

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

GUADALUPE L. GARCIA, <u>et al.</u> ,)	
Plaintiffs-Appellants,)	
v.)	
ANN VENEMAN, Secretary, UNITED STATES)	No. 04-8008
DEPARTMENT OF AGRICULTURE,)	(Civ. No. 00-2445 (JR))
Defendant-Appellee.)	

**PLAINTIFFS' REPLY TO DEFENDANT'S RESPONSE
TO PLAINTIFFS' PETITION FOR PERMISSION
TO TAKE AN INTERLOCUTORY APPEAL UNDER FED. R. CIV. P. 23(f)**

In her response, defendant would have the Court grant plaintiffs' Section 1292(b) petition with respect to the district court's March 20, 2002 Order ("3/20/02 Order") holding that the allegation that the failure of the United States Department of Agriculture ("USDA") to investigate complaints of discrimination from Hispanic farmers and ranchers arising out of their attempts to participate in farm credit and non-credit farm benefit programs does not state a claim under either the Administrative Procedure Act, 5 U.S.C. § 551 et al., and the Equal Credit Opportunity Act ("ECOA"), 15 U.S.C. § 1691 et seq., and therefore cannot be the basis for a finding of commonality under Fed. R. Civ. P. 23(a), while denying or holding in abeyance plaintiffs' Fed. R. Civ. P. 23(f) petition ("Petition"). Defendant, however, offers no sound reason why the Court should deny or hold in abeyance plaintiffs' 23(f) petition, while reviewing an issue that applies to only a subclass of plaintiffs, i.e., those Hispanic farmers and ranchers that USDA attempted to deny access to USDA-sponsored farm credit and non-credit farm benefit programs from 1981-1996. Moreover, a recent decision by the Third Circuit in an ECOA class action against defendant brought by Virgin Islanders asserting claims remarkably similar to claims in the instant case demonstrates that the district court clearly erred in denying class certification. See Chiang v. Veneman, No. 03-3488, 2004 WL 2085858 (3d Cir. Sept. 20, 2004). (Addendum F.)

It is well settled that “[b]ecause a ‘district court by definition abuses its discretion when it makes an error of law,’ the ‘abuse-of-discretion standard’ includes review to determine that the discretion was not guided by erroneous legal conclusions.”¹ While asserting that the district court’s opinion is not manifestly erroneous and all of its rulings are well within its broad discretion, defendant offers no defense for any of the district court’s manifestly erroneous rulings. For example, with respect to plaintiffs’ disparate impact claims, defendant, like the district court, notes that, in order to demonstrate disparate impact, plaintiffs must identify a specific practice that they contend adversely impacts them.² Response at 9. Similarly, like the district court, defendant does not dispute the fact that USDA’s centralized electronic databases do not contain the information necessary to pinpoint a specific loan eligibility criterion that adversely affects Hispanic farmers and ranchers and that the only hope of identifying such a specific criterion is by examining the underlying loan files. However, except for the loan files of 35 named plaintiffs that defendant volunteered to produce, plaintiffs were denied access to underlying loan files of Hispanic farmers and were denied access to the loan file of any white farmers, thus making a disparate impact analysis impossible.³ Clearly, in so doing, the district court abused its discretion. Petition at 11-12.

Similarly, the district court abused its discretion by relying upon Watson and Wards Cove to establish the burden of proof for certifying a class to pursue plaintiffs’ disparate impact

¹ In re Sealed Case, No. 03-7021, 2004 U.S. App. LEXIS 18340, at * 15 (D.C. Cir. Aug. 31, 2004) (quoting Koons v. United States, 518 U.S. 81, 100 (1996)); see also Information Handling Servs., Inc. v. Defense Automated Printing Servs., 338 F.3d 1024, 1035-36 (D.C. Cir. 2003); Hill v. Iraq, 328 F.3d 680, 683 (D.C. Cir. 2003) (“[I]t is an abuse of discretion to apply the wrong standard”).

² While defendant cites General Telephone Co. of the S.W. v. Falcon, 457 U.S. 147 (1982), for the requirement that “plaintiffs must identify specific practices alleged to be discriminatory,” Response at 9, the burden of proof actually has its origin in Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 994 (1988), and Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989).

³ Moreover, even when plaintiffs identified 34 plaintiffs who had been denied loan applications in violation of ECOA, the district court dismissed that as “essentially, thirty-four anecdotes about poor treatment given to individual Hispanic farmers at eight of USDA’s 2700 offices.” 9/10/04 Order at 19. In reaching that conclusion embraced by defendant (Response at 11), the district court overlooked the fact that it had permitted plaintiffs access to the files of only 35 Hispanic farmers.

claims, while ignoring the congressionally mandated modification of that burden of proof in circumstances identical to those present in the instant case. In response to the potential harsh effect of the burden of proof standard announced in Watson and Wards Cove, Congress expressly amended Title VII to provide that when a party maintained its records in such a way as to make it impossible to separate for analysis the individual components of the decisionmaking process, the court could treat such practices as “one . . . practice” for purposes of determining their impact upon plaintiffs. 42 U.S.C. § 2000e-2(k)(1)(B)(i). The district court refused to apply the congressionally mandated modification of the Wards Cove standard for purposes of determining commonality under Fed. R. Civ. P. 23(a) and refused to permit discovery of the underlying loan files despite the fact that the proffered databases do not permit a separate analysis of defendant’s loan eligibility criteria. Petition at 13.

Defendant does not offer any justification for the district court’s holding that USDA’s loan eligibility criteria are not sufficiently subjective to satisfy the dicta in Falcon, 457 U.S. at 159 n.15, despite the USDA’s explicit contrary admission that its loan eligibility criteria are entirely subjective. Indeed, neither the district court nor defendant even acknowledge, much less attempt to address, that admission. Petition at 16-17. That failure, in turn, is central to the district court’s misapplication of Falcon that infects its findings with respect to plaintiffs’ disparate impact and disparate treatment claims.

With respect to plaintiffs’ disparate treatment claims, the district court completely ignored a significant showing of a pattern and practice of discrimination. Instead of unsubstantiated complaint allegations, the Garcia plaintiffs have made a strong showing of pattern and practice discrimination supported by explicit findings of the United States Commission on Civil Rights, Congress, the admissions of then-Secretary Glickman, the original defendant in this case, and the findings of USDA’s own Civil Rights Action Team. See Petition at 3-4 n.4, 12 n.18, 14 n.20; see also Hartman v. Duffey, 19 F.3d 1459, 1472 (D.C. Cir. 1994). Indeed, Rosalind Gray, the Director of USDA’s Office of Civil Rights from July 13, 1998 to

January 20, 2001, stated in her declaration in support of plaintiffs' motion for class certification that:

After all the investigations and findings of discrimination, after all the findings that FSA was not in compliance with civil rights regulations, after the millions paid by FSA in settlement of administrative complaints and after the many more millions in debt that FSA has forgiven, there still has not been any change in the way programs are administered. There were many recommendations for change. Yet systemic exclusion of minority farmers remains the standard operating procedure for FSA.

Gray Decl. ¶ 28 (emphasis added). (Ex. 7 to Plaintiffs' Supplemental Memorandum filed 4/8/02.) (See Addendum G.) Ms. Gray was uniquely positioned to attest that discrimination against Hispanic and other minority farmers was USDA's "standard operating procedure."

As for the district court's reliance upon the theoretical musings of courts from other circuits to deny certification of plaintiffs' disparate treatment claims, defendant asserts that plaintiffs' example of the Nazi concentration camps to demonstrate palpable commonality despite geographically diverse facilities and decisionmakers is somehow "inappropriate and patently offensive." Response at 16. Defendant, however, does not dispute the logic of the example. Instead, defendant asserts that "a class action is not the appropriate remedy absent a "specific presentation" identifying the questions of law or fact common to the class representative and the members of the class proposed." *Id.* (quoting *Hartman*, 19 F.3d at 1472 (quoting *Falcon*, 457 U.S. at 158)). Significantly, plaintiffs have, in fact, made a "specific presentation" of the questions of law and fact common to the class representative and the members of the class proposed. See Petition at 8 n.12.

In asserting that plaintiffs cannot satisfy the requirements of Fed. R. Civ. P. 23(b)(2), defendant relies heavily upon plaintiffs' disavowed \$20 billion damage claim. Defendant does so knowing that current plaintiffs' counsel inherited the Second Amended Complaint when they assumed control of the case in 2002 and subsequently repeatedly disavowed the \$20 billion damage claim that, so far as counsel can determine, was selected merely for publicity purposes. See, e.g., December 18, 2002 Status Hearing Tr. at 9-10. Once current plaintiffs' counsel had conducted their own investigation and had obtained albeit very limited discovery, they sought to

amend the complaint.⁴ In denying plaintiffs' certification motion, the district court clearly considered the substance of the Third Amended Complaint insofar as plaintiffs' prayers for injunctive relief are concerned. See 9/10/04 at 21 & n.7. Yet, despite its express acknowledgement that "[l]eave to amend pleadings is to be 'freely given when justice so requires,'" the district court "den[ie]d leave to amend, without prejudice." Id. at 24 (quoting Fed. R. Civ. P. 15(a)). However, in Love v. Veneman, No. 00-2502, the same district court freely granted the Love plaintiffs' motion to file a Third Amended Complaint. See Memorandum Order Denying Class Certification, in Love v. Veneman, C.A. No. 00-2502, filed September 29, 2004, at 3. (Response Addendum A.) Significantly, defendant relies upon the district court's failure to permit plaintiffs to amend their complaint as a basis for suggesting that the disavowed \$20 billion damage claims prevents a (b)(2) certification. Response at 16-17. Ironically, in urging the Court to reject the 23(f) petition and accept only the 1292(b) petition, defendant asserts that "review by this Court may well be appropriate to ensure that similarly-situated minority groups are treated consistently." Id. at 20 (emphasis added). Clearly, if the district court had treated the similarly situated Love and Garcia plaintiffs consistently, it would have also "freely given" the Garcia plaintiffs leave to file their Third Amended Complaint. In sum, defendant's conclusory assertions to the contrary notwithstanding, plaintiffs have demonstrated that the district court clearly abused its discretion and erred repeatedly in the application of legal criteria in denying plaintiffs' motion and class certification. Thus, this Court clearly has authority to "review a class certification decision . . . to ensure against abuse of discretion or erroneous application of legal criteria." Hartman, 19 F.3d at 1471; Wagner v. Taylor, 836 F.2d 578, 586 (D.C. Cir. 1987).

⁴ More particularly, plaintiffs amended the complaint to make it unambiguously clear that the principal objective of the case, as reconfigured by current counsel, is to achieve definitive remedial relief such that the transparency and accountability central to the eradication of the longstanding discriminatory administration of USDA credit and non-credit farm benefit programs can be achieved. Indeed, the Environmental Working Group, in a recent independent study, identified the absence of such remedial relief as one of two major problems with the settlement in Pigford v. Glickman, 185 F.R.D. 82 (D.C. 1999). Petition at 19. The secondary objective is to obtain monetary damages for those plaintiffs who can make the requisite showing of discriminatory harm.

Defendant also asserts that the denial of class certification would not be the death knell of plaintiffs' claims. Response at 18-19. The primary basis for that assertion is plaintiffs' disavowed \$20 billion damage claim.⁵ *Id.* at 18. Defendant conveniently ignores the fact that for many Hispanic farmers, USDA succeeded in its attempts to deny them access to farm credit and non-credit farm benefit programs by denying them applications in violation of ECOA. The likelihood that subsistence farmers will be able to pursue such claims individually or will be able to engage counsel to pursue such claims against one of the largest and most powerful departments of the federal government and the seemingly limitless resources of that government is, at best, extremely remote. Clearly, the district court correctly recognized that its order denying class certification would spell the death knell to plaintiffs' claims. See 9/10/04 Order at 2 n.1.

In urging that the Court reject plaintiffs' 23(f) petition or hold it in abeyance pending consideration of plaintiffs' Section 1292(b) petition, defendant offers no sound basis for such a piecemeal interlocutory appeal. Defendant self-servingly characterizes the 1292(b) issue as the "threshold legal question." Response at 20. However, that certification addresses only a subset of the putative plaintiffs, *i.e.*, those Hispanic farmers and ranchers that USDA attempted to deny access to farm credit and non-credit farm benefit programs from 1981 to 1996.⁶ See 7 U.S.C § 2297 note. Moreover, while Judge Friedman used the failure to investigate discrimination complaints as the basis for distinguishing Pigford from Williams v. Glickman, C.A. No. 95-1149, 1997 U.S. Dist. LEXIS 1683 (D.D.C. Feb. 14, 1997), the instant case is clearly distinguishable from Williams wholly apart from the failure-to-investigate claims. For example,

⁵ Defendant also asserts that plaintiffs have had ample opportunity to prepare for the possibility that they might have "to file individual suits upon any eventual denial of class certification." *Id.* at 19 n.5. Defendant assumes that plaintiffs' counsel are able to contact all of the putative plaintiffs, many of whom have lost their farms and homes and do not have access to the internet or fax machines. Setting to one side the logistical problems that would attend contacting them, for many, if not most of the subsistence farmers comprising the putative class, just paying the filing fee for a new complaint would pose an insurmountable barrier to their claims as would the expense associated with joining a lawsuit filed in Washington, D.C.

⁶ For the remainder of the Hispanic farmers that USDA attempted to deny access to farm credit and non-credit farm benefit programs, there was no requirement that they file a discrimination complaint.

turning to the issue of commonality, the Williams court noted that the plaintiffs alleged that “the county supervisors under the FmHA had ‘unbridled discretion to determine whether or not to award or service farm loans to minority applicants,’ . . . [and] the fact that they have all suffered the same ‘injury’ – that is, denial of credit and loan servicing – establish [] common questions of law.” Id. at * 19. As the court put it, “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.”⁷ Id. at * 21 (emphasis added). In a footnote, the court 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.

In the instant case, plaintiffs have not only alleged the existence of unbridled discretion resulting in discrimination against Hispanic farmers, but have supported the allegation with “significant proof,” including the USDA’s explicit admission that its loan eligibility criteria are entirely subjective. See supra, at 3. Indeed, the allegation is supported by the findings of the 1982 report of the United States Commission on Civil Rights and confirmed by a 1990 report of the House Committee on Government Operations, the admission of then-Secretary Glickman, the original defendant in this case, as well as the declarations of former USDA Office of Civil Rights Director Gray, who has testified that “systemic exclusion of minority farmers remains the standard operating procedure for FSA.” Gray Decl. ¶ 28 (emphasis added).

⁷ The court characterized the complaint in Williams as “purport[ing] to include . . . Hispanic farmers who have suffered any type of discrimination in their dealings with the FmHA.” 1997 U.S. Dist. LEXIS 1683, at *14. By contrast, plaintiffs contend that defendant’s attempt to deny plaintiffs access to USDA-sponsored farm credit and non-credit farm benefit programs manifested itself in a limited number of ways, including denial of applications, refusal to assist farmers to complete applications, rejection of loans, delay of loans, delay or refusal of loan servicing and such practices are confirmed and chronicled by the USDA’s own CRAT Report. See Petition at 8, and CRAT Report at 15-16. Moreover, as the Third Circuit’s recent decision makes clear, the discrete practices alleged here are well within the bounds of that that is amenable to redress through class certification pursuant to Rule 23. Chiang, 2004 WL 2085858; see Marisol v. Giuliani, 126 F.3d 372, 376-77 (2d Cir. 1997) (class certified where plaintiffs challenged a variety of aspects of the child welfare system in New York, and where the claimed deficiencies in the treatment of the plaintiffs class implicated different statutory, constitutional and regulatory schemes); see also Buycks-Roberson v. Citibank Fed. Savs. Bank, 162 F.R.D. 322, 331 (N.D. Ill. 1995) (“‘subjective decisionmaking’ . . . is the practice . . . ‘generally applicable’ to the class”).

Moreover, plaintiffs have made a significant showing of a pattern and practice of discrimination that the district court chose to ignore despite this Court's holding that such a showing can serve as a basis for commonality. Hartman, 19 F.3d at 1472. If the Court permits an interlocutory appeal of the district court's denial class certification, and plaintiffs submit that the reasons for such review are clearly present here, it should consider all the bases upon which the district court relied. Certainly there are no efficiency benefits for the Court or the parties in the type of piecemeal interlocutory appeal proposed by defendant. Indeed, October 13, 2004 marks the fourth anniversary of the filing of the complaint in this case. To date, to the knowledge of plaintiffs' counsel, at least fourteen putative plaintiffs have died. There is no telling how many other putative plaintiffs have died unbeknownst to plaintiffs' counsel.

Furthermore, defendant's proposed piecemeal approach to the interlocutory appeal is contrary to settled authority. Indeed, as this Court has made clear, "[j]urisdiction of the interlocutory appeal is in large measure jurisdiction to deal with all aspects of the case that have been sufficiently illuminated to enable decision by the court of appeals without further trial court development." Wagner, 836 F.2d at 585 (quoting CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3921, at 17 (1977)). Accord Energy Action Educ. Found. v. Andrus, 654 F.2d 735, 746 n.54 (D.C. Cir. 1980) (quoting same), reversed on other grounds sub nom. Watts v. Energy Action Educ. Found., 454 U.S. 151 (1981); see also Fink v. National Savs. & Trust Co., 772 F.2d 951, 960-61 (D.C. Cir. 1985) (court reviewed a denial of class certification in the course of overturning a trial court's entry of summary judgment for defendants without discussing jurisdiction to review the denial of class certification and with no necessary connection between certification and the issue decided on summary judgment). In stark contrast to the situation in Fink, there is a direct connection between the summary judgment issue raised by the 1292(b) petition and the issues raised by the 23(f) petition.

Finally, the Third Circuit's recent decision in Chiang, 2004 WL 2085858, is instructive. There, plaintiffs alleged "systematic discrimination against . . . 'Virgin Islanders[]' over a period of [19] years, in the administration of loan programs intended to help low income rural families

obtain homes and make repairs to existing homes.” Id. at * 1. In allegations strikingly similar to those in the instant case, the Chiang plaintiffs alleged “discriminatory attempts to keep class members from having access to rural housing loan programs in the Virgin Islands,” by, among other means, maintaining a “‘phony’ waiting list.” Id. at * 6. In describing the scheme to deny Virgin Islanders access to the rural loan programs, the court noted that

Those multifarious practices include the following: the refusal to accept submission of loan applications from class members; the refusal to issue loan applications; the refusal to process loan applications; the refusal to provide reasons for failing to process the loan applications; . . . the failure to advise class members about requirements for keeping loan applications active; the unlawful denial of access to non-program loans; the refusal to advise class members of their right to review and appeal; the unlawful refusal to provide for administrative review of non-appealable decisions; the failure to investigate and process discrimination complaints; the denial of access to non-program procedures for assumption of existing USDA loans and properties; the systematic denial of access to housing programs; and the unlawful discouragement and refusal to process applications by way of the “impossible yes.”

Id. at * 6. Compare Petition at 8.

Noting that Fed. R. Civ. P. 23(c)(4) provides that “[w]hen appropriate (A) an action may be brought or maintained as a class action with respect to particular issues,” the court affirmed certification of “the phony waiting list and associated techniques” Id. at * 8. Turning to the requirements of Rule 23(b), the court found that the requirements of Rule 23(b)(3) were met notwithstanding plaintiffs’ damage claim of \$2.8 billion. Id. at * 13. Although the Chiang plaintiffs “concede[d] that the eventual calculations of damages will require individual proof,” the court found that “[t]he presence of individual questions as to [each class member] does not mean that the common questions of law and fact do not predominate over questions affecting individual members as required by Rule 23(b)(3).” Id. at * 13 (quoting Eisenberg v. Gaynon, 766 F.2d. 770, 786 (3d Cir. 1985)).

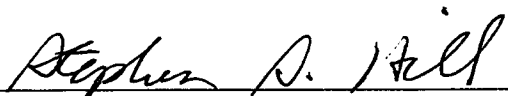
Plaintiffs submit that the significant showing of a well-documented pattern and practice of discrimination on the part of USDA in attempting to deny Hispanic farmers and ranchers access to USDA-sponsored farm credit and non-credit farm benefit programs under settled authority in this circuit satisfies the requirements for a (b)(2) class certification. See Hartman, 19

F.3d at 1472. In addition, as the court found in Chiang, “the necessity for calculation of damages on an individual basis should not preclude class determination when the common issues which determine liability predominate.” 20 WL 2085858 at * 13 (quoting Bogosian v. Gulf Oil Corp., 561 F.2d 434, 456 (3d Cir. 1977)).

In sum, defendant offers no sound basis for denying plaintiffs’ 23(f) petition. Plaintiffs have demonstrated that the district court’s order denying class certification is manifestly erroneous, internally inconsistent and ultimately establishes an impossible requirement for certification not unlike the impossible eligibility process complained of in Chiang. See Kickapoo Tribe of Indians v. Babbitt, 43 F.3d 1491, 1497 (D.C. Cir. 1995) (“The exercise of discretion contemplates reasoned decision making on the basis of relevant and appropriate considerations to the task at hand”). Defendant has offered nothing but reliance upon a disavowed damage demand in opposing the district court’s conclusions that its certification opinion spells the death knell for this litigation or the district court’s conclusion that its 9/10/04 Order and its 3/20/02 Order satisfy the requirements for interlocutory review. Indeed, the fact that the disavowed damage claim should even be an issue raises the specter of the disparate treatment of similarly situated plaintiffs seeking identical relief in the same court. See, e.g., Piesco v. City of New York, No. 85 Civ. 9893, 1994 U.S. Dist. LEXIS 4623, at * 3 (S.D.N.Y. Apr. 11, 2004) (“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”).

For the foregoing reasons and for the reasons set forth in plaintiffs’ petition, this Court should grant plaintiffs’ petition for permission to take an interlocutory appeal under Fed. R. Civ. P. 23(f).

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of October, 2004, I have caused Plaintiffs' Reply To Defendant's Response To Plaintiffs' Petition For Permission To Take An Interlocutory Appeal Under Fed. R. Civ. P. 23(f) to be served by hand upon the following counsel:

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