

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. 04-8009
(Civ. No. 00-2445 (JR))

**PETITION OF PLAINTIFFS GUADALUPE L. GARCIA, ET AL. FOR PERMISSION
TO TAKE AN INTERLOCUTORY APPEAL PURSUANT TO 28 U.S.C. § 1292(b)**

Plaintiffs Guadalupe L. Garcia, et al. (“plaintiffs”) respectfully petition, pursuant to 28 U.S.C. § 1292(b), for permission to appeal the district court’s Memorandum Order of March 20, 2002, (“3/20/02 Order”) (Addendum B) holding that plaintiffs’ allegations that the United States Department of Agriculture (“USDA”) failed to investigate civil rights complaints by Hispanic farmers and ranchers arising out of their attempts to participate in USDA-sponsored non-credit farm benefit and farm credit programs do not state claims under either the Administrative Procedure Act (“APA”), 5 U.S.C. § 551 et seq., or the Equal Credit Opportunity Act (“ECOA”), 15 U.S.C. § 1691 et. seq., and therefore do not serve as the basis for a finding of commonality pursuant to Fed. R. Civ. P. 23(a).

PRELIMINARY STATEMENT

This petition involves the same case that is the subject of the petition filed by plaintiffs on September 22, 2004 in Docket No. 04-8008, pursuant to Fed. R. Civ. P. 23(f), in which plaintiffs seek permission to appeal the district court’s order entered on September 10, 2004 denying plaintiffs’ motion for class certification (“9/10/04 Order”). In its 9/10/04 Order, the district court noted that that ruling “taken together with [its 3/20/02 Order] . . . so fundamentally alters the posture of this case that plaintiffs will presumably seek an interlocutory appeal.” 9/10/04 Order

at 2. Accordingly, the district court stated that “[i]f asked to do so, [it] will also certify [its 3/20/02 Order] pursuant to 28 U.S.C. § 1292(b).” Id. at 2-3. Thereafter, on September 24, 2004, plaintiffs filed a motion seeking certification of the 3/20/02 Order pursuant to 28 U.S.C. § 1292(b). The district court granted that motion in an order entered September 27, 2004 (“9/27/04 Certification Order”). (See Addendum C.) This petition is filed pursuant to that order. At the outset it is important to note that the 3/20/02 Order affects only a subset of the class that plaintiffs seek to represent, i.e. those Hispanic farmers that USDA attempted to deny access to USDA-sponsored farm credit and non-credit farm benefit programs during the period of 1981-1996. Moreover, as set forth in the Fed. R. Civ. P. 23(f) petition filed in Docket No. 04-8008, the following two questions of law and fact unite the class in this case: (1) Did USDA attempt to deny Hispanic farmers and ranchers access to farm credit and non-credit farm benefit programs? (2) Did USDA attempt to deny Hispanic farmers and ranchers access to farm credit and non-credit farm benefit programs in violation of ECOA, the APA and its own regulations? See Plaintiffs’ Fed. R. Civ. P. 23(f) Petition at 8 filed in Docket 04-8008.

To date the District Court for the District of Columbia has ruled on motions for class certification in four 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, 2001 U.S. Dist. LEXIS 25220 (D. D.C. Dec. 12, 2001) (Sullivan, J.), brought on behalf of Native-American farmers; Love v. Veneman, C.A. No. 00-2502 Memorandum Order dated Sept. 29, 2004 (Robertson, J.), brought on behalf of women farmers; and the instant case brought on behalf of Hispanic farmers. (Robertson, J.) In two of the four cases (Pigford and Keepseagle), the classes were certified. Subsequently in Pigford, this Court approved a 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, but which provided no meaningful remedial relief. See Pigford v. Glickman, 206 F.3d.1212 (D.C. Cir. 2002). Similarly in Keepseagle, this Court dismissed the government’s appeal pursuant to Fed. R. Civ. P. 23(f) challenging class certification. In re Veneman, 309 F.3d 789 (D.C. Cir. 2000).

In the wake of Pigford and Keepseagle, Judge Robertson, reviewing the identical Garcia complaint, denied the Hispanic farmers' motion for class certification. Significantly, for purposes of the instant petition, Judge Robertson concluded that Judges Friedman and Sullivan in Pigford and Keepseagle, respectively, were wrong in basing certification on the USDA's failure to investigate discrimination complaints by minority farmers arising out of its credit and non-credit farm benefit programs, holding that such claims could not serve as the basis for class certification. He reached a similar conclusion in Love. This conclusion is squarely at odds with this Court's holding in In re Veneman, 309 F.2d at 794.

QUESTIONS PRESENTED AND RELIEF SOUGHT

Fundamentally this petition presents two questions with respect to those Hispanic farmers whose attempts to gain access to USDA farm credit and non-credit farm benefit programs for the period 1981-1996 were denied due to USDA's discriminatory policies and actions: (1) Whether the USDA's failure to investigate the discrimination complaints of Hispanic farmers arising out their attempts to participate in non-credit benefit and farm credit programs states a cause of action under either the APA or ECOA? (2) Assuming arguendo that the USDA's failure to investigate such claims does not state a claim under either the APA or ECOA, can such allegations nevertheless serve as the basis for a finding of commonality and typicality pursuant to Fed. R. Civ. P. 23(a)? Plaintiffs submit that this Court should reverse the district court's 3/20/02 Order holding that USDA's failure to investigate discrimination complaints cannot form the basis for a finding of commonality and typicality pursuant to Fed. R. Civ. P. 23(a) and grant such other relief as the Court deems appropriate.

STATEMENT

A. Regulatory Background

The Farm Service Agency ("FSA") is a component of USDA. FSA, like its predecessor, the Farmers Home Administration ("FMHA"), is designed to be the federally funded lender of last resort for farmers and ranchers. It makes loans for a variety of different purposes, including,

inter alia, “farm ownership” loans to assist farmers in buying or improving farm property, 7 C.F.R. § 1943.2, “operating” loans to provide credit and management assistance to help farmers run their farms, 7 C.F.R. § 1941.2, and emergency loans to help farmers resume operations after an officially declared disaster. 7 C.F.R. § 1945.152.

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

The highly subjective eligibility criteria and the pattern and practice of discrimination employed by USDA in its efforts to deny Hispanic farmers and ranchers access to USDA-sponsored farm credit and non-credit benefit programs have been fully described in plaintiffs’ Fed. R. Civ. P. 23(f) petition filed in Docket No. 04-8008 and thus are not repeated here. Suffice it to say that the loan approval process was and is fraught with the opportunities to discriminate against Hispanic and other minority farmers and rancher as reported by USDA’s own Civil Rights Action Team (“CRAT”).¹

¹ 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 longstanding civil rights problems] . . . and make strong recommendations for change.” CRAT Report at 3. See id. at 15. The CRAT Report and other documents and exhibits cited herein are available on the internet. The precise internet addresses of the cited documents are set forth in Addendum H.

B. Equal Credit Opportunity Act

ECOA prohibits discrimination in the administration of 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). ECOA also expressly provides that “[u]pon application by an aggrieved applicant, the appropriate . . . district court . . . may grant such equitable and declaratory relief as is necessary to enforce the requirements imposed under [ECOA].” *Id.* § 1691e (c).

As part of its ECOA enforcement, USDA provides, in its regulations, that if a farmer believes that he has been the victim of proscribed discrimination in attempting to obtain farm credit, he may file a discrimination complaint with it. 7 C.F.R. § 15.6 (2004).² Indeed, USDA encouraged farmers to file such complaints. However, while encouraging farmers to file discrimination complaints, USDA, in the early 1980s, simultaneously secretly dismantled its civil rights investigatory unit and thereby hobbled one of the means of its 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 and non-credit benefit programs had their complaints relegated to a bureaucratic black hole. Upon belatedly learning of USDA’s secret actions, Congress took the extraordinary step of retroactively extending ECOA’s two-year state of limitations period for certain claims against USDA provided that the action was brought within two years of the special legislation’s enactment, *i.e.*, by October 21, 2000. 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). Specifically, Congress allowed individuals who filed complaints of discrimination with USDA between January 1, 1981 and July 1, 1997 to

² The regulations also provide that, once filed, “[t]he complaint shall be investigated” *Id.* (emphasis added).

sue for discrimination occurring between January 1, 1981 and December 31, 1996. Id. It is this subset of Hispanic farmers that is affected by the district court's 3/20/02 Order.

C. Administrative Procedure Act

The APA provides in pertinent parts that “final agency action for which there is no other adequate remedy in a court” is “subject to judicial review.” 5 U.S.C. § 704. The APA further provides that “[t]he reviewing court shall – (1) compel agency action unlawfully withheld or unreasonably delayed; and (2) hold unlawful and set aside agency action . . . found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law” 5 U.S.C. § 706.

D. The Pigford Litigation

In Pigford, a putative class of African-American farmers filed suit under ECOA, alleging that the USDA had discriminated against them in the provision of various farm credit and benefits. The African-American farmers also alleged that the USDA failed to investigate and process administrative complaints of discrimination properly. They sought damages and equitable relief. Rejecting the government's arguments that class certification was improper because, inter alia, the class was not sufficiently definite and that the Pigford plaintiffs failed to satisfy the commonality and typicality requirements of Fed. R. Civ. P. 23(a), Judge Friedman certified a class action pursuant to Fed. R. Civ. P. 23(b)(2). Pigford v. Glickman, 182 F.R.D. 341, 351 (D.D.C. 1998).

In so ruling, Judge Friedman found that the “gravaman [sic] of plaintiffs' complaint in this case is not just that they were subjected to discrimination when they applied for loans and subsidies but that when they filed complaints with the USDA regarding the alleged discrimination, the USDA failed properly to process and investigate those complaints.” Id. at 344-45. Distinguishing a prior district court decision denying class certification,³ Judge

³ In Williams v. Glickman, Civ. No. 95-1149, 1997 U.S. Dist. LEXIS 1683 (D.D.C. Feb. 14, 1997), Judge Flannery refused to certify a class of African-American and Hispanic farmers alleging discrimination by USDA in violation of ECOA. Even a cursory reading of Williams makes clear that the complaint in that case was so poorly pled that the district court found that case to be highly problematic. For example, plaintiffs included among the

Friedman stated that the “unifying pattern of discrimination at issue in this case is the USDA’s failure properly to process complaints of discrimination” Id. at 349.

As Judge Friedman explained, the “mere fact that plaintiffs are seeking monetary relief in addition to injunctive and declaratory relief” would not preclude Rule 23(b) certification so long as monetary relief did not predominate. Id. at 351. In that connection, he noted that plaintiffs were seeking a “variety of injunctive and declaratory remedies.” Id. Furthermore, Judge Friedman stated that the Rule 23(b)(2) class was “being certified only for purposes of determining liability.” Id. He suggested that “hybrid” certification might also be appropriate in light of Eubanks v. Billington, 110 F.3d 87, 92 (D.C. Cir. 1997). 182 F.R.D. at 351.

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

E. The Keepseagle Litigation

In Keepseagle, a putative class of Native-American farmers filed suit under ECOA seeking monetary damages and injunctive relief. Like the Pigford plaintiffs, the Keepseagle plaintiffs alleged that they suffered discrimination in USDA farm credit and non-credit benefit

purported class a white man, plaintiffs who had separate suits pending in other district courts and plaintiffs who had already settled their claims or whose claims were time-barred. Id. at *15-*16. Judge Flannery held, inter alia, that “the plaintiffs’ bare allegation of a ‘common thread of discrimination’ does not satisfy the . . . requirement of a rigorous ‘specific presentation’” and consequently “plaintiffs have not shown the existence of a common legal question.” Id. at *21. In a footnote, Judge Flannery noted that while plaintiffs had “claimed that the local FmHA supervisors had ‘unbridled discretion’ in making their decisions, they have not presented ‘significant proof’ that this is so.” Id. at * 21 n.16. Finally, Judge Flannery faulted plaintiffs for the absence of any statistical evidence. Id. at *23. See also Chiang v. Veneman, No. 03-3488, 2004 WL 2085858, at *6 (3rd Cir. Sept. 20, 2004) (distinguishing Williams while affirming class certification on the issue of liability with respect to claim that USDA attempted to deny class members access to rural housing loan programs through multifarious practices that included, inter alia, “the failure to investigate and process discrimination complaints”).

programs. The government opposed the Native-American farmers' motion for class certification on numerous grounds. Nevertheless, on September 28, 2001, Judge Sullivan certified a class pursuant to Fed. R. Civ. P. 23(b)(2). In a subsequent memorandum opinion, Judge Sullivan noted that:

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

Keepseagle, 2001 U.S. Dist. LEXIS 25220, at * 29. Accord Pigford v. Glickman, 182 F.R.D. at 348-49. In dismissing the government's Fed. R. Civ. P. 23(f) petition, the Court held that it did not "see anything either novel or manifestly erroneous . . . about the district court's conclusion that the farmers' allegations concerning . . . [USDA's] 'failure to . . . investigate discrimination complaints,' which 'affected each class member' satisfy Rule 23(a)'s commonality and typicality requirements." In re Veneman, 309 F.3d at 794; see also In re Veneman, No. 04-5031, 2004 U.S. App. LEXIS 4219 (D.C. Cir. Mar. 3, 2004) (denying petition for a writ of mandamus).

F. 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 at Addendum D.) However, unlike Pigford, in which the negotiated consent decree focused almost exclusively on damages, the

Garcia plaintiffs have focused primarily on substantial remedial relief aimed at the systemic discrimination that has infected USDA's farm credit and non-credit benefit programs.⁴

This case was initially assigned to Judge Oberdorfer, who, on January 23, 2001, placed a stay on discovery which remained in effect until January 15, 2003. The case was subsequently transferred to Judge Lamberth, who, on February 1, 2002, transferred it to Judge Robertson who also had Love.

Prior to the transfer, Judge Robertson, in Love, denied in part and granted in part defendant's motion to dismiss and to strike class allegations. He dismissed the Love plaintiffs' claims based on the APA, *i.e.*, those claims based upon the non-credit farm benefit programs and claims based upon the USDA's dismantlement of the apparatus for investigating discrimination complaints together with USDA's systematic failure to process such complaints with respect to farm loan programs. That decision was based in part upon the fact that in the Love case 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." 3/20/02 Order at 4 n.3. At the January

⁴ Current plaintiffs' counsel who inherited the Garcia case in 2002 submit that under traditional principles of notice pleading, the Second Amended Complaint is sufficient to put defendant on notice that plaintiffs seek broad remedial relief. Second Amended Complaint ¶¶ 120, 123, 127 & 129(2); *see, e.g., Western Colorado Fruit Growers Ass'n v. Marshall*, 473 F. Supp. 693, 699-700 (D. Colo. 1979) (motion to dismiss counterclaim seeking injunctive relief based on particularity requirements under Fed. R. Civ. P. 65(d) denied "[u]nder our system of notice pleading the counterclaim adequately places plaintiff on notice of the area into which defendants will inquire at trial"); *see also Sparrow v. United Air Lines, Inc.*, 216 F.3d 1111, 1113 (D.C. Cir. 2000); *Woodruff v. DiMario*, 197 F.R.D. 191, 192 (D.D.C. 2000). Indeed, Judge Friedman, reviewing a virtually identical complaint in *Pigford*, held that the complaint sought a "variety of injunctive and declaratory remedies." *Pigford v. Glickman*, 182 F.R.D. 341, 351 (D.D.C. 1998) *aff'd*, 206 F.3d 1212 (D.C. Cir. 2000); *compare Garcia v. Veneman*, 211 F.R.D. 15, 23 (D.D.C. 2002). However, in light of Judge Robertson's contrary finding in Garcia, *id.*, and in order to reflect the results of their limited discovery and public-record investigation and their desire to eliminate the \$20 billion damage claim that, so far as current counsel could determine, was selected merely for its publicity value, plaintiffs sought leave to amend their complaint. In so doing, plaintiffs sought to reconfigure the complaint to make abundantly clear that they primarily seek remedial relief aimed at establishing the accountability and transparency necessary to eradicate the discrimination infecting USDA's farm credit and non-credit farm benefit programs. Secondly, they seek damages for those plaintiffs able to make the requisite showing of discriminatory harm. In its 9/10/04 Order, the district court, after freely granting the Love plaintiffs leave to file a Third Amended Complaint, denied without prejudice the Garcia plaintiffs' motion to file a Third Amended Complaint. A copy of the proposed Third Amended Complaint is attached as Addendum E. The proposed Third Amended Complaint preserves plaintiffs' APA and ECOA claims. *See Proposed Third Amended Complaint* ¶¶ 113-117.

10, 2002 Love scheduling conference, Judge Robertson expressed concerns about the continued viability of that case as a class action. As he explained,

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

Love, 1/10/02 Hearing Transcript at 4-5.

At the February 21, 2002 Garcia status conference, Judge Robertson announced his intention to enter the same rulings in Garcia as he had entered in Love with respect to a similar motion to dismiss. Thereafter, in his 3/20/02 Order, he denied in part and granted in part defendant's motion to dismiss. He held that "(1) the Garcia plaintiffs are entitled to bring ECOA claims for discrimination in lending transactions without administrative exhaustion; (2) at least some of the named plaintiffs' lending claims satisfy the statute of limitations; and (3) plaintiffs' allegations of failure to investigate civil rights complaints do not state claims under ECOA or the APA." 3/20/02 Order at 3-4 (Addendum B). In contrast to the Love case, however, he also held that one of the named plaintiffs "has satisfied the special statute of limitations approved by Congress and has standing to assert [a] claim [for discriminatory administration of disaster benefit programs]. . . ." Id. at 4. Although Judge Robertson concluded that (1) "[a] disaster benefit decision is not a 'credit transaction' within the meaning of ECOA," and (2) "[a] final agency action denying a disaster benefit is . . . reviewable under the [APA]," he nevertheless held that the failure to investigate complaints of discrimination by farmers seeking such benefits did not state a claim under the APA and could not be a basis for a finding of commonality. Id. at 3-4 (emphasis added).

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

In addition, although plaintiffs had not had the benefit of any discovery, plaintiffs' expert, Professor Hausman of the Massachusetts Institute of Technology, using publicly available data, demonstrated that there was a statistically significant disparity in the ability of Hispanic farmers – in comparison to white male farmers – to obtain loans from USDA. Plaintiffs also adduced evidence from a publicly available USDA-funded study of a similar disparity in the ability of Hispanics to obtain USDA loans. (Exs. 3-4 to Plaintiffs' Supplemental Memorandum in Support of Their Motion For Classification filed on April 8, 2002.)

For its part, the government argued, inter alia, that in order to satisfy the commonality and typicality requirements of Rule 23(a), plaintiffs would have to demonstrate the existence of an "entirely" subjective decisionmaking process. See General Tel. Co. of the S.W. v. Falcon, 457 U.S. 147, 159 n.15 (1982). The government also argued that plaintiffs' statistical evidence of a disparity in the ability of Hispanic and white farmers to obtain USDA credit had to be linked to a specific USDA policy that plaintiffs contended was discriminatory. Thereafter, on May 22, 2002, the district court issued a Memorandum Order in which it found "the government's reliance upon footnote 15 of [Falcon] [to be] overly literal." 5/22/02 Memorandum Order at 1. (Addendum F.) The district court, citing Koger v. Reno, 98 F.3d 631, 639 (D.C. Cir. 1996), also concluded that "the plaintiffs' . . . statistical analysis and other evidence of record have not established a causal link between the policies that plaintiffs challenge and the asserted fact that

Hispanic and Latino farmers have been less likely than white farmers to receive loans from USDA.”⁵ 5/22/02 Memorandum Order at 2. The district court ordered “that the parties meet and confer on a schedule for further discovery related to the class certification issue.”⁶ Id. The district court also ordered the convening of a June 24, 2002 in-chambers status conference. Id. at 3.

The ensuing meetings and the resulting dispute with respect to the scope of discovery, as well as the district court’s proposal for addressing that dispute, are discussed in the petition in Docket No. 04-8008 and for that reasons are not discussed here. Suffice it to say that, after proposing a procedure for resolving a dispute that had arisen concerning the scope of class discovery, the district court nevertheless denied plaintiffs’ motion for class certification without ever addressing the discovery dispute that gave rise to the procedure or affording plaintiffs any discovery whatsoever. See Garcia, 211 F.R.D. 15. Recognizing the obvious unsustainability of such an order, the district court retreated slightly to permit plaintiffs some very limited discovery. That discovery consisted primarily of the loan files of some 35 plaintiffs named in the Second Amended Complaint that USDA offered to produce in lieu of responding to plaintiffs’ class discovery that included, inter alia, requests for the loan files of similarly situated white farmers obviously critical to demonstrate disparate impact. The district court initially required plaintiffs to demonstrate commonality among those 35 named plaintiffs as a condition precedent to being permitted to undertake the broader discovery plaintiffs had sought. On December 5, 2003, plaintiffs submitted a memorandum setting forth the common issues of law and fact that were revealed by the exceedingly limited discovery which, at a minimum, justified permitting plaintiffs to undertake their long-sought broader discovery. At length, the district

⁵ Because the district court’s May 22, 2002 Order did not address plaintiffs’ argument that the failure to investigate discrimination complaints gave rise to a cause of action under ECOA, plaintiffs, on June 3, 2002, filed a motion for reconsideration or in the alternative clarification. The district court summarily denied that motion on June 6, 2002. (Addendum G.)

⁶ While the order referred to “further discovery” there had, in fact, been no discovery taken in the case as Judge Oberdorfer’s stay remained in place and the district court had denied plaintiffs’ motion to lift the stay on discovery.

court abruptly cut past the discovery issue and once again denied plaintiffs' motion for class certification in its 9/10/04 Order. In so doing, the district court expressly noted that its Order

may present a "death-knell situation" for plaintiffs In any event, [it] . . . presents an "unsettled and fundamental issue of law relating to class actions, important both to [this] specific litigation and generally, that is likely to evade end-of-the-case review."

Id. at 2 n.1 (quoting In re Lorazepam & Clorazepate Antitrust Litig., 289 F.3d 98, 102, 105 (D.C. Cir. 2002)). In light of its 9/10/04 Order and its prior ruling in its 3/20/02 Order, the district court stated that "[i]f asked to do so, [it] w[ould] also certify [its 3/20/02 Order] pursuant to 28 U.S.C. § 1292(b). Id. at 2-3.

REASONS FOR GRANTING THE PETITION AND PERMITTING AN INTERLOCUTORY APPEAL

Section 1292(b) provides in relevant part that:

When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order.

28 U.S.C. § 1292(b) (2000). Accordingly, the district court must consider (1) whether the order to be appealed involves a controlling question of law, (2) whether substantial contrary authority or other grounds for a difference of opinion exist, and (3) whether an immediate appeal would materially advance the disposition of the litigation. See Virtual Dev. & Def. Int'l, Inc. v. Republic of Moldova, 133 F. Supp. 2d 9, 22 (D.D.C. 2001); see also Trout v. Garrett, 891 F.2d 332, 335 n.5 (D.C. Cir. 1989). As its 9/27/04 Certification Order makes clear, the district court found that its 3/20/02 Order satisfies the factors required for certification pursuant to 28 U.S.C. § 1292(b).⁷ Once the district court has certified an order for interlocutory review, this Court "may

⁷ In certifying its 3/20/02 Order for interlocutory appeal pursuant to Section 1292(b), the district court specifically identified "the question of whether plaintiffs' allegations of failure to investigate civil rights complaints state claims under the [APA] . . . or the [EEOA] . . . or both." 9/27/04 Certification Order. However, it is well settled that "the appellate court may address any issue fairly included within the certified order because 'it is the

thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order” certifying that order. 28 U.S.C. § 1292(b). This petition is timely filed because ten days from September 27, 2002 (excluding intervening weekends and holidays as required by Fed. App. R. 26(a)(1)-(4)) is October 12, 2004.

A. The Certified Order Addresses A Controlling Issue Of Law.

There can be no dispute that the certified order addresses a controlling issue of law. A question constitutes a “controlling issue of law” if its resolution could determine the outcome or future course of the litigation. See Judicial Watch, Inc. v. National Energy Policy Dev. Group, 233 F. Supp. 2d 16, 19 (D.D.C. 2002) (citing In re Vitamins Antitrust Litig., No. 99-197, 2000 U.S. Dist. LEXIS 11405, at *2 (D.D.C. Jan. 27, 2000); and Johnson v. Burken, 930 F.2d 1202, 1206 (7th Cir. 1991)), stay denied, No. 02-5355, U.S. Dist. LEXIS 22884 (D.C. Cir. Sept. 30, 2003).

Should the district court’s 3/20/02 Order be affirmed, and no other basis for commonality be found, the right of the putative plaintiffs to move forward as a class would end. Consequently, the practical impact would be to make their ability to pursue their requests for definitive remedial relief exponentially more difficult, time consuming and expensive, if not impossible. See 9/10/04 Order at 2 n.1. Not surprisingly, then, courts have repeatedly treated class certification issues as controlling questions of law proper for certification for interlocutory appeal. See, e.g., Fellows v. Universal Restaurants, Inc., 701 F.2d 447, 447-48 (5th Cir. 1983) (dismissal of class action aspects of discrimination suit reviewed under 1292(b)); Hewitt v. Joyce

order that is appealable, and not the controlling question identified by the district court.” Yamaha Motor Corp. v. Calhoun, 516 U.S. 199, 205 (1996) (quoting 9 J. MOORE & B. WARD, MOORE’S FEDERAL PRACTICE ¶ 110.25 [i], at 300 (2d ed. 1995)); California Public Employees’ Retirement Sys. v. WorldCom, Inc., 368 F.3d 86, 95 (2d Cir. 2004). In fact, this Court has power to “review an entire order, either to consider a question different from the one certified as controlling or to decide the case despite the lack of any identified controlling question.” Id. Hence, plaintiffs seek immediate appellate review of the certified order with respect to two questions that essentially reduces to a single question: regardless of whether USDA’s failure to investigate the discrimination complaints of Hispanic farmers and ranchers arising out of their attempts to obtain farm credit and non-credit farm benefits state a claim under either the APA or ECOA, can such allegations nevertheless be the basis for a finding of commonality and typicality pursuant to Fed. R. Civ. P. 23(a)? See supra at 3.

Beverages of Wisconsin, Inc., 721 F.2d 625, 626 (7th Cir. 1983) (decertification of class reviewed); Kirkpatrick v. J.C. Bradford & Co., 827 F.2d 718, 721 (11th Cir. 1987) (denial of class certification reviewed); Chateau de Ville Prods. v. Tams-Witmark Music Library, Inc., 586 F.2d 962, 964 (2d Cir. 1978) (certification of class reviewed); see also 19 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 203.31[2] (3d ed. 1997) (issue of whether action may be properly brought as a class action appropriate for appeal as controlling question of law).

B. The Certified Order Provides Substantial Grounds For Difference Of Opinion.

The issue of commonality among plaintiffs asserting claims for the period 1981-1996 based on the USDA's failure to investigate their discrimination complaints provides substantial grounds for difference of opinion. For example, plaintiffs have consistently maintained, and provided authority for, the position that the USDA's failure to investigate constitutes a violation of both the APA and ECOA and a basis for a finding of commonality pursuant to Fed. R. Civ. P. 23. The USDA's own regulations authorize such complaints and require that such complaints be investigated as a means of enforcing ECOA and a farmer's right to equal access to non-credit farm benefit programs. See 7 C.F.R. § 15.6 (2004). In addition, Regulation B, the interpretative regulation promulgated pursuant to ECOA, expressly defines a "credit transaction" subject to ECOA, as "every aspect of an applicant's dealing with a creditor (including, but not limited to, . . . investigation procedures. . . ." 12 C.F.R. § 202.2(m) (202). (Emphasis added.) Moreover, while correctly concluding that ECOA provides adequate relief for lending discrimination claims, the district court ignored the fact that plaintiffs also assert claims for discrimination with respect to non-credit farm benefit programs, which turn on whether USDA's actions were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). While such claims may include discrimination, they are not limited to it. Indeed, as this Court has recognized, an aggrieved party may bring a discrimination claim and an APA claim concurrently because the claims have independent bases. See McKenna v. Weinberger, 729 F.2d 783, 791 (D.C. Cir. 1989). Ironically, the district court's 3/20/02 Order held that

plaintiffs had stated a viable APA claim with respect to named plaintiff Morales, but nevertheless concluded that the failure to investigate claims of discrimination could not satisfy the commonality requirement of Fed. R. Civ. P. 23(a). But Fed. R. Civ. P. 23(a)(2) merely requires that “there are questions of law or fact common to the class. . . .” (Emphasis added.) The failure to investigate the discrimination complaints clearly is a “fact” which is common to all of the subclass of plaintiffs that USDA attempted to deny access to farm credit and non-credit farm benefit programs from 1981-1996. The district court could clearly issue remedial orders addressing the USDA’s failure to investigate such complaints and, as noted, securing remedial relief is the predominate thrust of the Garcia case as currently configured. Indeed, Congress expressly made that allegation a prerequisite for those farmers seeking to assert claims for the period 1981-1996 pursuant to the special legislation extending ECOA’s statute of limitation. See 7 U.S.C. § 2297 note and discussion supra at 5-6. The district court’s 3/20/02 Order is thus at odds with, inter alia, the express language of ECOA and its implementing regulations, settled principles of statutory construction, the express terms of Fed. R. Civ. P. 23(a)(2) and Congress’ intent in extending ECOA’s statute of limitations.

Substantial differences of opinion also exist regarding the certified order within this circuit. On the basis of complaints that are virtually identical to the complaint in this case, two judges of the district court have held that “[i]t is clear that the [USDA’s] systematic failure to process complaints of discrimination is a unifying characteristic of the class and raises common questions of fact and law.” See Keepseagle v. Veneman, No. 99-03119, 2001 U.S. Dist. LEXIS 25220, at * 29 (Native-American farmers); accord Pigford, 182 F.R.D. at 348-49 (African-American farmers’ discrimination complaints not investigated by USDA).

Notably, in In re Veneman this Court declined the government’s Fed. R. Civ. P. 23(f) petition to review the Keepseagle decision, holding that the USDA’s failure to investigate was a proper basis for a finding of commonality and typicality. In re Veneman, 309 F.3d at 794. At the very least, the existing decisions in practically identical cases demonstrate that there is strong support in this circuit for plaintiffs’ argument that commonality between the putative class

members exists based on the USDA's failure to investigate their discrimination claims. Moreover, in Chiang, the Third Circuit recently affirmed class certification on the issue of liability regarding claims that USDA attempted to deny class members access to rural development loans programs through multifarious practices including, inter alia, "the failure to investigate and process discrimination complaints. . . ." 2004 WL 2085858, at * 6. The strength of plaintiffs' position, the presence of such conflicting rulings within this circuit and the Third Circuit's recent decision in Chiang provide the proper basis for this Court to permit plaintiffs' appeal.

C. Interlocutory Review of the 3/20/02 Order Pursuant to Section 1292(B) Would Materially Advance The Disposition Of The Litigation.

An immediate appeal of the district court's 3/20/02 Order would materially advance the disposition of the litigation. The practical impact of a prompt resolution of the subject issue is substantial. Should this Court affirm the district court's 3/20/02 Order, and no other basis for commonality is found, this case would end as a class action. Such a result could well bring an end to this litigation for hundreds, if not thousands, of Hispanic farmers and ranchers. The Hispanic farmers and ranchers who comprise the putative class represent an oppressed minority who are confronting a powerful governmental agency that has systematically stripped them of their land and, in some instances, their ability even to subsist as farmers and ranchers. They are confronting an agency which the record shows reflects animus not just at the local level but at high levels within the bureaucracy. See Declaration of Lou Anne Kling (Ex. 3 to Plaintiffs' Emergency Motion to Stay Proceedings, filed December 9, 2002). It is an agency which, according to a former Director of the Office of Civil Rights, destroys documents and intimidates those who would complain about discrimination. See Declaration of Rosalind Gray ¶ 20 (Ex. 7 to Plaintiffs' Supplemental Memorandum in Support of Plaintiffs' Motion for Class Certification). Clearly, such subsistence farmers would find it infinitely more difficult, if not impossible, to pursue individual claims, as the district court apparently recognized. See

9/10/04 Order at 2-3 & n.l. This is particularly true as regards the effort to secure broad and definitive remedial relief which is at the core of the Garcia case, a goal achievable only through a class action on behalf of similarly situated victims.

A resolution of this issue would also guide the parties as to the manner in which to proceed, including, inter alia, the scope of discovery yet to be conducted. In addition, any settlement possibilities, particularly with respect to the long-overdue detailed remedial relief that plaintiffs have proposed, are inhibited by the existing uncertainty. Given the fact that this issue has arisen in other cases, uncertainty itself about what the appellate result might be will pose an obvious obstacle to the progress of this and other cases. See Johnson v. Washington Metro. Area Transit Auth., 773 F. Supp. 459, 460 (D.D.C. 1991) (clarification of law and conflicting authority would circumvent appeal and remand on issue, possibly saving additional cost and delay). Finally, from the standpoint of judicial economy and the cost to the parties, it is far more efficient to resolve the question now rather than proceed with a series of individual trials and the discovery associated with such trials and appeals that might well result in a conclusion that there was indeed a basis for proceeding as a class action. In that connection, because these claims date to the early 1980s when USDA secretly dismantled its civil rights investigative unit, many of the putative plaintiffs are very elderly, some are in their 90s. Indeed, as a result of the seemingly interminable delays that have already plagued this case, plaintiffs' counsel are aware of at least fourteen putative plaintiffs who have died while the certification issue has been pending. There is no telling how many putative plaintiffs have died during this time unbeknownst to plaintiffs' counsel. For those unfortunate individuals justice delayed has truly become justice denied.

CONCLUSION

For the foregoing reasons, plaintiffs respectfully request that this Court, pursuant to 28 U.S.C. § 1292(b), permit on interlocutory appeal of the district court's 3/20/02 Order and the following questions:

(1) 'Whether USDA's failure to investigate discrimination claims arising out of attempts by Hispanic farmers to obtain farm credit constitutes a cause of action under either the APA or ECOA?

(2) Assuming arguendo that the USDA's failure to investigate such discrimination complaints does not constitute a cause of action under either the APA or ECOA, can such claims constitute a common issue of fact sufficient to satisfy the commonality requirement of Fed. R. Civ. P. 23(a)?

Respectfully submitted,

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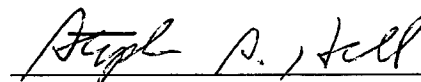
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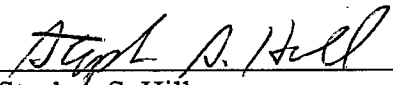
Dated: October 12, 2004

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of October, 2004, I have caused 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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