

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

GUADALUPE L. GARCIA, *et al.*,)
)
 Plaintiffs-Appellants,)
)
 v.) Nos. 04-5448, 05-5002
)
 MICHAEL JOHANNNS, Secretary, UNITED)
 STATES DEPARTMENT OF AGRICULTURE,)
)
 Defendant-Appellee.)

**APPELLANTS' OPPOSITION TO DEFENDANT'S MOTION
TO CONSOLIDATE APPEALS**

Appellants, Guadelupe L. Garcia *et al.*, hereby oppose the motion of the Secretary of the United States Department of Agriculture (“Secretary” or “USDA”), appellee in the above-captioned appeal, to consolidate the instant case with the appeal in *Love v. Johanns*, Nos. 04-5449, 05-5084, for purposes of briefing and argument. Despite some similarities and overlap between the two cases, substantial differences in the records, district court decisions, and issues raised on appeal make consolidation inappropriate. All of the objectives set forth in the Secretary’s motion could be achieved instead, and with greater efficiency, by setting the two separate cases for argument before the same panel on the same day.

The reasons for opposing the motion to consolidate are as follows:

1. In the instant case, plaintiffs are Hispanic farmers and ranchers who allege race discrimination in the denial of access to USDA-administered farm credit and non-credit farm benefit programs in violation of the Equal Credit Opportunity Act (“ECOA”) and the Administrative Procedure Act (“APA”). The plaintiffs in *Love* are women farmers who allege

gender discrimination in the denial of access to USDA-administered farm credit in violation of ECOA and the APA.

2. While this Court granted requests for permission to take interlocutory appeals filed in the two separate cases pursuant to Fed. R. Civ. P. 23(f) and 28 U.S.C. § 1292(b), proceedings in the two cases have followed different paths that have produced quite different procedural postures, district court records and issues on appeal. For example, with respect to their disparate impact claims, the *Garcia* plaintiffs have raised an issue with respect to the USDA's admittedly faulty data gathering and its implications for the requirement of isolating and identifying specific policies or practices that are allegedly responsible for any observed disparate impact to satisfy Fed. R. Civ. P. 23(a) in light of the 1990 amendment to Title VII, which provides that when the data do not permit one to analyze separately "the elements of a . . . decisionmaking process," then "the decisionmaking process may be analyzed as one . . . practice." 42 U.S.C. § 2000e-2(k)(1)(B)(i)¹ More importantly, the district court has treated the *Garcia* plaintiffs in a fashion that is demonstrably different from its treatment of the *Love* plaintiffs. For example, the district court freely permitted the *Love* plaintiffs to file a third amended complaint that, *inter alia*, dropped their substantial damage claim but refused a similar request by appellants and used that refusal as a basis for concluding that appellants could not satisfy the requirements of Fed. R. Civ. P. 23(b)(2). Compare *Love v. Veneman*, 224 F.R.D. 240, 242 (D.D.C. 2004), with *Garcia v. Veneman*, 224 F.R.D. 8, 16 (D.D.C. 2004) (*Garcia II*), and *Garcia v. Veneman*, 211 F.R.D. 15, 23 (D.D.C. 2002) (*Garcia I*) (citing damage demand).

3. Similarly, the district court recognized critical distinctions between the *Love* case and the instant case with respect to the APA claims raised in the § 1292(b) petitions. See March 20, 2002 Memorandum Order at 4 & n.3 ("3/20/02 Order") (Exhibit 1). For example, in *Love*,

¹ See, e.g., Petition Of Plaintiffs Guadalupe L. Garcia Et Al., For Permission To Take An Interlocutory Appeal Under Fed. R. Civ. P. 23(f), No. 04-8008 (Case No. 04-5448), filed Sept. 23, 2004, at 8-9, 11-14 ("*Garcia* 23(f) Petition"); compare questions presented in the *Garcia* 23(f) Petition at 8-9 and Plaintiffs' Petition for Permission To Take An Interlocutory Appeal Pursuant To Fed. R. Civ. P. 23(f), No. 04-8010 (Case No. 04-5449), filed Oct. 14, 2004, at 4 ("*Love* 23(f) Petition").

the district court dismissed the plaintiffs' APA claims, *i.e.*, those claims based on the non-credit farm benefit programs and claims based on the USDA's failure to investigate discrimination complaints with respect to farm loans. The district court based that decision in part on the fact that in *Love* the only named plaintiff who asserted a claim based upon the denial of access to a non-credit farm benefit program "was successful on her administrative appeal." *Love v. Veneman*, Civ. No. 00-2502, Memorandum Opinion at 13 (D.D.C. Dec. 13, 2001) (Exhibit 2). In *Garcia*, however, the district court 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]" 3/20/02 Order at 4 (Exhibit 1).

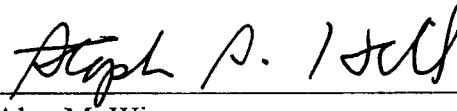
4. In denying the class certification motion in the instant case, the district court improperly seized upon a procedure devised by it to resolve a discovery dispute as the basis for issuing an ill-timed decision on the merits with respect to the motion for class certification without ever addressing the discovery dispute. *See Garcia I*, 211 F.R.D. 15. As a consequence, along with an additional published opinion, the instant case presents discovery and class certification issues that are not present in *Love*. *See Garcia II*, 224 F.R.D. 8; *compare Garcia* 23(f) Petition at 11-20 *with Love* 23(f) Petition at 13-20.

5. Appellants therefore oppose consolidation, but do not object to having the two cases heard separately by the same panel on the same day. Indeed, any legitimate concerns of appellee would be fully accommodated by such a procedure.

CONCLUSION

For the foregoing reasons, the Court should deny appellee's motion to consolidate the appeals in *Garcia*, Nos. 04-5448, 05-5002 and *Love*, Nos. 04-5449, 05-5084, for purposes of briefing and oral argument. Appellants do not, however, oppose the Court's entering an order requiring that the cases be heard separately by the same panel on the same day.

Respectfully submitted,



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