

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. 04-8008
(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 September 10, 2004) denying plaintiffs’ motion for class certification.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 (Robertson, J.). In two of the three cases (Pigford and Keepseagle), the classes were certified based on the failure of the United States Department of Agriculture (“USDA”) to investigate discrimination complaints filed by African-American and Native-American farmers. Pigford v. Glickman, 182 F.R.D. 341, 349, 351 (D.D.C. 1998); Keepseagle, Memorandum Op. at 22.

¹ Memorandum Order Denying Class Certification entered September 10, 2004 (“Order”) (Addendum B). In addition to the material contained in the Addendum, memoranda and exhibits submitted to the district court and filings submitted to this Court referred to herein are available for the Court’s convenience on the internet at <http://www.garciaaction.org>, by clicking on “Docket and Filings.”

Glickman, 182 F.R.D. 341, 349, 351 (D.D.C. 1998); Keepseagle, Memorandum Op. at 22. 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. Pigford v. Glickman, 206 F.3d 1212 (D.C. Cir. 2002). Similarly, in Keepseagle, this Court dismissed the government's appeal pursuant to Rule 23(f) challenging class certification.² In marked contrast, the district court has twice denied the motion for class certification filed on behalf of Hispanic farmers.

STATEMENT

A. Regulatory Background

The Farm Service Agency ("FSA") is a component of the USDA. Like its predecessor, the Farmers Home Administration ("FmHA"), it is the federally funded lender of last resort for farmers and ranchers. It makes loans for a variety of 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, elected by local farmers in each county in a closed process, are and continue to be predominantly white and male. These committees determined a farmer's eligibility to participate in USDA farm credit and non-credit benefit programs. They, in turn, appointed the county loan supervisors, who processed and approved the loans once a farmer's eligibility was determined. Owing to the unfettered discretion of their

² In re Veneman, 309 F.3d 789 (D.C. Cir. 2002), petition denied, No. 04-5031, 2004 U.S. App. LEXIS 4219 (D.C. Cir. Mar. 3, 2004). There is a fourth case pending in the district court, Love v. Veneman, C.A. No. 00-2502 (Robertson, J.). A renewed motion for class certification is pending in that case.

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 major source of discrimination for Hispanic farmers and ranchers. Frequently, as the USDA Civil Rights Action Team³ (“CRAT”) reported, the Hispanic farmer was 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 discouragement and obtained an application, he was invariably refused assistance in completing it, notwithstanding USDA regulations requiring 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 extended the loan process for months, well past the optimal planting season. 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. In making that determination, the county committee was supposed to consider seven criteria: age, 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 age and 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. Indeed, the discriminatory effect of that discretion was documented by the United States Commission on Civil Rights (“Civil Rights Commission”) and confirmed by Congress:

As 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

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 recommendation for change.” CRAT Report at 3. *See Pigford v. Veneman*, 292 F.3d 918, 919 (D.C. Cir. 2002). The CRAT Report is available at <http://www.garciaaction.org/press>.

range of subjective interpretation The problem of subjectivity permeates much of the FmHA loan decision process Lack of specific criteria for loan determinations potentially enhances FmHA's flexibility and ability to serve clients. It also creates loopholes which allow for discriminatory treatment.⁴

Even the most cursory review of the eligibility criteria confirms the Civil Rights Commission's finding.⁵ Indeed, if there were any doubt in that regard, FmHA itself stated unequivocally that "the decisions on eligibility, feasibility, creditworthiness, etc. are unreviewable because they are subjective criteria . . . and they are wholly within FmHA discretion."⁶

B. Equal Credit Opportunity Act

The Equal Credit Opportunity Act ("ECOA"), 15 U.S.C. § 1691, et al. (2000), prohibits discrimination in the administration 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).

⁴ United States Commission on Civil Rights, The Decline of Black Farming In America at 80-81 (1982) (emphasis added), quoted with approval in The Minority Farmer: A Disappearing American Resource: Has the Farmers Home Administration Been The Primary Catalyst?, H.R. Rep. No. 101-984, at 10-11 (1990). (Ex. 5 to Plaintiffs' Supplemental Memorandum In Support Of Their Motion For Class Certification dated April 8, 2002 ("Plaintiffs' Supplemental Memorandum").)

⁵ 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, i.e., 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).

⁶ Motion and Brief of the United States For Summary Judgment Affirming Agency Action, filed July 8, 1987 in the United States District Court of Colorado in Velarde v. United States acting through the Farmers Home Administration, C.A. No. 85-K-2103, at 7 (emphasis added). (Ex. 6 to the Memorandum In Response To The Court's July 15, 2003 Order With Respect To Commonality ("12/5/03 Commonality Memo."))

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 after belatedly discovering that in the early 1980s USDA had secretly dismantled its civil rights investigatory unit, thereby eviscerating 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. To redress this wrong, 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, 1996.⁷

C. 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 injunctive relief and monetary damages. 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 in Addendum C.)⁸

After two prior assignments, this case was transferred on February 1, 2002, to Judge Robertson, who from the very outset expressed his belief that Judges Friedman and Sullivan had erred in certifying the classes in Pigford and Keepseagle, notwithstanding this Court's approval of the Pigford consent decree. Accordingly, on March 20, 2002, the district court denied in part

⁷ 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).

⁸ On December 5, 2003, plaintiffs moved for leave to file a Third Amended Complaint to specifically plead the additional common questions of law and fact revealed during the extremely limited discovery permitted by the district court. The Proposed Third Amended Complaint is set forth in Addendum D.

and granted in part defendant's motion to dismiss. It 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 [Administrative Procedure Act, 5 U.S.C. §§ 701, et seq.]." ⁹ 3/20/02 Memorandum Order at 3-4. It 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.

Following a subsequent round of briefing, the district court 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." 5/22/02 Memorandum Order at 2. (Addendum E) Accordingly, the district court ordered "that the parties meet and confer on a schedule for . . . discovery related to the class certification issue." Id. The district court also ordered the convening of a June 24, 2002 in-chambers status conference. Id. at 3.

During those meetings, a dispute arose as a result of defendant's insistence that plaintiffs were entitled to access only the data contained in two centrally maintained USDA electronic databases that defendant readily conceded did not contain the information needed to establish the causal link required by the district court's 5/26/02 Memorandum Order. Consequently, plaintiffs sought access to the underlying loan files. Advised of the dispute, the district court suggested that plaintiffs submit a supplemental memorandum and affidavit of counsel describing the deficiencies in the proffered databases and defendant respond thereto, thereby narrowing the discovery issues in dispute.

⁹ The district court stated that "[i]f asked to do so, [it] will also certify [its] Memorandum Order of March 20, 2002 pursuant to 28 U.S.C. § 1292(b)." Order at 2-3. Because of the importance of that order to the class certification issues, plaintiffs are so requesting.

On December 2, 2002, following the supplemental filings in which defendant did not dispute any of the alleged deficiencies in the proffered databases, the district court, without ever addressing the discovery dispute that prompted the filings, issued a Memorandum Order denying plaintiffs' motion for class certification.¹⁰ At the subsequent status hearing, the district court acknowledged that plaintiffs had not been afforded any class discovery (December 18, 2002 Status Hearing Tr. at 21) and gave plaintiffs the option of perfecting their appeal or withdrawing it and taking discovery.¹¹ Id. at 26. Plaintiffs withdrew their appeal and sought class discovery, whereupon the district court ordered plaintiffs to file their discovery requests the following week and ordered defendant to submit objections to such discovery requests on or before February 14, 2003. January 15, 2003 Status Hearing Tr. at 17.

Subsequently, after interposing so-called "general objections" and claiming to be able to find loan files for only 37 of the approximately 110 plaintiffs named in the Second Amended Complaint, defendant offered to produce those files and certain other documents in lieu of responding fully to plaintiffs' discovery requests. April 29, 2003 Status Hearing Tr. at 12-13. The district court ordered defendant to produce the proffered files and to respond to the discovery requests within 30 days. Id. at 40. Defendant ultimately produced, for inspection and copying, loan files for only 35 named plaintiffs. At the next status hearing, defendant produced the loan documents that plaintiffs had designated for copying two months earlier. The district court ordered plaintiffs to review the documents to determine whether there is commonality among the named plaintiffs. July 15, 2003 Status Hearing Tr. at 22-23. After reviewing those files, plaintiffs submitted the 12/5/03 Commonality Memo.

¹⁰ See Garcia v. Veneman, 211 F.R.D. 15 (D.D.C. 2002) ("Garcia I"). Thereafter plaintiffs filed an appeal petition pursuant to Rule 23(f). See Petition Of Plaintiffs Guadalupe L. Garcia, Et Al. For Permission To Take An Interlocutory Appeal Under Fed. R. Civ. P. 23(f), Dkt. No. 02-8014, filed December 16, 2002.

¹¹ Inasmuch as a principal basis of the appeal was the denial of class discovery, once the district court acknowledged that plaintiffs were entitled to such discovery and that it would permit plaintiffs to obtain discovery, the appeal was effectively mooted.

That review and other research revealed that FSA personnel engaged in tactics to (i) deny Hispanic farmers loan applications or routinely deny their requests for assistance in completing paperwork, (ii) systematically delay the processing of credit applications of Hispanic farmers, (iii) utilize highly subjective criteria to reject loan applications of Hispanic farmers, (iv) all-too-often subject Hispanic farmers (but not white males) to supervised bank accounts (“SBAs”) and (v) deny or delay needed loan servicing requests by Hispanic farmers. Collectively, these tactics describe a lending process that clearly violates ECOA and its implementing Regulation B, as well as USDA’s own regulations. Moreover, these tactics, which were calculated to deny Hispanic farmers equal access to the full range of credit and non-credit benefit opportunities that USDA affords to others, were knowingly countenanced by USDA throughout its FSA and FmHA operations. As such, these tactics present issues of fact and law common to all plaintiffs and those they profess to represent.¹² Significantly, these tactics are virtually identical to tactics that USDA documented in its investigation of its farm credit programs. See CRAT Report at 15-16.

D. Question Presented

In denying the class certification motion, did the district court abuse its discretion by denying plaintiffs the discovery needed to satisfy its mandated burden of proof, by refusing to

¹² For example, did USDA attempt to deny Hispanics farm credit and loan servicing in violation of the ECOA? Did USDA seek to deny Hispanic farmers access to non-credit farm benefit programs? Did USDA attempt to discourage Hispanics from availing themselves of farm credit and loan servicing in violation of the ECOA, Regulation B promulgated pursuant thereto, and USDA’s own regulations with respect to farm credit? The latter question can be subdivided into five questions of fact. Did defendant attempt to discourage Hispanic farmers from availing themselves of farm credit by denying them applications and assistance in completing applications? Did defendant attempt to discourage Hispanic farmers from availing themselves of farm credit by delaying the process of their loan applications? Did defendant attempt to discourage Hispanic farmers from availing themselves of farm credit by using highly subjective criteria to reject their loan applications? Did defendant attempt to discourage Hispanic farmers from availing themselves of farm credit by subjecting them to supervised bank accounts? Did defendant attempt to discourage Hispanic farmers from availing themselves of farm credit by delaying or denying loan servicing? The foregoing five questions of fact can, in turn, be readily converted to questions of law; e.g., did defendant’s attempt to discourage Hispanic farmers from availing themselves of farm credit by denying them loan applications and assistance in completing applications constitute a violation of the ECOA, Regulation B promulgated pursuant thereto and USDA’s own regulations? In addition, each of those five questions serves to define a subclass of Hispanic farmers whom defendant attempted to discourage from availing themselves of farm credit.

follow legislation specifically enacted to modify that burden of proof in circumstances identical to those presented in the instant case, by ignoring a significant showing of a pattern and practice of discrimination and evidence that USDA acquiesced to and ratified that discrimination, and by misapplying Gen. Tel. Co. of the S.W. v. Falcon, 457 U.S. 147 (1982)?

E. Relief Sought

With respect to their disparate treatment claims, plaintiffs request that the Court find that the district court, contrary to settled authority, ignored a significant showing of a pattern and practice of discrimination affecting the class as a whole and thus erred in failing to certify a disparate treatment class pursuant to Fed. R. Civ. P. 23(b). With respect to their disparate impact claims, plaintiffs request that the Court remand the case with instructions that the district court cannot hold plaintiffs to a burden of proof for class certification and deny them the very discovery required to meet that burden of proof. Alternatively, in the event that plaintiffs are required to rely upon USDA's centralized electronic databases that do not permit plaintiffs to separate for analysis the elements of USDA's decision-making process for determining farm credit eligibility, plaintiffs request that the Court find that the district court must treat that decision-making process as a single practice for purposes of determining disparate impact upon plaintiffs. With respect to both their disparate impact claims and disparate treatment claims, plaintiffs request that the Court find that the district court misapplied Falcon. Plaintiffs also request such other relief as the Court may deem appropriate.

F. Reasons For Granting The Petition

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 to it within ten days after entry of the order." Fed. R. Civ. P. 23(f). The district court's Order denied plaintiffs' motion for class certification. This petition is timely filed because ten days from September 10, 2004 (excluding intervening weekends) is September 24, 2004.

1. The Court Should Grant Plaintiffs' Petition.

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

(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 into 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). 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. Indeed, the district court itself recognized that factors in favor of interlocutory appeal are presented by its Order. Order at 2 n.1.

2. The Order 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 discrimination against minority farmers.¹³ That discrimination is longstanding, well known and well documented as evidenced by findings of Congress and the Civil Rights Commission, as well as the sworn admissions of high USDA officials, including Secretary Glickman, the original defendant in this case.¹⁴ 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 their adverse effect on minority farmers. See supra at 3-4. Thus, this is clearly not a case where the discrimination in question is based upon nothing more than unsubstantiated complaint allegations. Falcon, 457 U.S. 147, 157 (1982).

¹³ Although plaintiffs have sought to amend their complaint and the proposed Third Amended Complaint alleges with great specificity the class and subclasses, as well as the questions of law and fact common to the class and subclasses, the proposed Third Amended Complaint preserves plaintiffs’ claims based upon USDA’s failure to investigate civil rights complaints. See proposed Third Amended Complaint ¶¶ 114-117.

¹⁴ See, e.g., Ex. 3 to Plaintiffs’ Second Supplemental Memorandum and Exs. 1-2 and 5-8 to Plaintiffs’ Supplemental Memorandum.

The Hispanic farmers and ranchers who comprise the putative class represent an oppressed minority confronting a powerful governmental agency that for decades has systematically stripped them of their land and, in some instances, their ability even to subsist as farmers and ranchers. They confront an agency which reflects racial and ethnic animus not just on the local level but at high levels within the bureaucracy.¹⁵ It is an agency which, according to a former Director of the USDA Office of Civil Rights, destroys documents and intimidates those who would complain about discrimination. See Declaration of Rosalind Gray (“Gray Decl.”) ¶ 20. (Ex. 7 to Plaintiffs’ Supplemental Memorandum.) Thus, it took remarkable courage for the named plaintiffs to 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.¹⁶ Indeed, these oppressed and, in many cases, subsistence farmers cannot reasonably be expected to pursue individual claims against USDA, a fact that the district court clearly recognized. Order at 2 n.1.

3. The District Court’s Decision Is Manifestly Erroneous.

a. The district court abused its discretion by holding plaintiffs to a burden of proof that required discovery that the district denied.

The district court declined to certify plaintiffs’ disparate impact claims because plaintiffs supposedly failed to identify a single practice or policy that they alleged has adversely impacted Hispanic farmers. See Order at 7-9. It held that “[t]he plaintiff in a disparate impact case must ‘isolat[e] and identify[y] the specific employment practices that are allegedly responsible for any observed statistical disparities.’” Id. at 7 (quoting Watson v. Fort Worth Bank and Trust, 487

¹⁵ See Declaration of Lou Ann Kling.

¹⁶ In addition, 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 an 8-day period in order to protect their rights. Even with respect to the hundreds of putative plaintiffs known to plaintiffs' counsel, 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 machines or the internet, and then make such filings within such a short period of time.

U.S. 977, 994 (1988)).¹⁷ Significantly it did not take issue with the well-documented fact that USDA intentionally does not capture and maintain in USDA's centralized electronic databases information that would permit one to isolate and identify the specific eligibility criterion that adversely impacts Hispanic farmers.¹⁸ Given the acknowledged inadequacy of defendant's centralized databases, plaintiffs could satisfy the district court's burden of proof only by reviewing the underlying loan files. Yet despite this fact, aside from 35 files that defendant volunteered to produce, the district court steadfastly refused to permit such discovery and has not permitted plaintiffs to review the loan files of any white farmers despite the obvious need to review such files to demonstrate disparate impact. Indeed, the district court cited the very need

¹⁷ While the district court cites Watson in support of its burden of proof, it addresses the amendment to Title VII as a response to the burden of proof holding in Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989). Order at 7. Although it is not clear whether in so doing the district court seeks to draw some distinction between the two cases, the Court in Watson merely held that disparate impact analysis applies to subjective criteria. See, e.g. 487 U.S. at 1011 (Stevens, J. concurring in judgment). Wards Cove adopted and expanded the O'Connor concurring opinion in Watson, setting forth the burden of proof relied upon by the district court and in so doing cites the portion of Watson cited by the district court. Order at 7.

¹⁸ USDA has repeatedly ignored warnings from the General Accounting Office ("GAO"), Congress, and the United States Commission on Civil Rights ("Civil Rights Commission") concerning the inadequacy of its recordkeeping, and its effect upon USDA's ability and that of other entities to assess the impact of USDA's policies and practices on, among others, minority farmers. In 1982, for example, the Civil Rights Commission made specific recommendations concerning how USDA might improve its data collection to facilitate oversight and auditing of its lending practices. See UNITED STATES COMMISSION ON CIVIL RIGHTS, THE DECLINE OF BLACK FARMING IN AMERICA 132, 150 (1982) ("1982 Civil Rights Commission Report"). Nevertheless, the House Committee on Government Operations, in a 1990 report, concluded that USDA and FmHA had largely ignored the recommendations of the Civil Rights Commission. As the report noted,

[t]he USDA and FmHA have not given sufficient attention to the Commission on Civil Rights recommendations made in 1982 or specific recommendations the Indian Agricultural Study made in 1987. FmHA still does not collect, maintain, and analyze data to determine the impact its programs have on minority farmers.

H.R. Rep. 101- 984 at 42-43 (emphasis added). That finding prompted the Committee to recommend that the FmHA Administrator

[e]nsure that appropriate agency components collect, maintain and assess data so that FmHA knows the impact of its programs on minority farmers and can correct deficiencies within its realm of responsibility.

Id. at 43.

for such discovery, which is in direct response to its imposed burden of proof, as a justification for denying class certification.¹⁹ See Order at 23.

In light of the district court's refusal to provide the discovery that its burden of proof mandated, plaintiffs, citing the 1990 amendment to Title VII, argued that if they were required to rely instead upon the databases that do not permit plaintiffs to analyze separately "the elements of [USDA's] decisionmaking process . . . ," then "the decisionmaking process may be analyzed as one . . . practice." 42 U.S.C. § 2000e-2(k) (1)(B)(i). Despite the fact that Congress passed the foregoing language expressly to modulate the stringent linkage requirement for Title VII purposes imposed by the very case that the district court relied upon for its burden of proof, the district court found the argument "creative" but "unpersuasive." Order at 7. At no point, however, does the district court explain why it is appropriate to continue to use, for Fed. R. Civ. P. 23 purposes, a standard that Congress expressly modified in circumstances that are identical to the circumstances Congress sought to address in modifying the standard. One must assume that when Congress expressly amended Title VII to modify the holding in Wards Cove and hence Watson, it was aware that the standard had been incorporated in Fed. R. Civ. P. 23, insofar as disparate impact claims under Title VII and ECOA are concerned. See, e.g., Cannon v. University of Chicago, 441 U.S. 677, 696-98 (1979); Washington Legal Found. v. United States Sentencing Comm'n, 17 F.3d 1446, 1450 (D.C. Cir. 1994).

¹⁹ The district court implied that plaintiffs have overreached in their discovery requests. See, e.g., Order at 3-5 and 22-23. Plaintiffs' discovery, however, was, in fact, tailored to address specific issues raised by the district court in Garcia I. For example, in Garcia I, the district court held that in order to establish commonality with respect to a disparate treatment claim where there is "geographic dispersion of the decision-makers . . . proof would have to be adduced on at least a county-by-county basis." Garcia I, 211 F.2d at 22 n.8 citing cases. Similarly, the district court noted that in order to demonstrate commonality "in a nationwide class with decentralized decision-making" there would have to be a showing that the discrimination "did not vary significantly by division," or by "individual facility." Id. (citing McReynolds v. Sodexo Marriott Servs., Inc., 208 F.R.D. 428, 441 (D.D.C. 2002), and Stastny v. Southern Bell Tel. & Tel. Co., 628 F.2d 267, 279 (4th Cir. 1980)). At one point, the district court conceded that its rulings required the discovery sought by plaintiffs. April 29, 2003, Status Hearing Tr. 9-11. Ironically, while suggesting that plaintiffs have overreached in their discovery, the district court continues to rely upon cases such as Stastny, and McReynolds. See Order at 12 and 18. As the foregoing makes clear, the district court's refusal to permit the discovery its rulings mandate also infects and dooms its holding with respect to plaintiffs' disparate treatment claims.

The district court also rejected the argument because it supposedly “leapfrog[s] to the merits,’ contrary to the teaching of Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177 (1974),” and “boils down to the proposition that unexplained discrepancies in the distribution of government benefits satisfy the commonality requirement of Rule 23(a)(2) without more.” Order at 7-8. First, it is unclear and the district court does not explain how the argument based upon the 1990 amendment to Title VII “leapfrogs into the merits.” Second, in rejecting the argument, the district court noted an exception to the linkage requirement, *i.e.* “in the ‘conceivable’ case where there is both ‘significant proof’ that the defendant ‘operated under a general policy of discrimination’ and ‘the discrimination manifested itself . . . in the same general fashion, such as through entirely subjective decisionmaking processes.’” Order at 9 (quoting Falcon, 457 U.S. at 159 n.15) (emphasis in original). Setting to one side the fact that the exception cited by the district court involves precisely the sort of merits discussion it held, a page earlier, was prohibited by Eisen, the evidence adduced to date is overwhelming that USDA has operated under a general policy of discrimination, a fact that even the district court reluctantly appears to concede.²⁰ *Id.* at 12. Compare Falcon 457 U.S. at 160. As for the second part of the exception, the district court concludes that plaintiffs have failed to demonstrate that the USDA’s credit decision-making process is “sufficiently subjective” to satisfy what the district court concedes is the undefined “entirely subjective” test of Falcon. Indeed, the district court ultimately concludes that “[p]laintiffs must either bring their claims under the ‘entirely subjective’ rubric . . . or fail on their class certification motion.” Order at 13.

²⁰ This well-documented discrimination cited by Congress, the Civil Rights Commission, the GAO and USDA itself is “more than a mere occurrence of isolated or ‘accidental’ or sporadic discriminating acts” but is in fact USDA’s standard operating procedure. International Bhd. of Teamsters v. United States, 431 U.S. 324, 336 (1977). Segar v. Smith, 738 F.2d 1249, 1266 (D.C. Cir. 1984), as evidenced by the testimony of Rosalind Gray, former Director of the Office of Civil Rights at USDA until 2000: “[a]fter all the investigations and findings of discrimination, after all the findings that FSA was not in compliance with civil rights regulations . . . [the] systemic exclusion of minority farmers remains the standard operating procedure for FSA.” (Gray Decl. ¶ 28.) (Emphasis added.) See Hartman v. Duffey, 19 F.3d 1459, 1468, 1472 (D.C. Cir. 1994); Wagner v. Taylor, 836 F.2d 578, 592 (D.C. Cir. 1987). Cotrell v. Lopeman, 119 F.R.D. 651, 657 (S.D. Ohio 1987) (“Certification . . . is . . . appropriate when . . . defendant’s actions are part of a pattern or practice of activity”); Ellis v. O’Hara, 105 F.R.D. 556, 560 (E.D. Mo. 1985).

The district court's analysis of plaintiffs' disparate treatment claims is similarly fatally flawed. In Garcia I, the district court relied upon a number of cases for the proposition that class certification is inappropriate with respect to claims of disparate treatment involving geographic diversity and supposed multiple decision-makers. See 211 F.R.D. at 22 & n.8. In response, plaintiffs argued that such theoretical holdings should not trump substantial evidence of a pattern and practice of discrimination.²¹ Plaintiffs also argued that by failing to take action in response to repeated notice of a pattern and practice of discrimination, USDA acquiesced to and ratified that discrimination. The district court concluded that the cases cited for that proposition do not overcome that unsubstantiated theory. Order at 11. In so doing, the district court acknowledged that the "cases . . . [cited by plaintiffs] stand for the proposition that a pattern of notice and refusal to correct can serve as proof of the intent element in an employment discrimination case" Id. However, the district court stated conclusorily that those cases "do not address the implication of such a pattern upon class certification." Id. Finally, the district court noted that "[p]roof of conscious inaction on the part of USDA . . . in the face of numbers demonstrating that Hispanic farmers suffered disproportionately high loan rejection rates . . . might satisfy the first Falcon requirement of a 'general policy of discrimination,' but it would be no help at all with respect to the second Falcon requirement of decision-making processes that were 'entirely subjective.'" Id. at 11-12; see n.20 supra. As explained more fully infra, the district court erred in so concluding and that error dooms its findings with respect to both plaintiffs' disparate impact and disparate treatment claims.

²¹ Because few class action cases are ever actually litigated to conclusion once a class has been certified, it is highly unlikely that any empirical evidence can be offered in support of such a theory. Moreover, it is not very difficult to imagine scenarios in which the application of the theory would produce absurd results. One can envision, for example, palpable commonality among large numbers of Holocaust survivors alleging disparate treatment at multiple concentration camps, the commandants of which exercised wholly independent discretion in deciding how to carry out the so-called "final solution," inasmuch as they were operating pursuant to a single policy bent on annihilation.

b. The district court's misapplication of Falcon dooms its class certification rulings.

Essentially, the district court's decision denying plaintiffs class certification with respect to their disparate impact and disparate treatment claims rests largely upon the district court's reading of Falcon and its application to the instant case. See Order at 9, 12-13 and 18. First, the district court treats this case as if it involved nothing more than the bare, unsubstantiated claims of a complaint in which a plaintiff alleges that he has been denied a benefit and, without more, extrapolates from that allegation a claim that the defendant denied that benefit for discriminatory reasons and that defendant discriminates against all similarly situated individuals. In this respect, the instant case is clearly distinguishable from Falcon. Unlike the situation in Falcon, this is not a case based solely on unsubstantiated complaint claims. To the contrary, there is a well-documented history of systemic discrimination. See supra at 10-11. Moreover, plaintiffs' claims do not involve the sort of across-the-board claims found in Falcon. For each of the proposed subclasses set forth in plaintiffs' Proposed Third Amended Complaint, there are named plaintiffs that are members of and can, therefore, represent the subclass. Thus, this is not a situation in which, as in Falcon, applicants for employment seek to represent incumbent employees or vice versa. See Order at 8-9, 11.

Second, the district court's conclusion that USDA's credit criteria are not "entirely subjective" is fundamentally at odds with USDA's own admission to the contrary that the district court neither alluded to nor addressed. Order at 18. See supra at 4. Nor does the district court address a similar conclusion reached by the Civil Rights Commission. See supra at 3. Moreover, as the lender of last resort, USDA necessarily exercises a great deal of subjectivity in choosing among borrowers. Indeed, as Regulation B makes clear, USDA's credit evaluation system is by definition "a judgmental system." See Reg. B, 12 C.F.R. § 202.2(t). Thus, to insist, as the district court does, that plaintiffs have not satisfied a "subjectivity" test that it readily admits it cannot define in the face of overwhelming evidence of the total subjectivity of the lending process, including the admission of the agency charged with administering the loan

programs, suggests that the district court has erected its own insurmountable hurdle for plaintiffs.²²

c. The district court erred in summarily rejecting commonality within the subclasses.

The district court also erred in rejecting the disparate treatment claims that do not depend upon subjectivity. Order at 19-21. In each instance, the district court ignored the identified common issues of law and fact and focused instead upon perceived differences among the plaintiffs that were not material to those common issues. See Wagner, 836 F.2d at 589. In so doing, the district court's analysis is at odds with settled authority. For example, with respect to the claim that "[t]hirty-four named plaintiffs were either denied applications altogether or refused requested assistance in completing the loan applications," the district court dismissed these claims as "essentially thirty-four anecdotes about poor treatment given to individual Hispanic farmers" Order at 19. These farmers were denied applications or assistance in direct contravention of USDA's own regulations as well as ECOA and Regulation B promulgated pursuant thereto. See, e.g., 7 C.F.R. § 1910.3 and Reg. B, 12 C.F.R. § 202.5(a). Such conduct raises common questions of law and fact. For example, did USDA attempt to discourage Hispanic farmers from availing themselves of farm credit in violation of ECOA, Regulation B promulgated pursuant thereto, and USDA's own regulations with respect to farm credit? Did USDA attempt to discourage Hispanic farmers from availing themselves of farm credit by denying them applications and assistance in completing applications?

The district court was similarly dismissive of plaintiffs' claim that USDA discouraged Hispanic farmers from availing themselves of farm credit by delaying or denying loan servicing as "anecdotes of bureaucracy, geographically dispersed, and quite different one from another."

²² See McReynolds, 208 F.R.D. at 442 n.19. The district court's assertion to the contrary notwithstanding (Order at 18-19), there is no substantive difference between USDA's loan decision-making process that is centrally prescribed and concededly subjective and the unwritten subjective policy described in McReynolds, 208 F.R.D. at 441-42 or the salary and promotion programs in Dukes v. Wal-Mart Stores, Inc., 222 F.R.D. 139, 145 (N.D. Cal. 2004), that contained objective elements but nevertheless permitted salary and promotion decisions to be made in a "largely subjective manner."

Order at 20. However, the conduct in question clearly raises common questions of law and fact. For example, did USDA attempt to discourage Hispanic farmers from availing themselves of loan servicing in violation of ECOA, Regulation B and USDA's own regulations by delaying or denying loan servicing for Hispanic farmers? Did USDA attempt to discourage Hispanic farmers from availing themselves of loan servicing by delaying or denying loan servicing?

In each instance addressed by the district court, plaintiffs have identified common issues of both fact and law. See Hanlon v. Chrysler Corp., 150 F.3d 1011, 1020 (9th Cir. 1998) (the necessary showing to satisfy commonality is "minimal"). Significantly, it is well settled that "there need only be a single issue [of law or fact] common to all members of the class,' and differences in individual class member cases concerning damages or treatments will not defeat commonality." Buycks-Roberson v. Citibank Fed. Sav. Bank, 162 F.R.D. 332, 329 (N.D. Ill. 1995) (quoting Gomez v. Illinois State Bd. of Educ., 117 F.R.D. 394, 399 (N.D. Ill. 1987); Tonya K. v. Chicago Bd. of Education, 557 F. Sup. 1107, 1110 (N.D. Ill. 1982).²³

d. The Rule 23(b) rulings are fatally flawed.

The district court, without even affording plaintiffs the opportunity to address the issue (given the narrow focus of the July 15, 2003 Order), concluded that plaintiffs do not satisfy the requirements of either Rule 23(b)(2) or Rule 23(b)(3). Order at 21. Turning first to Rule 23(b)(2), the district court conceded that plaintiffs "seek[] broad and carefully tailored injunctive relief in their proposed third amended complaint. . . ." Id. at 21. Indeed, in Pigford, Judge Friedman certified a 23(b)(2) class on the basis of requested injunctive relief far less broad and tailored. Pigford, 182 F.R.D. at 351. However, the district court concludes that plaintiffs' assertion that USDA "has acted or refused to act on grounds generally applicable to the class" depends upon the same 'one practice' and 'single actor' theories by which plaintiffs have sought

²³ Accord In re American Med. Sys., Inc., 75 F.3d 1069, 1080 (6th Cir. 1996); Dukes, 222 F.R.D. at 145; Bynum v. District of Columbia, 214 F.R.D. 27, 30 (D.D.C. 2003); Coleman v. General Motors Acceptance Corp., 220 F.R.D. 69, 71 (M.D. Tenn. 2004); Marisol A. by Forbes v. Guiliani, 929 F. Supp. 662, 690 (S.D. N.Y. 1996), aff'd, 126 F.3d 372 (2d Cir. 1997); Sterling v. Velsicol Chem. Corp., 855 F.2d 1188, 1197 (6th Cir. 1988); Putnam v. Davies, 169 F.R.D. 89, 93-94 (S.D. Ohio 1996); Huguley v. General Motors Corp., 638 F. Supp. 1301, 1303-04 (E.D. Mich. 1986).

to establish Rule 23(a) commonality, and which have already been rejected.” Order at 21-22. The errors upon which that conclusion is based are discussed supra at 12-16. The pattern and practice conduct that establishes commonality has been well documented by, among others, USDA itself. See CRAT Report at 15-16; see also nn.18 & 20 supra. It is difficult to imagine how the broad and tailored remedial relief sought by plaintiffs and acknowledged by the district court could be achieved by bringing hundreds, if not thousands, of individual cases alleging the same violations of USDA’s regulations and ECOA that present the common issues of law and fact that give rise to the subclasses defined in plaintiffs’ proposed Third Amended Complaint. At a minimum, plaintiffs have set forth the basis for a 23(b)(2) certification on liability. See Pigford, 182 F.R.D. at 351.

Turning to Rule 23(b)(3), the district court cites alleged “discovery difficulties” and the “history of the Pigford (black farmers) class action litigation” as proof that a Rule 23(b)(3) certification would be improper. Order at 22. Ironically, the only difficulty that plaintiffs have encountered to date is defendant’s stonewalling and the district court’s refusal to permit the very discovery that its rulings dictate. As for Pigford, the Environmental Working Group’s recent independent study found that the problems with the Pigford settlement flow from (1) the lack of any remedial relief and (2) sabotage by USDA and the Department of Justice.²⁴ The court would certainly send a perverse message were it to reward such conduct by permitting defendant to avoid the consequences of its class-wide discrimination.

4. The Order Presents Special Circumstances

The Order is to be “read in conjunction with [Garcia I]” (Order at 3), in which the district court held that “USDA’s failure to investigate discrimination complaints . . . cannot serve as the common issue of fact necessary to a Rule 23(a) determination . . .” 211 F.R.D. at 19. That ruling is flatly contradicted by this Court’s 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

²⁴ See Obstruction of Justice, <http://www.ewg.org/reports/blackfarmers>.

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, 1994 U.S. Dist. LEXIS 4623, at * 4 (S.D.N.Y. Apr. 11, 1994) (“It is important . . . that the public perceive the courts as acting fairly and not on the basis of some personal bias of the presiding judge”). Precisely to avoid any such perception gives rise to “special circumstances” to warrant an interlocutory review of the issue pursuant to Rule 23(f).

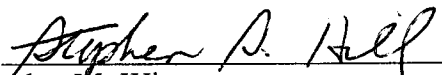
CONCLUSION

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

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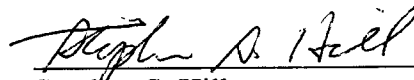
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CERTIFICATE OF SERVICE

I hereby certify that on this 22 day of September 2004, I have caused the foregoing Petition of Plaintiffs Guadalupe L. Garcia, et al. For Permission To Take An Interlocutory Appeal Under Fed. R. Civ. P. 23(f) and the attached addendum to be served by hand delivery upon the following counsel:

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