

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

---

GUADALUPE L. GARCIA, et al.,	)	
	)	
Plaintiffs-Appellants,	)	
	)	No. 04-8009
v.	)	
	)	(Civ. No. 00-2445 (JR))
ANN VENEMAN, Secretary, UNITED	)	
STATES DEPARTMENT OF AGRICULTURE,	)	
	)	
Defendant-Appellee.	)	
	)	
	)	

---

**DEFENDANT'S RESPONSE TO PLAINTIFFS' PETITION FOR PERMISSION  
TO TAKE AN INTERLOCUTORY APPEAL PURSUANT TO 28 U.S.C. 1292(b)**

This case concerns discrimination claims by Hispanic farmers alleging that, over a period of nearly two decades, they were denied credit and benefits in a variety of different farm programs administered by the United States Department of Agriculture ("USDA"). Plaintiffs seek to proceed as a class action under Fed. R. Civ. P. 23, and seek \$20 billion in damages.

On December 2, 2002, the district court denied plaintiffs' motion for class certification. See Garcia v. Veneman, 211 F.R.D. 15 (D.D.C. 2002). However, the court later granted plaintiffs' request for limited discovery to support their motion for class certification. On September 10, 2004, after the completion of discovery, the court again denied class certification. In No. 04-8008, plaintiffs petitioned this Court to review the class certification decision under Fed. R. Civ. P. 23(f). In the present petition, plaintiffs now seek to have this

Court review a threshold legal question related to class certification that the district court certified for review under 28 U.S.C. § 1292(b): "whether plaintiffs' allegations of failure to investigate civil rights complaints state claims under the Administrative Procedure Act or the Equal Credit Opportunity Act, or both." Pl. App. C (certified question).

As set forth in the government's response to plaintiffs' Rule 23(f) petition in No. 04-8008, although plaintiffs have not satisfied the stringent criteria for interlocutory review under Rule 23(f), see In re: Veneman, 309 F.3d 789, 794 (D.C. Cir. 2002), this case may nonetheless present "special circumstances" that warrant the exercise of this Court's discretionary jurisdiction. Notably, this is one of three related cases now pending in district court alleging virtually identical claims against the USDA on behalf of different minority groups that each desire to proceed as a class action. In Love v. Veneman, No. 00-02502 (D.D.C.) - a case involving female farmers - Judge Robertson recently denied plaintiffs' motion for class certification, while in Keepseagle v. Veneman, No. 99-3119 (D.D.C.) - a case involving Native American farmers - Judge Sullivan granted plaintiffs' motion to proceed as a class limited (at least for now) solely to claims for declaratory and injunctive relief under Rule 23(b)(2). This Court denied the government's petition for review of the decision granting class

certification under Rule 23(f) in Keepseagle. In re: Veneman, 309 F.3d at 796. As noted, however, plaintiffs in this case have now filed a Rule 23(f) petition seeking review of the denial of class certification (now pending in No. 04-8008), and on October 14, 2004, the plaintiffs in Love also filed a Rule 23(f) petition seeking review of the denial of class certification in that case (now pending in No. 04-8010).

Now that there is an actual conflict in the certification of class actions in virtually identical suits by Hispanic, female, and Native American farmers (and two petitions for review under Rule 23(f) are now pending), some form of consolidated appellate review may well be appropriate to provide guidance to the district courts on the propriety of class certification in these related cases. What form that review should take is a more difficult question. However, because one of the primary reasons for the varying class certification decisions in these cases is disagreement among the district courts on the threshold legal question that the district court has now certified for review under 28 U.S.C. § 1292(b), the government submits that the best approach would be for this Court first to review that legal question pursuant to Section 1292(b) while denying (or holding in abeyance) plaintiffs' Rule 23(f) petitions.

Although the government believes the district court in this case correctly concluded that plaintiffs' claim concerning the

USDA's alleged "failure to investigate discrimination complaints" is not actionable under either the APA or the ECOA, we recognize that plaintiffs have presented contrary arguments that are not insubstantial. And, because the legal viability of that claim informs any assessment of the propriety of class certification in these cases, we recognize that the resolution of this question "may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). Finally, because this Court has previously held that it lacks authority to address the legal viability of plaintiffs' "failure to investigate" claim under Rule 23(f) - because it is a "merits" questions not reviewable under Rule 23(f), see Veneman, 309 F.3d at 794-95 - review under Section 1292(b) will provide much-needed flexibility for the Court to address all the necessary legal issues to provide critical guidance concerning the propriety of class certification in these cases. Cf. Hartman v. Duffey, 19 F.3d 1459 (D.C. Cir. 1994) (reviewing merits of class certification decision on interlocutory appeal from injunction).

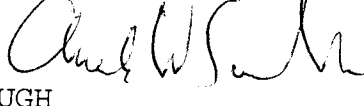
Accordingly, as noted above and in the government's response to plaintiffs' Rule 23(f) petition in No. 04-8008, we do not oppose plaintiffs' petition for review of the legal question certified by the district court pursuant to 28 U.S.C. § 1292(b). Because resolution of that question will likely clarify whether plaintiffs' claims in these cases may ever proceed as class

actions, the government continues to believe that this Court should deny (or hold in abeyance) plaintiffs' petitions for review under Rule 23(f) in No. 04-8008 and No. 04-8010.

Respectfully submitted,

PETER D. KEISLER  
Assistant Attorney General  
KENNETH L. WAINSTEIN  
Acting United States Attorney

ROBERT M. LOEB  
(202) 514-4332  
CHARLES W. SCARBOROUGH  
(202) 514-1927  
Attorneys, Appellate Staff  
Civil Division  
Department of Justice  
950 Pennsylvania Ave., N.W., Room 7244  
Washington, D.C. 20530-3001

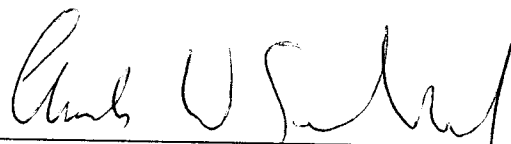


OCTOBER 2004

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of October, 2004, I have caused the Defendant's Response to Plaintiffs' Petition for Permission To Take Interlocutory Appeal Under 28 U.S.C. § 1292(b) to be served by hand upon the following counsel:

Alan M. Wiseman  
Stephen S. Hill  
Howrey, Simon, Arnold & White, LLP  
1299 Pennsylvania Ave., N.W.  
Washington, D.C. 20004  
(202) 783-0800

  
Charles W. Scarborough