

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

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

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

The government concedes, as indeed it must, that the Court should permit plaintiffs to take an interlocutory appeal. The principal disagreement between plaintiffs and the government concerns the scope of the Court’s review. For its part, the government seeks to limit the Court’s review to what it mischaracterizes as the “threshold legal question” presented by plaintiffs’ instant petition pursuant to Section 1292(b), while denying or holding in abeyance the Court’s consideration of the issues presented by plaintiffs’ petition pursuant to Fed. R. Civ. P. 23(f).<sup>1</sup>

<sup>1</sup> The government is intentionally misleading in asserting that plaintiffs seek \$20 billion in damages. Defendant’s Response To Plaintiffs’ Petition For Permission To Take An Interlocutory Appeal Pursuant To 28 U.S.C. 1292(b) (“Defendant’s 1292(b) Response”) at 1. As the government well knows, current plaintiffs’ counsel and plaintiffs have repeatedly disavowed that damage claim and have repeatedly attempted to redefine the case to emphasize that definitive remedial relief predominates over whatever damages, if any, may ultimately be found to be appropriate. Indeed, the government is able to raise this red herring only because the district court, after freely granting the motion of the plaintiffs in Love v. Veneman, No. 00-2502 (D.D.C.) (Robertson, J.), leave to file a Third Amended Complaint (thereby permitting the Love plaintiffs to drop their multi-billion dollar damage claim), inexplicably denied a similar request from the Garcia plaintiffs. See Plaintiffs’ Reply To Defendant’s Response To Plaintiffs’ Petition For Permission To Take An Interlocutory Appeal Under Fed. R. Civ. P. 23(f) in Docket No. 04-8008 (“Plaintiffs’ 23(f) Reply”) at 4-5. See Addendum C to Plaintiffs’ 1292(b) Petition and Addendum I attached describing the nature of the injunctive relief being sought.

The government is also misleading in asserting that the district court “granted plaintiffs’ request for limited discovery to support their motion for class certification” and denied class certification “after the completion of

Defendant's 1292(b) Response at 3. Despite twice proposing such an approach, the government has yet to explain how the ends of justice or the efficient utilization of the resources of the Court or the parties will be served by having the Court narrowly limit its review to an issue that affects only a subset of the putative class that plaintiffs seek to represent.<sup>2</sup> Defendant's piecemeal approach to the interlocutory appeal is clearly contrary to settled authority in this circuit. 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 v. Taylor, 836 F.2d 578, 585 (D.C. Cir. 1987) (emphasis added) (quoting 16 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3291, 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).

In sum, the government has offered no sound reason for the piecemeal approach to the interlocutory appeal advocated by it. The government properly concedes that plaintiffs have

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discovery. . . ." Defendant's 1292(b) Response at 1. After realizing that it had prematurely denied plaintiffs' motion for class certification without affording plaintiffs any discovery whatsoever and indeed in the context of a procedure designed by it to narrow issues in dispute regarding class discovery, the district court purported to grant limited discovery only after plaintiffs had filed a petition for review pursuant to Fed. R. Civ. P. 23(f) in Docket No. 02-8014. See Petition Of Plaintiffs Guadalupe L. Garcia, Et Al. For Permission To Take An Interlocutory Appeal Under Fed. R. Civ. P. 23(f) in Docket No. 04-8008 ("Plaintiffs' 23(f) Petition") at 6-7. Ultimately, the "discovery" consisted largely of the loan files of 35 of the 110 plaintiffs named in Plaintiffs' Second Amended Complaint that defendant offered to produce in lieu of plaintiffs' proposed discovery. Significantly, the district court refused to grant plaintiffs access to the loan files of any white farmers thereby making a disparate impact analysis impossible.

<sup>2</sup> The legal question presented by the Section 1292(b) petition affects only those Hispanic farmers and ranchers that USDA attempted to deny access to farm credit and non-credit benefit programs from 1981 to 1996. See 7 U.S.C. § 2297 note. The question presented by the 1292(b) petition represents a last resort for plaintiffs rather than, as the government suggests, a "threshold legal question." Defendant's Response at 3. Indeed, based upon an extensive review of the public record and the very limited discovery permitted by the district court, plaintiffs found that USDA personnel engaged in various tactics designed to deny Hispanic farmers and ranchers equal access to USDA-administered farm credit and non-credit benefit programs and that those tactics present issues of fact and law common to all plaintiffs and those they seek to represent. See Plaintiffs' 23(f) Petition at 8 & n.12. Thus, while the special legislation extending the statute of limitations to permit plaintiffs to assert claims for the period 1981 to 1996 requires that plaintiffs asserting such claims must allege that they complained of discrimination and USDA failed to investigate their claims, plaintiffs would seek to pursue the failure-to-investigate claims applicable to a subset of the putative class only if they were denied the opportunity to pursue the issues of law and fact common to the entire class on a class-wide basis.

satisfied the requirements for interlocutory appeal pursuant to Section 1292(b) and the record shows that plaintiffs have similarly met the requirements of Fed. R. Civ. P. 23(f). Settled precedent, the ends of justice and the efficient utilization of the resources of the Court and the parties all dictate that, in permitting an interlocutory review of the district court's findings with respect to class certification, the Court should ““deal with all aspects of the case that have been sufficiently illuminated to enable decision by [it] without further trial court development.””

Wagner, 886 F. 3d at 585 (quoting treatise) (emphasis added).

In that connection, it should be noted that this case concerns well-documented, indeed admitted, discrimination against Hispanic farmers and ranchers who, over a period of now more than two decades, have been systematically denied access to farm credit and non-credit benefit programs administered by the United States Department of Agriculture (“USDA”). This is not the typical case in which plaintiffs rely solely upon the bald, unsubstantiated allegations of their complaint. See, e.g., General Tel. Co. of the S.W. v. Falcon, 457 U.S. 147 (1982). Plaintiffs assert disparate treatment claims that are consistent with and supported by, inter alia, explicit findings of Congressional committees,<sup>3</sup> and USDA's own Civil Rights Action Team,<sup>4</sup> as well as admissions by then Secretary Glickman,<sup>5</sup> the original defendant in this case, and the testimony of the former Director of USDA's Office of Civil Rights, Rosalind Gray. Indeed, Ms. Gray declared that “[a]fter all the investigations and findings of discrimination . . . there still has not been any change in the way programs are administered . . . [and] systemic exclusion of minority farmers remains the standard operating procedure for [USDA].” Gray Decl. ¶ 28.<sup>6</sup>

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<sup>3</sup> See, e.g., The Minority Farmer: A Disappearing American Resource; Has The Farmers Home Administration Been The Primary Catalyst? H.R. Rep. No. 101-984, at 41-43 (1990). (Addendum J.)

<sup>4</sup> Civil Rights At The United States Department Of Agriculture, A Report By The Civil Rights Action Team (“CRAT Report”) at 15-16 (1997). The entire CRAT Report is available on the internet at [www.garciaaction.org](http://www.garciaaction.org). The cited portion of the CRAT Report is attached as Addendum K.

<sup>5</sup> See, e.g., Treatment Of Minority And Limited Resource Producers By The U.S. Department Of Agriculture: Hearings Before The Subcomm. On Department Operations, Nutrition, And Foreign Agriculture Of The House Comm. On Agriculture, 105<sup>th</sup> Cong. 94-95 (1997) (testimony of Hon. Dan Glickman). (Addendum L.)

<sup>6</sup> Addendum M.

Plaintiffs' disparate impact claims are similarly well founded and not merely bald, unsubstantiated complaint allegations. For example, the Civil Rights Commission and Congress expressly found that USDA's loan eligibility criteria are highly subjective and lend themselves to discriminatory impact upon minority farmers.<sup>7</sup> Moreover, USDA, itself, has admitted that its eligibility criteria are entirely subjective.<sup>8</sup> In denying plaintiffs' motion for class certification, the district court ignored such evidence.

Indeed, in a series of rulings starting with the March 20, 2002 Order that is the subject of this petition, the district court has made a number of manifestly erroneous rulings that, in combination, have hobbled plaintiffs' efforts to attain class certification.<sup>9</sup> Significantly, these rulings are at odds with (1) the plain meaning of relevant statutory language and settled principles of statutory construction,<sup>10</sup> (2) rulings of other district courts within this circuit,<sup>11</sup> (3)

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<sup>7</sup> H.R. Rep. No. 101-984, at 10-11 (Addendum J); see also Plaintiffs' 23(f) Petition at 3-4, 16-17.

<sup>8</sup> Motion And Brief Of The United States For Summary Judgment Affirming Agency Action, filed July 8, 1987 in the U.S. District Court of Colorado in Velarde v. U.S., C.A. No. 85-K-2103, at 7. (Addendum N.)

<sup>9</sup> See Garcia v. Veneman, 211 F.R.D. 15 (D.D.C. 2002), and Garcia v. Veneman, C.A. No. 00-2445 (D.D.C.), Memorandum Order Denying Class Certification entered Sept. 10, 2004. (Addendum B to Plaintiffs' 23(f) Petition); see also Plaintiffs' 23(f) Petition at 11-13, 16-17.

<sup>10</sup> See Plaintiffs' 1292(b) Petition at 15-16.

<sup>11</sup> See, e.g., McReynolds v. Sodexho Marriott Servs., Inc., 208 F.R.D. 428, 442 (D.D.C. 2002); see also Plaintiffs' 23(f) Petition at 16-17 & n.22; Pigford v. Glickman, 182 F.R.D. 341, 349, 351 (D.D.C. 1998); Keepseagle v. Veneman, No. 99-03119, 2001 U.S. Dist. LEXIS 25220 (D.D.C. Dec. 11, 2001).


this Court's rulings,<sup>12</sup> and (4) the rulings of other circuits addressing similar issues.<sup>13</sup> In addition, the district court has also grossly misapplied the Supreme Court's holding in Falcon, 457 U.S. at 159 n.15. The net effect of these manifestly erroneous rulings is, as the district court itself recognized, to sound the death knell to this litigation. See 9/10/04 Order at 2 n.1 (Addendum B to Plaintiffs' 23(f) Petition.)

For the foregoing reasons and for the reasons set forth in Plaintiffs' 1292(b) petition, this Court should grant plaintiffs' petition for permission to take an interlocutory appeal under 28 U.S.C. § 1292(b). Plaintiffs further submit that the ends of justice and the efficient utilization of the Court's resources as well as those of the parties dictate that this petition should be consolidated with the petition in Docket No. 04-8008, thereby permitting the Court to deal with all aspects of the district court's decision denying class certification that have been presented.

Respectfully submitted,

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Dated: October 27, 2004

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<sup>12</sup> In re Veneman, 309 F.3d 789, 794 (D.C. Cir. 2002), petition for a writ of mandamus denied, No. 04-5031, 2004 U.S. App. LEXIS 4219 (D.C. Cir. Mar. 3, 2004); Hartman v. Duffey, 19 F.3d 1459, 1472 (D.C. Cir. 1994); see also Plaintiffs' 23(f) Reply at 3-4.

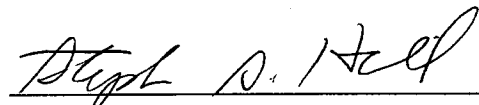
<sup>13</sup> See, e.g., Chiang v. Veneman, No. 03-3488, 2004 WL 2085858 (3d Cir. Sept. 20, 2004); Marisol A. by Forbes v. Giuliani, 126 F.3d 372, 376-77 (2d Cir. 1997); Buycks-Roberson v. Citibank Fed. Sav. Bank, 162 F.R.D. 322, 331 (N.D.Ill. 1995); see also Plaintiffs' 23(f) Reply at 7-8.

**CERTIFICATE OF SERVICE**

I hereby certify that on this 27th day of October, 2004, I have caused Plaintiffs' Reply To Defendant's Response To Plaintiffs' Petition For Permission To Take An Interlocutory Appeal Pursuant To 28 U.S.C. § 1292(b) to be served by hand upon the following counsel:

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