

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

_____)	
GUADALUPE L. GARCIA, et al.,)	
)	
Plaintiffs-Appellants,)	
)	No. 02-8014
v.)	
)	(Civ. No. 00-2445 (JR))
ANN VENEMAN, Secretary, UNITED)	
STATES DEPARTMENT OF AGRICULTURE,)	
)	
Defendant-Appellee.)	
)	
_____)	

RESPONSE OF DEFENDANT ANN VENEMAN TO PLAINTIFFS' PETITION
FOR PERMISSION TO TAKE AN INTERLOCUTORY APPEAL
UNDER FED. R. CIV. P. 23(f)

INTRODUCTION AND SUMMARY

This case concerns discrimination claims by Hispanic farmers alleging that, over a period of nearly two decades, they were denied credit and benefits in a variety of different farm programs administered by the United States Department of Agriculture (USDA). Plaintiffs seek to proceed as a class action under Fed. R. Civ. P. 23, and seek \$20 billion in damages from the USDA. On December 2, 2002, after extensive briefing and multiple opportunities for discovery on this issue, the district court denied plaintiffs' motion for class certification. Plaintiffs now seek interlocutory review of that decision under Fed. R. Civ. P. 23(f).

As explained more fully below, plaintiffs have not satisfied any of the three criteria for review under Rule 23(f). First, the district court's decision denying class certification in this case is correct; it is certainly not "manifestly erroneous." Second,

plaintiffs have not even attempted to identify any novel or unsettled question relating to class actions that is likely to evade end-of-case review. Third, the denial of certification is not the "death knell" for plaintiffs' claims. They will simply have to litigate their claims individually - a task that is hardly insurmountable if plaintiffs' estimate that each claim is worth \$1 million has any credibility. Pl. App. B (Compl.), at 57 n.4.

Despite these barriers to review under Rule 23(f), this case may nonetheless present "special circumstances" that warrant the exercise of this Court's discretionary review. Most importantly, this is one of three related cases now pending in district court alleging virtually identical claims against the USDA on behalf of different groups that each desire to proceed as a class action. In Love v. Veneman, No. 00-02502 - a case involving female farmers - Judge Robertson has not yet ruled on plaintiffs' motion for class certification (although he has expressed skepticism that the case may proceed as a class), while in Keepseagle v. Veneman, No. 99-3119 - a case involving Native-American farmers - Judge Sullivan has granted plaintiffs' motion to proceed as a class limited solely to claims for equitable relief under Rule 23(b)(2).

As the government explained in its Rule 23(f) petition in Keepseagle, early appellate resolution of the question whether these virtually identical cases may proceed as class actions will conserve judicial resources and will enhance judicial consistency

by ensuring that similar cases are treated similarly. Although this Court denied the USDA's petition for review in Keepseagle, it did so primarily on the ground that a critical legal issue concerning the scope of partial certification under Rule 23(c)(4) had not been briefed or decided below. See In re: Veneman, 309 F.3d 789, 795-96 (D.C. Cir. 2002). The Court acknowledged that the case might otherwise present "special circumstances" warranting review under Rule 23(f) and left open the possibility of later review. Id. Now that there is an actual conflict in the certification of claims brought by Hispanic farmers and those brought by Native-American farmers, interlocutory review under Rule 23(f) may be appropriate to provide guidance to the district courts on the propriety of class certification in these cases.

STATEMENT

A. Regulatory Background

The Farm Service Agency (FSA) is a component of the USDA. Like its predecessor, the Farmers Home Administration (FmHA), the FSA is statutorily authorized to make loans to farmers who cannot obtain credit from commercial institutions. See Consolidated Farm and Rural Development Act, 7 U.S.C. § 1921, et seq. The FSA makes loans for a variety of different purposes including, inter alia, "farm ownership" loans, which are intended to assist farmers in buying or improving farm property, 7 C.F.R. § 1943.2, "operating" loans, which provide credit and management assistance to help

farmers run their farms, 7 C.F.R. § 1941.2, and emergency loans, which are intended to help farmers resume operations after an officially-declared disaster, 7 C.F.R. § 1945.152. To apply for such loans, a qualified applicant - that is, an individual who cannot obtain credit elsewhere - must submit a Farm and Home Plan ("FHP"), including the applicant's farming record, financial condition, and an explanation of how the loan proceeds will be used, which demonstrates that the applicant will be able to repay the requested loan. See 7 C.F.R. §§ 1941.4, 1943.4, 1943.24.¹

Although the FSA's credit and benefit programs are federally funded, until 1999, decisions to approve or deny applications for credit or benefits were made by a combination of farmers elected to local committees and USDA staff. See Pigford v. Glickman, 206 F.3d 1212, 1214 (D.C. Cir. 2000); Dahl v. United States, 695 F.2d 1373, 1378 (Fed. Cir. 1982). FSA decisions denying credit, loan servicing requests, or farm benefits may be appealed to the USDA's National Appeals Division (NAD), an entity entirely separate from the FSA. See 7 C.F.R. Part 11. Such appeals are a prerequisite for judicial review. See 7 U.S.C. § 6912(e); Deaf Smith County Grain Processors, Inc. v. Glickman, 162 F.3d 1206 (D.C. Cir. 1998).

The USDA has internal management guidelines proscribing discrimination based on "race, color, religion, sex, age, handicap,

¹ In addition to credit programs, the FSA also administers a variety of benefit programs under which there is no expectation that the recipient will repay the FSA. See 7 C.F.R. Part 1477.

or national origin" in the administration of any of its programs and activities. See 7 C.F.R. §§ 15.51, 15.52 (1999). These guidelines include a voluntary administrative mechanism under which a person who believes he has suffered discrimination in a covered USDA program may file a complaint with the USDA's Office of Civil Rights ("OCR"). OCR then investigates the complaint and determines what corrective action, if any, is required to resolve it.

B. Equal Credit Opportunity Act

The Equal Credit Opportunity Act ("ECOA"), 15 U.S.C. § 1691, et seq., prohibits discrimination in the field of consumer credit. ECOA makes it "unlawful for a 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 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 sustained by such applicant acting either in an individual capacity or as a member of a class." Id. § 1691e(a).

Although ECOA contains a two-year statute of limitations, 15 U.S.C. § 1691e(f), Congress enacted legislation that retroactively extended the limitations period for certain claims against USDA. Provided an action was commenced within two years of that amendment (October 21, 1999), Congress allowed individuals who filed

administrative complaints of discrimination with the USDA between January 1, 1981 and July 1, 1997 to sue for discrimination alleged to have occurred between January 1, 1981 and December 31, 1996. See Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 1999, Pub. L. No. 105-277, § 741, 112 Stat. 2681 (codified at 7 U.S.C. 2297 note).

C. Prior ECOA Litigation Against the USDA

Since 1995, several different groups of farmers have filed suits against the USDA under the ECOA, alleging that the agency discriminated against them in the provision of various farm loans and benefits. Plaintiffs in these cases have typically sought both damages under the ECOA and equitable relief under the APA, and have attempted to obtain class certification under Rule 23.

1. Williams

In Williams v. Glickman, Civ. No. 95-1149 (Addend A), Judge Flannery refused to certify a class of African-American and Latino farmers alleging discrimination by the USDA in violation of the ECOA. Among other things, Judge Flannery held that bare allegations of a "common thread of discrimination" did not establish the existence of a common legal question. Id. at 13. The court also concluded that the class could not be certified under Rule 23(b)(2) because plaintiffs were primarily concerned with obtaining money damages rather than injunctive relief, id. at 18-19, and that the class could not be certified under Rule

23(b)(3) because individual questions clearly predominated over common questions, id. at 21.

2. Pigford

In Pigford v. Glickman, 182 F.R.D. 341 (D.D.C. 1998), Judge Friedman certified a class of African-American farmers pursuant to Fed. R. Civ. P. 23(b)(2). While acknowledging that plaintiffs' credit discrimination claims were highly individual, Judge Friedman identified a common issue amenable to class treatment, explaining that the "unifying pattern of discrimination at issue in this case is the USDA's failure properly to process complaints of discrimination, without regard to the program that triggered the discrimination complaints." Id. at 349. Despite plaintiffs' claims for substantial monetary relief, the court also found that the class could be certified under Rule 23(b)(2). So long as monetary relief did not predominate, Judge Friedman explained, the "mere fact that plaintiffs were seeking monetary relief in addition to injunctive and declaratory relief" would not preclude certification under Rule 23(b)(2). Id. at 351.

Within weeks after a class was certified in Pigford, the USDA entered into a consent decree to resolve plaintiffs' discrimination claims. Because the consent decree "involve[d] primarily monetary relief," the district court vacated its 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). This Court subsequently held that the district court had not abused its discretion in approving the consent decree under Fed. R. Civ. P. 23(e), but it did not review the certification decision on the merits. See Pigford v. Glickman, 206 F.3d 1212, 1213 (D.C. Cir. 2000).

3. Keepseagle

In Keepseagle v. Veneman, No. 99-3119 (Addend. B), Judge Sullivan certified a class of Native-American farmers under Rule 23(b)(2). Judge Sullivan first held that plaintiffs' claim that the USDA had failed to process complaints of discrimination satisfied the commonality requirement of Rule 23(a). Id. at 20-22. Acknowledging that "Rule 23(b)(2) may not be invoked * * * where the appropriate final relief relates exclusively or predominantly to money damages," the court emphasized that certification under Rule 23(b)(2) may nonetheless be appropriate "[w]here monetary damages are incidental to a claim for injunctive relief." Id. at 32. However, the court did not analyze whether plaintiffs' claims for injunctive relief predominated over their claims for \$19 billion in damages. Instead, Judge Sullivan simply certified a "class pursuant to Rule 23(b)(2) for purposes of declaratory and injunctive relief." Id. at 32-33. The court also declined to certify a "hybrid" class under Rule 23(b)(2) &(3). Id. at 33-35.

The USDA filed a Rule 23(f) petition in Keepseagle, arguing primarily that Judge Sullivan abused his discretion by certifying

a class under Rule 23(b)(2) without first determining whether plaintiffs' claims for \$19 billion in damages predominated over any arguable claims for "injunctive" relief. This Court accepted the petition for merits briefing and granted a stay of proceedings pending the Rule 23(f) appeal, but it ultimately denied the government's petition. The Court acknowledged that "the question of whether district courts may certify a (b)(2) class solely for purposes of equitable relief without first determining if plaintiffs' claims for monetary relief predominate over their equitable claims is both unsettled * * * and fundamental." In re: Veneman, 309 F.3d at 795. Although the Court found this question was not "likely to evade end-of-the-case review," the Court also suggested that it "might nonetheless regard the case as presenting 'special circumstances'" justifying appellate review. Id. However, the Court ultimately declined to grant review because a critical issue concerning the propriety of partial certification under Rule 23(c)(4) had not been briefed or decided below. Id. at 795-96.

D. Proceedings in this Case

1. Plaintiffs in this case are Hispanic farmers who allege that they suffered the same discriminatory treatment by the USDA - and are entitled to the same remedies - as the African-American farmers in Pigford. See Pl. Add. B (Compl.), at 15. As in Pigford and Keepseagle, plaintiffs have sought damages under the ECOA for the denial of credit and benefits to individual farmers, id. at 57,

and declaratory and injunctive relief under the APA based upon the USDA's "acts of denying plaintiffs and Class members credit and other benefits and systematically failing to properly process their discrimination complaints." Id. Unlike in Pigford and Keepseagle, however, the district court in this case has dismissed plaintiffs' claim concerning the USDA's failure to investigate and process discrimination complaints on the ground that this claim is not actionable under either the ECOA or the APA.² See Pl. Add. C.

2. On December 2, 2002, the district court denied plaintiffs' motion for class certification. Pl. Add. A. The court first held that plaintiffs had not established sufficient commonality among their individual claims of credit discrimination to satisfy Rule 23(a). Id. at 7-19. The court noted that plaintiffs' theory of commonality was predicated on two assertions: (1) that Hispanic farmers were injured by a systemic failure by the USDA to investigate discrimination complaints, and (2) that the USDA's process for awarding loans and benefits was entirely subjective and

² Judge Robertson initially ruled that plaintiffs' claim concerning the USDA's alleged failure to process discrimination complaints was not actionable under either the ECOA or the APA in a December 13, 2001 memorandum opinion in Love v. Veneman, No. 00-2502 (Addend. C), a companion case brought by female and other farmers. Among other things, the court concluded that a failure to investigate discrimination claims is not a "credit transaction" within the meaning of ECOA, id. at 13, and that such a claim is not actionable under the APA because Congress has provided an adequate alternate remedy - an extension of the ECOA limitations period on the credit discrimination claims, id. at 13-14. On March 20, 2002, the court adopted that ruling in this case. Pl. Add C.

resulted in discrimination against minority farmers. Id. at 8. The court explained that plaintiffs' first theory of commonality was precluded given its prior ruling that plaintiffs' could not pursue "failure to investigate" claims under either the ECOA or the APA. Id. at 9. And, the court rejected plaintiffs' arguments that the USDA's allegedly subjective decision-making could supply the requisite commonality, because plaintiffs failed to tie any statistical disparity in loans to Hispanic farmers "to any one or more subjective criterion." Id. at 15. Moreover, the court found that commonality was "defeated - not only by plaintiffs' inability to correlate the discrimination they allege with subjective loan qualification criteria - but also by the large numbers and geographic dispersion of the decision-makers. Id. at 17.³

The court also held that plaintiffs had not satisfied the prerequisites for class certification under any subdivision of Rule 23(b). Id. at 19-27. First, the court explained that plaintiffs could not satisfy Rule 23(b)(2)'s requirement that injunctive relief predominate over monetary relief. Given its dismissal of plaintiffs' complaint-processing claim, the court emphasized that plaintiffs were seeking "no injunctive relief at all." Id. at 17. Thus, given plaintiffs' request for \$20 billion in damages, the

³ The court emphasized that "[t]he thousands of Hispanic farmers plaintiffs seek to represent have dealt with hundreds, if not thousands, of local FSA officials, in more than 2,700 county offices across the country, over a 19-year period." Id. at 18.

court held that "the monetary relief plaintiffs seek predominates under any applicable test." Id. at 21.

Second, the court held that plaintiffs could not satisfy Rule 23(b)(3)'s requirement that common issues predominate over individual issues. Id. at 22-25. The court found that "[t]he instant case, if allowed to proceed as a class action, would quickly devolve into hundreds or perhaps thousands of individual inquiries about each claimant's particular circumstances." Id. at 24. "Even if the presence of classwide discrimination were established," the court concluded, "individual issues would be much more important to any claimant's recovery." Id.

Finally, the court held that "hybrid" certification would also be improper. Id. at 25-27. Because certification under Rule 23(b)(3) "is out of the question," the court explained, the "proposed class would not really be a hybrid but rather a Rule 23(b)(2) class with a different name." Id. at 25-26. Citing this Court's decision in Veneman, however, the court expressed skepticism that the class "could be certified under Rule 23(b)(2), even temporarily." Id. at 26. Given Rule 23(b)(2)'s requirement that a defendant has acted (or refused to act) in ways generally applicable to the entire class, the court noted that "the decentralization of loan and other benefits decision[s] could negate such a finding of general applicability." Id.

3. On December 10, 2002, the district court entered an order tolling the statute of limitations on plaintiffs' claims nunc pro tunc, pending resolution of their petition for review under Rule 23(f). Pl. Add G. At a status conference on December 18, however, plaintiffs indicated that they intended to request additional discovery related to class certification in order to support a motion for reconsideration of the class certification decision. To date, plaintiffs have not yet made any such requests.

DISCUSSION

Review under Rule 23(f) is highly discretionary. The advisory committee notes accompanying the rule make clear that a court of appeals has "unfettered discretion whether to permit the appeal, akin to the discretion exercised by the Supreme Court in acting on a petition for certiorari." Advisory Comm. Note to Rule 23(f).

This Court has held that interlocutory review under Rule 23(f) is "ordinarily appropriate" in three circumstances: (1) when a questionable class certification decision creates a "death-knell situation" for either the plaintiff or the defendant, (2) when the certification decision presents an "unsettled and fundamental issue of law relating to class actions" that is likely to evade end-of-case review, and (3) when the certification decision is manifestly erroneous. In re: Lorazepam & Clorazepate Antitrust Litig., 289 F.3d 98, 105 (D.C. Cir. 2002). In addition, this Court has suggested that review under Rule 23(f) may be granted in "special

circumstances," but the Court has "cautioned that such review should be 'granted rarely.'" In re: Veneman, 309 F.3d at 794 (quoting Lorezepam, 289 F.3d at 105-06). Thus, the Court recently denied a Rule 23(f) petition by the government in a virtually identical case presenting a question concerning class certification under Rule 23(b)(2) that the Court acknowledged was both "unsettled" and "fundamental." Id. at 795.

A. Plaintiffs Have Not Satisfied The Criteria For Interlocutory Review Under Rule 23(f).

As noted previously, this case does not fit the three primary criteria for interlocutory review under Rule 23(f). The district court's decision denying class certification is not "manifestly erroneous;" no unsettled or fundamental question of law relating to class actions is presented; and plaintiffs have not made a persuasive case that the denial of certification is the "death knell" for their claims. Nonetheless, as explained in section B infra, the court's decision denying certification in this case may present "special circumstances" warranting review under Rule 23(f) because this case is one of several related cases involving identical claims of discrimination against the USDA by different minority groups. It could therefore conserve judicial resources and promote consistency for this Court to provide guidance to the district courts on the question whether these cases may proceed as class actions.

1. **The Denial Of Class Certification
Was Not An Abuse of Discretion.**

As noted above, plaintiffs do not argue that the district court's decision denying class certification presents an unsettled or fundamental question of law warranting review under Rule 23(f). Instead, plaintiffs contend primarily that the denial of certification was manifestly erroneous. Pet. 15-18. It was not. The court properly concluded that there were no common questions of law or fact linking plaintiffs' disparate claims of credit discrimination and that, in any event, those claims could not proceed under either Rule 23(b)(2) or Rule 23(b)(3). That decision was well within the district court's discretion as the court "uniquely well situated" to make class certification decisions. See Wagner v. Taylor, 836 F.2d 578, 587 (D.C. Cir. 1987).

Plaintiffs do not directly challenge the district court's conclusion that they failed to establish the requisite commonality among their disparate claims of credit discrimination. Instead, plaintiffs contend that the court abused its discretion by denying class certification "without ever affording plaintiffs any class discovery." Pet. 15.⁴ This assertion is inaccurate, because the

⁴ Plaintiffs also argue that the court erred by relying on the wrong regulations in concluding that the USDA's eligibility criteria for loans were not completely subjective. Pet. 17. But this argument, at best, reduces the number of objective criteria; it does not prove that the decision-making was entirely subjective. Nor is this argument responsive to the court's conclusion that plaintiffs failed to show how any statistical disparity in loans to Hispanic farmers is linked to subjective criteria. Id. at 15.

court provided plaintiffs with ample opportunities to take discovery to identify common issues. Among other things, the USDA provided all relevant databases to plaintiffs, who pronounced them "useless," Pet. 11, and then elected to proceed without ever propounding specific discovery requests. But these strategic choices do not show that the court abused its discretion in denying discovery. To the contrary, they confirm that plaintiffs failed to satisfy their burden to make a "'specific presentation' identifying the questions of law or fact common to the class representative and the members of the class proposed." Hartman v. Duffey, 19 F.3d 1459, 1472 (D.C. Cir. 1994). And, to the extent plaintiffs moved for class certification before they had compiled an adequate record to identify common issues, that is a problem of their own making, not a problem that the court had any obligation to cure.

Plaintiffs do not challenge the district court's conclusion that a class could not be certified under Rule 23(b)(3), because individual issues predominate over common issues. Instead, they contend that the court's decision is manifestly erroneous because a premise for the court's conclusion that the case could not be certified under Rule 23(b)(2) - that "the complaint does not seek injunctive relief" - was incorrect. Pet. 18. However, the court did not rest its (b)(2) analysis solely on the absence of a request for injunctive relief in plaintiffs' complaint, but also on the conclusion that plaintiffs' request for \$20 billion in damages

"predominates under any applicable test." Pl. Add. A, at 21. Even now, plaintiffs have not identified any specific injunctive relief that could act as a meaningful counterweight to their enormous damages claims.

Moreover, as the court explained, whatever "injunctive" relief plaintiffs may initially have requested with respect to the USDA's alleged failure to process discrimination complaints is irrelevant given the prior dismissal of their so-called complaint-processing claim. Id. at 21 & n.21. Plaintiffs characterize the court's prior decision to dismiss their complaint-processing claim as "wholly unsupported," Pet. 18 n.12, and urge the Court to reverse that decision on the merits. See id. at 19-20 (arguing that the dismissal of the failure-to-investigate claim presents "special circumstances" warranting interlocutory review). But that is precisely the merits question that this Court refused to address in deciding whether to grant the USDA's Rule 23(f) petition in Keepseagle, where the government argued that Judge Sullivan's failure to dismiss that claim was a manifestly erroneous predicate for his commonality finding. See Veneman, 309 F.3d at 794-95. As in Keepseagle, this Court should not grant interlocutory review here to address plaintiffs' merits arguments.⁵

⁵ Nonetheless, as explained in section B infra, if this Court decides to grant review under Rule 23(f), resolution of the purely legal question whether plaintiffs' "complaint-processing" claim may proceed under either ECOA or the APA would provide guidance to the district courts on the threshold question whether there are any common issues in these cases that could satisfy Rule 23(a).

2. **The Denial Of Class Certification Is
Not The "Death Knell" of Plaintiffs'
Claims.**

Plaintiffs also contend that interlocutory review is warranted because the denial of certification "is the death knell to hundreds, if not thousands, of valid claims." Pet. 14. However, plaintiffs nowhere offer a persuasive explanation why putative class members with individual claims of credit discrimination alleged to be worth \$1 million on average, Pl. Add. B (Compl.), at 57 n.4, would be unwilling to pursue individual lawsuits. Without offering any evidence that any class members would be deterred from pursuing individual claims, plaintiffs simply speculate that "there is no telling how many Hispanic farmers will abandon valid claims for fear of retaliation and intimidation by FSA." Pet. 15. But such vague allegations of possible "chill" cannot suffice to demonstrate the "death knell" of claims absent review under Rule 23(f), particularly where, as here, "there is reason to believe individual suits are feasible." Castano v. The American Tobacco Co., 84 F.3d 734, 748 (5th Cir. 1996).⁶

⁶ Plaintiffs' argument that many individuals will forever lose their right to sue because only 8 days remain on the ECOA limitations period in this case, Pet. 15, is equally unavailing as evidence of a "death knell." As noted above, the district court tolled the limitations period during the pendency of the Rule 23(f) petition, Pl. Add G, thereby providing ample opportunity for plaintiffs' counsel to file individual suits to protect class members in the event the denial of class certification is affirmed, and plaintiffs may, of course, always seek additional, reasonable tolling of the limitations period.

B. Review Under Rule 23(f) May Be Warranted To Provide Guidance On The Propriety of Class Certification In Related Cases.

Despite all the barriers to interlocutory review identified above, this Court may still wish to exercise its considerable discretion to permit review under Rule 23(f), because this is one of three related cases now pending in district court alleging virtually identical claims against the USDA on behalf of different groups that desire to proceed as a class action. Although it is conceivable that a district judge could act within his discretion in denying class certification in one case while another judge could grant certification in a virtually identical case, it would be in the interests of justice for this Court to review such varying decisions to ensure that similarly-situated minority groups are treated consistently. Moreover, as noted above, it may ultimately conserve scarce judicial resources for this Court to resolve earlier rather than later whether the current trilogy of post-Pigford cases - Keepseagle, Love, and this case - may properly proceed as class actions. This case presents a suitable vehicle for resolution of the principal issues in these cases.

We note, however, that two days after filing their petition in this Court, plaintiffs indicated at a district court status conference that they intended to request additional discovery related to class certification in order to support a motion for reconsideration of that decision, and the court suggested that it

would be receptive to such requests. Even if review under Rule 23(f) would otherwise be appropriate, such ongoing proceedings would obviously undermine appellate review of the court's class certification decision and could arguably deprive this Court of jurisdiction. Cf. Clifton Power Corp. v. FERC, 294 F.3d 108, 110 (D.C. Cir. 2002) (request for reconsideration of agency decision renders it non-final and thus unreviewable). The Court should thus deny review under Rule 23(f) unless plaintiffs agree to forego any future class certification proceedings in district court.

CONCLUSION

For the foregoing reasons, this case does not satisfy the criteria for review under Rule 23(f). However, it may present "special circumstances" under which this Court should grant review in order to provide guidance to the district courts on the question whether three virtually identical cases may proceed as class actions. In that event, the Court should only grant review if plaintiffs agree to forego future proceedings related to class certification - including discovery - in district court.

Respectfully submitted,



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DECEMBER 2002

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of December, 2002, I have caused the foregoing Response of Defendant Ann Veneman to Plaintiffs' Petition for Permission To Take Interlocutory Appeal Under Fed. R. Civ. P. 23(f) to be served by courier upon the following counsel:

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- Exh. C Memorandum opinion, December 13, 2001, in Love v. Veneman, Civ. No. 00-2502 (JR), dismissing plaintiffs' claim that USDA failed to investigate and process discrimination complaints