loans to a specific subjective policy or policies of USDA. Significantly, the district court reached these conclusions in denying class certification without ever affording plaintiffs an opportunity to take any class discovery.

Fundamentally, this petition presents two questions. (1) Whether the district court abused its discretion in denying plaintiffs' motion for class certification without affording plaintiffs any discovery? (2) Whether the district court erred in baldly asserting, without any analysis, that the grounds upon which two other judges of the court considering identical complaints had granted class certification could not form the basis for class certification? Plaintiffs submit that this Court should (1) remand the case to the district court to allow plaintiffs to take class discovery and (2) reverse the trial court's holding that USDA's failure to investigate discrimination

² There is a fourth case pending in the district court, Love v. Veneman, C.A. No. 00-2502 (Robertson, J.). The parties in that case are currently engaged in class discovery, which has been ongoing since May 2002.

complaints cannot form the basis for a finding of commonality and typicality pursuant to Rule 23(a).

STATEMENT

A. Regulatory Background

The Farm Service Agency (“FSA”) is a component of USDA. FSA, like its predecessor, the Farmers Home Administration (“FmHA”), is designed to be the federally funded lender of last resort for farmers and ranchers. It makes loans for a variety of different purposes, including, inter alia, “farm ownership” loans, to assist farmers in buying or improving farm property, 7 C.F.R. § 1943.2, “operating” loans to provide credit and management assistance to help farmers run their farms, 7 C.F.R. § 1941.2, and emergency loans to help farmers resume operations after an officially declared disaster. 7 C.F.R. § 1945.152.

For most of the relevant period, the administration and implementation of these loan programs was delegated to three-to-five-person county committees, acting pursuant to nationally prescribed regulations. The county committees, whose members were and are elected by local farmers in each county in what amounts to a closed process, are and continue to be predominantly white and male. These committees make the threshold determination regarding a farmer’s eligibility to participate in USDA farm credit and non-credit benefit programs. The county committees, in turn, appointed the county loan supervisors, who processed and approved the loans once a farmer was determined by the committees to be eligible to participate in the loan program. Owing to the unfettered discretion of their members and the highly subjective eligibility criteria of the USDA credit and benefit programs, the committees are free to reflect whatever deep-seated prejudices infect the counties or regions.

In terms of the loan process itself, the farmer first had to obtain an application from the county office. That seemingly simple task often was a source of discrimination for Hispanic farmers and ranchers. Frequently, as the USDA Civil Rights Action Team³ (“CRAT”) noted, the

³ The Civil Rights Action Team was a group of USDA officials appointed in late 1996 by then-Secretary Glickman “to take a hard look at [USDA’s long-standing civil rights problems] . . . and make strong

Hispanic farmer would simply be told that there were no more applications or that there was no loan money available or that he did not qualify for loans, hence there was no need to apply. *Id.* at 15-16. If he persisted in the face of such hostility and discouragement and actually succeeded in obtaining an application, he would invariably be left to fill out his own application or pay costly loan packagers to assist him, notwithstanding the fact that USDA regulations required county personnel to assist farmers in preparing their applications, as they did for white male farmers and ranchers. 7 C.F.R. § 1910.4 (1988). By failing to assist minority farmers and delaying to notify them of problems in their applications, the local USDA personnel could extend the loan process for months, well past the optimal planting season. *See, e.g.*, CRAT Report at 15.

Once the application was finally completed, the farmer then had to submit it to the county committee for an eligibility determination. The county committee was supposed to consider six criteria: creditworthiness, citizenship, experience, character, appropriate farm size and ability to obtain non-USDA credit. *See* 7 C.F.R. §§ 1941, 1943 (1988). With the exception of citizenship, all of the criteria are highly subjective and fraught with the potential for discrimination against Hispanic farmers and ranchers and other minorities when applied by individuals with unfettered discretion.⁴ Indeed, the discriminatory effect of that discretion was documented twenty years ago by the United States Commission on Civil Rights (“Commission”) and subsequently confirmed by Congress. As the Commission stated in its 1982 report,

[a]s a lender of last resort, the goals of the [FmHA] appear to be clear. However, regulations intended to implement these goals leave room for a wide range of subjective interpretation. . . . The problem of subjectivity permeates much of the FmHA loan decision process. . . . Lack of specific criteria for loan determinations

recommendations for change.” CRAT Report at 3. *See* *Pigford v. Veneman*, 292 F.3d 918, 919 (D.C. Cir. 2002). As this Court is aware, the CRAT Report is available at http://www.usda.gov/news/civil/cr_next.htm.

⁴ In analyzing the claim that the county committee used highly subjective criteria to determine loan and benefit eligibility, the district court erroneously examined the current regulations. *See* 12/02/02 Memorandum at 11-13 and n.5.

potentially enhances FmHA's flexibility and ability to serve clients. It also creates loopholes which allow for discriminatory treatment.⁵

Even the most cursory review of the eligibility criteria confirms the finding of the Commission and reveals that they were highly subjective. For example, with respect to experience, the county committee had to determine if the applicant had "sufficient applicable educational and/or on the job training or farming experience in managing and operating a farm or ranch [within one of the past five years], which indicates the managerial ability necessary to assure reasonable prospects of success in the proposed . . . operation." 7 C.F.R. §§ 1941.12(a)(3), 1943.12(a)(3) (1988). Similarly, with respect to good character, the county committee had to determine whether the applicant had the "character and industry" to carry out his plan. Id. at §§ 1941.12(a); 1943.12(a). In addition, the committee had to determine if the farmer was dependable and reliable. Id.

The county committee also had to determine that once the loan was closed, the applicant would be the owner-operator or tenant-operator of a "family farm." See id. at §§ 1941.4, 1943.4, (1988). In so doing, the committee had to consider whether the applicant produced agricultural commodities for sale in sufficient quantities so that the applicant's community viewed his operation as a farm rather than a residence. Id. at §§ 1941.12(a)(7), 1943.12(a)(7). Finally, the county committee had to determine if the applicant was unable to get credit elsewhere. Even that determination was highly subjective. The regulation provided that the applicant was eligible for a loan only if he could not "obtain sufficient credit elsewhere to finance actual needs at reasonable rates and terms taking into consideration prevailing private and cooperative rates . . ." Id. at §§ 1941.6, 1943.6 (1988).

Although USDA substantially reduced the role of the county committees in the farm loan credit application process in 1999, that change did not make the criteria any less subjective or

⁵ United States Commission on Civil Rights, The Decline of Black Farming In America, 80-81 (1982) ("Commission Report") (emphasis added), quoted with approval in The Minority Farmer: A Disappearing American Resource: Has the Farmers Home Administration Been The Primary Catalyst? Thirty First Report of the Comm. on Gov't Operations, 101st Cong. 10-11 (1990). (Ex. 5 to Plaintiffs' Supplemental Memorandum In Support Of Their Motion For Class Certification dated April 8, 2002 ("Plaintiffs' Supplemental Memorandum").)

more specific. Thus, the net effect of the change was to reduce the number of people exercising unfettered discretion from three county committeemen and a county loan supervisor to a single USDA official.

B. Equal Credit Opportunity Act

The Equal Credit Opportunity Act (“ECOA”), 15 U.S.C. §§ 1691-1691(f) (2000), prohibits discrimination in the field of consumer credit. ECOA makes it “unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction . . . on the basis of race, color, religion, national origin, sex or marital status, or age.” 15 U.S.C. § 1691(a). ECOA creates a private right of action for credit applicants against creditors, including the United States, who violate its anti-discrimination provisions, and makes such creditors “liable to the aggrieved applicant for any actual damages” *Id.* § 1691e(a).

Although ECOA contains a two-year statute of limitations, *id.* § 1691e(f), Congress enacted legislation that retroactively extended the limitations period for certain claims against USDA provided that an action was brought within two years of the enactment, *i.e.*, by October 21, 2000. Congress took this extraordinary step in response to its belated discovery that in the early 1980s, USDA had secretly dismantled its civil rights investigatory unit and hence hobbled one of its means of ECOA enforcement. As a result of USDA’s secret actions, for a period of nearly twenty years, Hispanic and other minority farmers who complained of discrimination in connection with USDA’s farm credit programs had their complaints relegated to a bureaucratic black hole. Consequently, Congress allowed individuals who filed complaints of discrimination with USDA between January 1, 1981 and July 1, 1997 to sue for discrimination occurring between January 1, 1981 and December 31, 1996. *See* Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriation Act, 1999. Pub. L. No. 105-277, § 741, 112 Stat. 2681 (codified at 7 U.S.C. § 2297 note).

C. The Pigford Litigation

In Pigford, a putative class of African American farmers filed suit under ECOA, alleging that USDA had discriminated against them in the provision of various farm credit and benefits.

Plaintiffs also alleged that the USDA failed to investigate and process administrative complaints of discrimination properly. Plaintiffs sought damages and equitable relief. Rejecting the government's arguments that class certification was improper because, *inter alia*, the class was not sufficiently definite, and plaintiffs failed to satisfy the commonality and typicality requirements of Rule 23(a), Judge Friedman certified a class action pursuant to Fed. R. Civ. P. 23(b)(2). Pigford v. Glickman, 182 F.R.D. 341, 351 (D.D.C. 1998).

In so ruling, Judge Friedman found that the "gravaman [sic] of plaintiffs' complaint in this case is not just that they were subjected to discrimination when they applied for loans and subsidies, but that when they filed complaints with USDA regarding the alleged discrimination, the USDA failed properly to process and investigate those complaints." *Id.* at 344-45. Distinguishing a prior district court decision denying class certification,⁶ Judge Friedman stated that the "unifying pattern of discrimination at issue in this case is the USDA's failure properly to process complaints of discrimination . . ." *Id.* at 349.

As Judge Friedman explained, the "mere fact that plaintiffs are seeking monetary relief in addition to injunctive and declaratory relief" would not preclude Rule 23(b) certification so long as monetary relief did not predominate. *Id.* at 351. In that connection, he noted that plaintiffs were seeking a "variety of injunctive and declaratory remedies." *Ibid.* Furthermore, Judge Friedman stated that the Rule 23(b)(2) class was "being certified only for purposes of determining liability." *Ibid.* He suggested that "hybrid" certification might also be appropriate in light of Eubanks v. Billington, 110 F.3d 87, 92 (D.C. Cir. 1997).

⁶ In Williams v. Glickman, Civ. No. 95-1149, 1997 U.S. Dist. LEXIS 1683 (D.D.C. Feb. 14, 1997), Judge Flannery refused to certify a class of African American and Hispanic farmers alleging discrimination by USDA in violation of ECOA. Even a cursory reading of Williams makes clear that the complaint in that case was very poorly pled and the Court found that fact highly problematic. For example, plaintiffs included among the purported class a white man, plaintiffs who had separate suits pending in other district courts and plaintiffs who had already settled their claims or whose claims were time-barred. *Id.*, at *15-*16. Judge Flannery held, *inter alia*, that "the plaintiffs' bare allegation of a 'common thread of discrimination' does not satisfy the . . . requirement of a rigorous 'specific presentation'" and consequently "plaintiffs have not shown the existence of a common legal question." *Id.* at *21. In a footnote, Judge Flannery noted that while plaintiffs had "claimed that the local FmHA supervisors had 'unbridled discretion' in making their decisions, they have not presented 'significant proof' that this is so." *Id.* at *21 n.16. Finally, Judge Flannery faulted plaintiffs for the absence of any statistical evidence. *Id.* at *23.

Subsequently, USDA entered into a consent decree to resolve plaintiffs' discrimination claims. Because the ultimate negotiated consent decree, as opposed to the complaint, "involve[d] primarily monetary relief," Judge Friedman vacated his prior order certifying the class pursuant to Rule 23(b)(2) and entered a new order certifying the class under Rule 23(b)(3). Pigford v. Glickman, 185 F.R.D. 82, 93-94 (D.D.C. 1999). Thereafter, this Court held that he had not abused his discretion in approving the consent decree under Fed. R. Civ. P. 23(e). Pigford v. Glickman, 206 F.3d 1212, 1213 (D.C. Cir. 2000).

D. The Keepseagle Litigation

In Keepseagle, a putative class of Native American farmers filed suit under ECOA seeking monetary damages and injunctive relief. Like the Pigford plaintiffs, the Keepseagle plaintiffs alleged that they suffered discrimination in USDA farm credit and non-credit benefit programs. The government opposed the Native American farmers' motion for class certification on numerous grounds. However, on September 28, 2001, Judge Sullivan certified a class pursuant to Fed. R. Civ. P. 23(b)(2). In a subsequent memorandum opinion, Judge Sullivan noted that:

the alleged absence of a functioning effective mechanism for investigating and resolving complaints of discrimination against Native American farmers exacerbate[d] and prolong[ed] any discrimination in the administration of USDA programs. It is clear that the systematic failure to process complaints of discrimination is the unifying characteristic of the class and raises common questions of fact and law.

Keepseagle, Memorandum Op. at 22. Accord, Pigford v. Glickman, 182 F.R.D. at 348-49.

E. Proceedings In This Case

Plaintiffs in this case are Hispanic farmers and ranchers who allege that they suffered the same discriminatory treatment by USDA as experienced by Pigford and Keepseagle plaintiffs, and are entitled to monetary damages and injunctive relief. Initially represented by the same attorneys who handled Pigford and filed Keepseagle, the Hispanic farmers and ranchers share with the African American and Native American farmers a complaint which is, for all practical

purposes, identical to the complaints filed on behalf of the classes certified in Pigford and Keepseagle. (The second amended complaint is set forth at Addendum B.)

This case was initially assigned to Judge Oberdorfer, who, on January 23, 2001, placed a stay on discovery which remains in effect to this date. The case was subsequently transferred to Judge Lamberth, who, on February 1, 2002, transferred it to Judge Robertson who also had Love.

Prior to the transfer, Judge Robertson, in Love, denied in part and granted in part defendant's motion to dismiss and to strike class allegations. He dismissed the Love plaintiffs' claims based on the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), the so-called "APA" claims, *i.e.* those claims based upon the non-credit farm benefit programs and claims based upon the USDA's dismantlement of the apparatus for investigating discrimination complaints and its systematic failure to process such complaints with respect to farm loan programs. At the January 10, 2002 Love scheduling conference, he expressed concerns about the continued viability of that case as a class action. As he explained,

[o]f even more concern, it seems to me, is trying to figure out what it is that holds this plaintiff class together Judges Friedman and Sullivan have held . . . [t]hat it is the failure or refusal of [USDA] to investigate and deal with . . . the plaintiff[s'] claims that is the glue that holds those classes together. But I have held in this case and I think it is now law in the case, that there's no claim that arises out of that action. Because there is no final agency action, because there is another remedy provided by law, that the [ECOA] is that remedy and if that's not a claim, than I am not quite sure where the commonality is in this case that distinguish this case as Judges Friedman and Sullivan distinguished their cases from Judge Flannery's opinion in Williams.

Love, 1/10/02 Hearing Transcript at 4-5. (Emphasis added.)

At the February 21, 2002 Garcia status conference, Judge Robertson announced his intention to enter the same rulings in Garcia as he had entered in Love with respect to a similar motion to dismiss. Thereafter, in a Memorandum Order dated March 20, 2002, he denied in part and granted in part defendant's motion to dismiss. He held that "(1) the Garcia plaintiffs are entitled to bring ECOA claims for discrimination in lending transactions without administrative exhaustion; (2) at least some of the named plaintiffs' lending claims satisfy the statute of

limitations; and (3) plaintiffs' allegations of failure to investigate civil rights complaints do not state claims under ECOA or the APA." 3/20/02 Memorandum Order at 3-4. (Addendum C) He also held that one of the named plaintiffs "has satisfied the special statute of limitations approved by Congress and has standing to assert [a] claim [for discriminatory administration of disaster benefit programs]...." *Id.* at 4.

The parties thereafter filed supplemental memoranda with respect to plaintiffs' pending motion for class certification pursuant to a schedule established at the February 21, 2002 status hearing. In their supplemental memorandum, plaintiffs argued, *inter alia*, that the failure to investigate complaints of discrimination arising from the USDA credit application process that expressly provides for such complaints constitutes a violation of ECOA as defined by the statute and its interpreting regulations. Plaintiffs also argued that commonality and typicality requirements of Rule 23 were satisfied because USDA's credit and non-credit benefit programs gave unfettered discretion to county committees to apply nationally prescribed, highly subjective eligibility requirements to farmers seeking credit.

In addition, although plaintiffs had not had the benefit of any discovery, plaintiffs' expert, Professor Hausman of the Massachusetts Institute of Technology, using publicly available data, demonstrated that there was a statistically significant disparity in the ability of Hispanic farmers in comparison to white male farmers to obtain loans from USDA. Plaintiffs also adduced evidence from a publicly available USDA-funded study of a similar disparity in the ability of Hispanics to obtain USDA loans. (Exs. 3-4 to Plaintiffs' Supplemental Memorandum.)

For its part, the government argued, *inter alia*, that in order to satisfy the commonality and typicality requirements of Rule 23(a), plaintiffs would have to demonstrate the existence of an "entirely" subjective decisionmaking process. *See Gen. Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 159 n.15 (1982). The government also argued that plaintiffs' statistical evidence of a disparity in the ability of Hispanic and white farmers to obtain USDA credit had to be linked to a specific USDA policy that plaintiffs contended was discriminatory.

Subsequent to the initial round of supplemental briefing, plaintiffs filed a motion requesting the district court to lift the stay on discovery. The government opposed the motion and the district court denied it on May 9, 2002. (Addendum D) Thereafter, on May 22, 2002, the district court issued a terse Memorandum Order in which it found “the government’s reliance upon footnote 15 of [Falcon] [to be] overly literal.” 5/22/02 Memorandum Order at 1. (Addendum E) The district court, citing Koger v. Reno, 98 F.3d 631, 639 (D.C. Cir. 1996), also concluded that “the plaintiffs’ statistical analysis and other evidence of record have not established a causal link between the policies that plaintiffs challenge and the asserted fact that Hispanic and Latino farmers have been less likely than white farmers to receive loans from USDA.”⁷ 5/22/02 Memorandum Order at 2. The district court ordered “that the parties meet and confer on a schedule for further discovery related to the class certification issue.”⁸ Ibid. The district court also ordered the convening of a June 24, 2002 in-chambers status conference. Id. at 3.

Pursuant to the district court’s 5/22/02 Memorandum Order, the parties met on June 4 and June 13, 2002 to discuss discovery issues and a possible discovery schedule. In addition, the parties exchanged correspondence and USDA provided plaintiffs with certain documents which purportedly described in detail certain of defendant’s centralized electronic databases. During the course of the discussions, defendant took the position that plaintiffs were only entitled to discovery with respect to certain USDA centralized electronic databases. It soon became obvious to plaintiffs that there are a number of deficiencies in those databases that render them useless for purposes of auditing USDA’s lending practices.

⁷ Because the district court’s May 22, 2002 Order did not address plaintiffs’ argument that the failure to investigate discrimination complaints gave rise to a cause of action under ECOA, plaintiffs, on June 3, 2002, filed a motion for reconsideration or in the alternative clarification. The district court summarily denied that motion on June 6, 2002. (Addendum F)

⁸ While the order referred to “further discovery” there had, in fact, been no discovery taken in the case as Judge Oberdorfer’s stay remained in place and the district court had denied plaintiffs’ motion to lift the stay on discovery.

When the parties met with the district court on June 24, 2002 at the in-chambers status conference, plaintiffs presented a detailed discovery proposal in connection with the proposed lifting of the stay on discovery. In the course of the discussion, plaintiffs also shared with the district court their concerns about the inadequacies of the centralized databases to which defendant sought to limit plaintiffs' class discovery. In response to those concerns, the district court prescribed a procedure directing plaintiffs to file a second supplemental memorandum and affidavit of counsel outlining what plaintiffs believed to be the problems with the centralized databases to which USDA sought to confine plaintiffs' discovery. As the district court described the process in the June 24, 2002 in-chambers status conference, the purpose of the exercise was "to narrow the issues" in dispute.

At no point did plaintiffs ever concede the legitimacy of the limitations which USDA sought to impose upon plaintiffs' class discovery. Quite the contrary, plaintiffs argued that if the district court sustained what plaintiffs considered to be the government's wholly insupportable position that the only class discovery to which plaintiffs were entitled was the central databases described in the meetings between plaintiffs and defense counsel, then plaintiffs could not make the specific linkage that the district court seemed to require in its May 22 order because the databases did not identify the reasons for loan rejections. Plaintiffs also made clear, however, their belief that they were entitled to more than the flawed databases and, if the district court still insisted on a showing of such a linkage then plaintiffs were entitled to full discovery of individual loan files to determine the reasons for rejections. Plaintiffs clearly stated their position in this regard:

Consistent with settled authority and the circumstances here presented, plaintiffs submit that they have already presented evidence sufficient to warrant class certification under both disparate treatment and disparate impact theories. . . . If, however, the Court is not convinced that plaintiffs have satisfied the requirements of Rule 23, plaintiffs submit that they are entitled to meaningful class discovery that would not be limited, as the government contends, to certain centralized electronic databases that, as defendant concedes, contain no useful information. See June 17, 2002 letter from Jean Lin, Esq. To Stephen S. Hill, Esq. (Ex. E to the Hill Aff. (Ex. 1 to the [Plaintiffs'] Second Supplemental Memorandum [In

Support Of Their Motion For Class Certification, dated July 7, 2002 (“Plaintiffs’ Second Supplemental Memorandum”).

Plaintiffs’ Reply To Defendant’s Response To Plaintiffs’ Second Supplemental Memorandum In Support of Their Motion for Class Certification, dated September 5, 2002, at 4. (Emphasis added.) Against this backdrop, on December 2, 2002, the district court, without ever lifting the stay on discovery or even addressing the inadequacies of the databases to which the government sought to limit plaintiffs’ class discovery, denied plaintiffs’ motion for class certification.

REASONS FOR GRANTING THE PETITION AND PERMITTING AN INTERLOCUTORY APPEAL

Under Rule 23(f), the court may entertain an interlocutory “appeal from an order of a district court granting or denying class action certification . . . if application is made within ten days after entry of the order.” Fed. R. Civ. P. 23(f). The district court’s December 2, 2002 order denied plaintiffs’ motion for class certification. This petition is timely filed because ten days from December 2, 2002 (excluding intervening weekends) is December 16, 2002.

A. The Court Should Grant Plaintiffs’ Petition For Immediate Appeal.

This Court has set forth the factors it considers in reviewing Rule 23(f) petitions:

[I]n this circuit, interlocutory review of class certification decisions pursuant to Rule 23(f) is ordinarily appropriate in three circumstances: (1) when a “questionable” class certification decision creates a “death-knell situation” for either party; (2) when the certification decision presents “an unsettled and fundamental issue of law relating to class actions . . . that is likely to evade end-of-the-case review”; and (3) when the certification decision is manifestly erroneous.

In re Veneman, 309 F.3d at 794 (quoting In re Lorazepam & Clorazepate Antitrust Litig., 289 F.3d 98, 105 (D.C. Cir. 2002)). This Court has also made clear that “[e]ven if a case falls in none of these categories, [it] will grant 23(f) interlocutory review in ‘special circumstances. . . .’” Id. at 794 (quoting Lorazepam, 289 F.3d at 105-06). Plaintiffs submit that immediate appellate review of the district court’s certification decision is appropriate because the certification decision (1) “creates a ‘death-knell situation’” for thousands of Hispanic farmers, (2) is manifestly erroneous, and (3) presents special circumstances.

B. The District Court's Decision Denying Class Certification Is The Death Knell to Hundreds, If Not Thousands, of Valid Claims.

On the basis of identical complaints, putative classes of African American and Native American farmers have been certified to bring suit against USDA for its well-documented discrimination against minority farmers. Indeed, in Pigford, USDA has settled and thus far paid more than \$800,000,000 to approximately 13,000 black farmers. Thus, this is clearly not a case where the discrimination in question is based upon nothing more than unsubstantiated allegations in a complaint. Compare, Falcon, 457 U.S. at 157. To the contrary, the USDA's history of discrimination against minority farmers is longstanding, well known and well documented as evidenced by findings of Congress and the United States Commission on Civil Rights as well as the sworn admissions of high USDA officials, including Secretary Glickman, the original defendant in this case. See, e.g., Ex. 3 to Plaintiffs' Second Supplemental Memorandum and Exs. 1-2 and 5-8 to Plaintiffs' Supplemental Memorandum. Indeed, there have been specific findings by both the Civil Rights Commission and Congress pointing to the discretion and subjectivity that infect the USDA credit and benefit programs and the adverse effect of that discretion and subjectivity on minority farmers. See Ex. 5 to Plaintiffs' Supplemental Memorandum.

In the instant case, the Hispanic farmers and ranchers who comprise the putative class represent an oppressed and, in some ways, beaten down minority who are confronting a powerful governmental agency that has systematically stripped them of their land and, in some instances, their ability even to subsist as farmers and ranchers. They are confronting an agency which the record shows reflects racial and ethnic animus not just on the local level but at high levels within the bureaucracy. It is an agency which, according to a sworn declaration by the former director of the Office of Civil Rights, destroys documents and intimidates those who would complain about discrimination. See Declaration of Rosalind Gray at ¶ 20. (Ex. 7 to Plaintiffs' Supplemental Memorandum.) Given these circumstances, it took remarkable courage for the named plaintiffs to come forward and assert their rights under ECOA. With the denial of class

certification, there is no telling how many Hispanic farmers will abandon valid claims for fear of retaliation and intimidation by FSA.

Wholly apart from those who will abandon valid claims as a result of fear, untold thousands of Hispanic farmers will have their valid claims extinguished without ever having received notice of the pending lawsuit or an opportunity to protect their rights, because if the district court's order is allowed to stand, they would have to intervene or file individual suits within a brief 8 day period in order to protect their rights.⁹ Even with respect to the hundreds of putative plaintiffs of whom plaintiffs' counsel are aware, it would be close to impossible to contact each of them to determine whether they wish to intervene in the pending case or to file separate claims as many of these farmers live in remote rural areas and do not have access to fax machine or the internet, and then make such filings within such a short period of time.

C. The District Court's Decision Is Manifestly Erroneous.

1. The district court abused its discretion in denying plaintiffs' motion for class certification without ever affording plaintiffs any class discovery.

The district court faults plaintiffs for "hav[ing] failed to make [a] 'significant showing'" that members of the class suffered from a common policy of discrimination. 12/02/02 Memorandum Op. at 8. The district court also faults the statistical analysis performed by Professor Jerry Hausman for failing to show how the statistically significant disparity in the ability of Hispanic farmers to obtain USDA loans "is attributable to any one, or more, of the arguably subjective criteria that are part of the loan approval process." *Id.* at 15. The district court concludes that the alleged failure on the part of plaintiffs' statistical analysis "is particularly toxic to [plaintiffs'] claim of disparate impact." *Id.* at 16 n.7. The district court concluded that "where an employer combines subjective criteria with the use of more rigid standardized rules or tests," plaintiffs are "responsible for isolating and identifying the specific employment practices

⁹ The district court, in response to an emergency motion has entered an order staying the proceeding nunc pro tunc to December 2, 2002 (the date of its order denying class certification) to stay the running of the statute of limitations pending the resolution of plaintiffs' Rule 23(f) appeal. (Addendum G)

that are responsible for any observed statistical disparities.” Ibid. (quoting Wards Cove Packaging v. Atonio, 490 U.S. at 656 (1989) (quoting Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 994 (1988) (O’Connor, J. concurring)). Significantly, the district court faults plaintiffs for not including in its analysis facts that, if they exist at all, exist only in the files and records of defendant, and as to which plaintiffs have been afforded no discovery whatsoever.¹⁰ Indeed, in its reliance on Wards Cove, the district court seems to suggest that plaintiffs must demonstrate the precise policy that causes the alleged disparate impact upon them even when the defendant’s policies are not capable of separate analysis.

The district court’s heavy reliance upon Wards Cove and Watson is misplaced. Wholly apart from the fact that plaintiffs have not had any discovery to determine whether it is even possible to isolate and identify the specific practices which cause the disparate impact, Congress, in part to modify the effect of the holding in Wards Cove, amended Title VII in 1991.¹¹ As amended, the statute provides that a plaintiff, asserting a disparate impact claim, must “demonstrate[] that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex or national origin. . . .” 42 U.S.C. § 2000e-2(k)(1)(A)(i). Significantly, the revised statute provides an exception to that requirement where “the complaining party can demonstrate to the court that the elements of a respondent’s decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice.” Id. § 2000e-2(k)(1)(B)(i). (Emphasis added.)

To the extent that USDA is permitted to limit plaintiffs’ ultimate discovery to databases and records which, as USDA concedes, do not contain any information concerning the reasons for rejecting loan applications, USDA is, in effect, maintaining a system in which “the elements

¹⁰ The district court cites as another potential bar to class certification the geographic dispersion of the decision-makers. Significantly, the district court concedes that such a theoretical bar to class certification may be overcome by an appropriate statistical analysis. 12/02/02 Memorandum Op. at 18-19. Nevertheless, the district court denied class certification without ever affording plaintiffs any discovery.

¹¹ The only other case cited by the district court in support of the requirement that plaintiffs identify the specific matters causing the disparate impact is a decision which predates the 1991 amendment to Title VII.

of [its] decisionmaking process are not capable of separation for analysis [and hence] may be analyzed as one . . . practice.” Ibid. Under such an approach, evidence of “numerous questionable” subjective criteria in USDA’s eligibility requirements “ought to fortify [plaintiffs’] assertion that the practices caused racial disparities.” Wards Cove, 490 U.S. at 673 (Stevens, J. dissenting).

2. The district court erroneously relied upon the wrong regulations in concluding that the instant case does not fit within the Falcon exception.

The district court also concludes that the instant case does not fit within the Falcon footnote 15 exception. See 12/02/02 Memorandum Order at 11. While acknowledging that “[s]lavish adherence to the word ‘entirely’ would be unwise” the district court nevertheless concludes that “where, as here, a number of objective factors guide the decision-making process, the proposed class fits less neatly into the Falcon exception.” Ibid. (Emphasis added.) However, in reaching that conclusion, the district court erroneously cites the current regulations as governing the decisions of county committees in determining eligibility. The district court finds that the current regulations set forth eleven eligibility criteria “at least eight of which . . . cannot be properly characterized as subjective.” Id. at 12. In relying upon the current regulations, the district court erroneously notes that “[t]he parties have not indicated that these provisions have materially changed over the relevant time period.” Id. at 13 n.5. The regulations cited by the district court as governing the county committees’ decision-making with respect to determining farmer eligibility for participation in USDA loan programs in fact played not such role. The county committees ceased playing any role in loan eligibility determinations after 1999. Moreover, as previously noted, (supra at 4-5) for most of the period covered by the complaint, the county committee considered only six factors, of which five were subjective, in determining eligibility. See, e.g., 7 C.F.R. §§ 1941, 1943 (1988).

3. **The district court's conclusion that the class cannot be certified pursuant to Rule 23(b)(2) because the complaint does not seek injunctive relief is manifestly erroneous.**

Turning to Rule 23(b)(2), the district court concludes that certification under (b)(2) is not appropriate because “the monetary relief plaintiffs seek predominates under any applicable test.” 12/02/02 Memorandum Order at 21. In so holding, the district court focused primarily on the damages claim of \$20 billion. *Ibid.* The district court concluded that the complaint “seeks no injunctive relief at all.” *Ibid.* That conclusion is completely at odds with that reached by Judge Friedman in *Pigford*, who, in reading a complaint which is for all practical purposes indistinguishable from the instant complaint, found that the *Pigford* plaintiffs were seeking “a variety of injunctive and declaratory remedies.” *Pigford*, 182 F.R.D. at 351. Moreover, there is no requirement, and the district court cites none, that plaintiffs must set forth in minute detail the precise nature and contours of the injunctive relief they seek. *See, e.g., Western Colorado Fruit Growers Ass'n v. Marshall*, 473 F. Supp. 693, 699-700 (D. Co. 1979) (motion to dismiss counterclaim seeking injunctive relief based on particularity requirements of Fed. R. Civ. P. 65(d) denied “[u]nder our system of notice pleading the counterclaim adequately places plaintiff on notice of the area into which defendants will inquire at trial”); *see also Sparrow v. United Air Lines, Inc.* 216 F.3d 1111,1113 (D.C. Cir. 2000); *Woodruff v. DiMario*, 197 F.R.D. 191,192 (D.D.C. 2000). Plaintiffs have repeatedly made clear that a major part of this case involves trying to fix the USDA farm credit system once and for all so that another set of plaintiffs will not have to repeat this process a few years from now. For whatever reason, the district court seems unwilling to credit those representations.¹²

¹² Apparently, the district court predicates its assertion that the complaint “seeks no injunctive relief at all” upon its wholly unsupported conclusion that the failure to investigate discrimination complaints is not actionable under ECOA and cannot form the basis of a finding of commonality. Judge Robertson’s holding in that regard is contrary to the express holdings of Judges Friedman and Sullivan considering carbon copy complaints. While plaintiffs recognize that the Court normally will not address the merits in considering class certification, the instant case, as discussed in Part D, presents circumstances where addressing the merits is clearly warranted.

D. The District Court's Decision That The Farmers' Failure To Investigate Claim Could Not Be The Basis For A Finding Of Commonality and Typicality Presents Special Circumstances That Warrant The Court's Review.

This case also presents special circumstances warranting this Court's review of the district court's decision denying class certification. Two other cases involving carbon copy complaints filed in the same court by African American and Native American farmers have been certified, while the district court denied certification with respect to Hispanic farmers. The district court seeks to justify this disparate treatment of the putative Hispanic class by citing to its conclusion, reached without the benefit of any apparent analysis, that the failure to investigate discrimination complaints arising out of the USDA credit application process cannot form the basis for class certification. Yet, in connection with the Keepseagle case, which, as the government conceded when seeking a Rule 23(f) petition to review that case, is for all practical purposes indistinguishable from the instant complaint, this Court observed that it did not

see anything either novel or manifestly erroneous (the second and third Lorazepam categories) about the district court's conclusion that the farmers' allegations concerning the Department's "failure to properly process, account for, and/or investigate discrimination complaints," which affected each class member," satisfy Rule 23(a)'s commonality and typicality requirements.

In re Veneman, 309 F.3d at 794 (quoting Keepseagle, Memorandum Op. at 19-20).

In reaching that conclusion, this Court expressly refused the government's invitation to consider the merits of whether the "farmers' complaint-processing claim is actionable under . . . the ECOA . . ." In so doing, this Court noted that "courts may not examine whether 'plaintiffs have stated a cause of action or will prevail on the merits' in order to determine whether class certification is appropriate." Ibid. (quoting Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 178 (1974)). As this Court is well aware, however, the foregoing is not a hard and fast rule. Indeed, as this Court noted in Lorazepam, "there may be occasions when threshold issues . . . jurisdictional issues . . . or issues on the merits (e.g., affirmative defenses or the elements of a cause of action) would be appropriate for interlocutory review pursuant to Rule 23(f)."

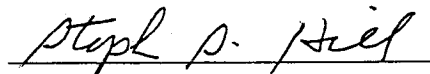
Lorazepam, 298 F.3d at 108 (citations omitted). As this Court further explained, “[i]n such circumstances, however, those issues would relate . . . to the certification of the class” Ibid.

This case presents such circumstances. The district court’s bald assertion that the failure to investigate claims cannot form the basis of a finding commonality and typicality is flatly contradicted by this Court’s contrary holding in In re Veneman, 309 F.3d at 794, and by two other judges of the same court considering identical complaints. At a minimum, the apparent disparate treatment of minority groups advancing identical complaints in the same court calls into question the fair administration of justice. See, e.g., Piesco V. City of New York, No. 85 Civ. 1983 (JJM), 1994 U.S. Dist. LEXIS 4623, at *4 (“It is important to the administration of justice that the public perceive the courts as acting fairly and not on the basis of some personal bias of the presiding judge”). Moreover, precisely to avoid any such perception should give rise to sufficient “special circumstances” to warrant an interlocutory review of the issue pursuant to Rule 23(f).

CONCLUSION

For the foregoing reasons, plaintiffs should be granted permission to take an interlocutory appeal from the district court’s order denying class certification.

Respectfully submitted,



Alan M. Wiseman
Stephen S. Hill
HOWREY SIMON ARNOLD & WHITE, LLP
1299 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 783-0800
(202) 383-6610

Of Counsel:
Kenneth C. Anderson
Robert L. Green, Jr.
HOWREY SIMON ARNOLD & WHITE, LLP
1299 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 783-0800
(202) 383-6610

Alexander J. Pires, Jr.
Ingrid Hutto
CONLON, FRANTZ, PHELAN & PIRES,
LLP
1818 N Street, N.W., Suite 700
Washington, DC 20036
(202) 331-7050
(202) 331-9306 – Fax

Philip Fraas
3050 K Street, N.W., Suite 400
Washington, DC 20007
(202) 342-8864
(202) 342-8451 - Fax

COUNSEL FOR PLAINTIFFS-APPELLANTS

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ADDENDUM

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