

Respectfully submitted,



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Date: November 15, 2002

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GUADALUPE L. GARCIA, JR., et al.,)	
)	
Plaintiffs,)	
)	
v.)	Civil Action No. 1:00CVO2445
)	Judge Robertson
ANN VENEMAN,)	
)	
Defendant.)	

ORDER

After considering plaintiffs' motion to lift the stay on discovery, to adopt discovery plan and to enter an order requiring defendant to preserve all conceivably relevant documents during the pendency of this case, and defendant's opposition thereto, it is

ORDERED that the following schedule is established for discovery.

1. Merits discovery is to commence immediately and is to be completed by February 7, 2003.
 - a. Each side, as a group, may take up to fifty depositions, excluding depositions of experts designated pursuant to Fed. R. Civ. P. 26(a)(2), without leave of Court.
 - b. Each side, as a group, may serve up to seventy-five interrogatories.
2. Discovery from Rule 26(a)(2) merits experts shall be conducted as follows:
 - a. Expert reports and all documents discoverable under Fed. R. Civ. P. 26(a)(2) shall be exchanged simultaneously in accordance with Rule 26(a)(2) by February 21, 2003.
 - b. Expert depositions may commence after the exchange of expert reports and shall be completed no later than March 8, 2003.
3. Any discovery disputes are to be presented, in the first instance, by telephone conference with the Court, and not by motion.

It is further

ORDERED that defendant shall preserve all documents and tangible things, as those terms are defined in Rule 34 of the Federal Rules of Civil Procedure, that are conceivably relevant to any issue in this case until further order of the Court.

Trial in this matter shall commence on March 17, 2003.

SO ORDERED this _____ day of November, 2002.

James Robertson
United States District Judge

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defendant to cease and desist destroying documents. Defendant's counsel not only declined to do so, but suggested that such a request was unprecedented. See Exhibits D and E to Exhibit 1 to Plaintiffs' Second Supplemental Memorandum In Support of Their Motion For Class Certification ("Plaintiffs' Second Supplemental Memorandum"), filed July 17, 2002. Subsequently, during a telephone conference in Love v. Veneman, C.A. No. 00-2502, (D.D.C.), the Court indicated that it would not want to discover that the United States Department of Agriculture ("USDA") was continuing to destroy documents. Thereafter, USDA issued a directive to local FSA offices to cease destroying all loan documents. Notwithstanding the Court's express concern about document destruction and an explicit directive from USDA headquarters, personnel in local FSA offices, on information and belief, have continued to destroy documents. Furthermore, it is clear that local FSA offices persist in discriminating against and harassing Hispanic farmers and ranchers, thereby inflicting harm on many of them. With the March 17, 2003 trial date rapidly approaching, it is important that the Court lift the stay on discovery so that plaintiffs will have a fair opportunity to try this case and, as a first matter of business, to remedy the continuing pattern and practice of discrimination.

On July 17, 2002, in response to the Court's suggestion made during an in-chambers conference on June 24, 2002, plaintiffs filed Plaintiffs' Second Supplemental Memorandum.¹ On August 28, 2002, after receiving an extension of time, defendant filed an opposition. Plaintiffs filed their reply on September 5, 2002. Subsequently, on September 13, 2002, defendant filed a motion for leave to file a surreply to plaintiffs' September 5 filing. On September 17, 2002, plaintiffs filed an opposition to defendant's motion. The matter is currently sub judice.

Since the parties last class-certification filing, the United States Courts of Appeal for the District of Columbia Circuit dismissed the government's appeal of the district court's order

¹ At the time the Court suggested that plaintiffs file a second supplemental memorandum, the Court stated that it could be quick in issuing its ruling with respect to class certification.

granting class certification in Keepseagle v. Veneman.² In re Veneman, No. 02-5021 (D.C. Cir. Oct. 29, 2002) slip op. (The slip opinion is attached hereto as Exhibit 1.) In dismissing the government's appeal, the court held that there was nothing "either novel or manifestly erroneous . . . about the district court's conclusion that the farmers' allegations concerning the Department's 'failure to properly process, account for, and/or investigate discrimination complaints,' which 'affected each class member,' satisfy Rule 23 (a)'s commonality and typicality requirement." In re Veneman, slip op. at 5. In addition, the D.C. Circuit explicitly rejected defendant's argument that the "farmers' complaint-processing claim is actionable under neither the ECOA nor the APA," (id. at 6), noting that

this argument . . . has no bearing on the question of class certification. As the Supreme Court has long held, courts may not examine whether "plaintiffs have stated a cause of action or will prevail on the merits" in order to determine whether class certification is appropriate. . . . To entertain the Department's claims concerning ECOA and APA coverage, now dressed up as challenges to class certification, would "inappropriately mix the issues of class certification with the merits."

Id., quoting Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 178 (1974), and In re Lorazepan & Clorazepate Antitrust Litig., 289 F.3d 98, 107 (D.C. Cir. 2002). In so holding, the D.C. Circuit directly undercuts this Court's conclusion that the failure to investigate discrimination complaints could not form the basis for a finding of commonality. See Hearing Transcript at 4-5 in Love v. Veneman, CA No. 1:00 CV02502 (D.D.C.) and Memorandum Order dated March 20, 2002 in the instant case. See also Plaintiffs' Supplemental Memorandum in Support of Their Motion for Class Certification at 3-4, April 8, 2002.

Plaintiffs' objectives in this litigation are, first and foremost, to achieve meaningful remedial relief aimed at eradicating once and for all USDA's discrimination against Hispanic farmers and ranchers – something that was left undone in the settlement in Pigford v. Glickman, 185 F.R.D. 82 (D.D.C. 1999), aff'd, 206 F.3d 1212 (D.C. Cir. 2000). Second, plaintiffs seek to

² December 12, 2001 Order, C.A. No. 99CV3119 (D.D.C.).

recover damages for those Hispanic farmers and ranchers who suffered economic harm as a consequence of the discrimination practiced against them. In pursuit of the urgently needed remedial relief, it is imperative that plaintiffs be permitted to conduct discovery needed both to prove liability and then to formulate a plan for comprehensive remediation. Accordingly, any further delay in lifting the stay on discovery will prejudice plaintiffs, perhaps irreparably, because the USDA continues to mishandle files, to destroy documents, and to discriminate against plaintiffs. For example, recently, several plaintiffs, as is their right under applicable USDA regulations, requested copies of their files from their local FSA offices. In each instance, they have been told that their files had been transferred to USDA headquarters in Washington, D.C., and that the farmers would have to file FOIA requests in order to obtain copies of their files. Significantly, when one of those plaintiffs submitted a FOIA request for a copy of his files, he was advised that his files do not exist notwithstanding the fact he continues to receive letters pertaining to his account from FSA on a regular basis. See Exhibit 2.

Additionally, plaintiffs have reason to believe that local county officials are destroying documents despite the pending litigation and the Court's warning to USDA against the destruction of documents. Indeed, plaintiffs are aware of FSA personnel shredding documents subsequent to the directive from USDA headquarters to cease all document destruction. Not surprisingly, the eyewitnesses to this destruction are fearful of reprisal if their identities are made known. Indeed, given USDA's history of discrimination and intimidation³, plaintiffs cannot say that those fears are unfounded. See also the Tyn Davis discussion infra at 5-6. Given the continued destruction of documents, further delay in lifting the stay on discovery will severely affect plaintiffs' ability to obtain pertinent documents from defendant and hence to try this case. By contrast, lifting the stay and adopting the proposed discovery plan will in no way prejudice defendant.

³ See, e.g., Plaintiffs' Reply To Defendant's Response To Plaintiffs' Second Supplemental Memorandum In Support of Their Motion For Class Certification at 17, n.11.

Plaintiffs understand defendant's only objection to this motion to be that it is premature because the Court has not ruled upon plaintiffs' motion for class certification. However, plaintiffs' instant motion is timely in light of (1) the D.C. Circuit's recent decision in In re Veneman substantiating plaintiffs' position with respect to at least one basis for class certification and (2) the pending trial date. It is well established that merits discovery need not be stayed pending class certification. In light of the on-going document retention issues, there should be no further delay. Otherwise, additional important discovery may be foreclosed by defendant's failure to preserve evidence. Each day's delay in exposing USDA to the spotlight of discovery provides cover and an opportunity for continued document destruction and prejudice to plaintiffs.

In addition, the plaintiffs continue to encounter discrimination, harassment and retaliation by USDA. For example, USDA recently engaged in blatant witness intimidation directed at Tyn Davis, whose declaration was submitted as part of Plaintiffs' Second Supplemental Memorandum. The facts are as follows: Mr. Davis recently discovered that he had been declared ineligible to participate in the USDA cotton subsidy program. When he inquired as to the reason for his alleged ineligibility, Mr. Davis was informed by FSA personnel that Mr. McAnally, his local Farm Service Agency ("FSA") loan manager, had instructed FSA to declare Mr. Davis ineligible because of a bankruptcy filing. Significantly, the bankruptcy, which occurred some five years earlier, had never been a bar to Mr. Davis' participation in the cotton subsidy program until he filed a declaration in this case. See 11/02/02 Declaration of Tyn Davis (attached hereto as Exhibit 3). The loss of the subsidy would have cost Mr. Davis approximately \$100,000 and ruined him financially.⁴ Id. at ¶ 9. When several members of Congress contacted Secretary Veneman on Mr. Davis' behalf, he was reinstated and the incident explained as a "computer glitch." See Exhibit 4. Interestingly, the proffered explanation is wholly inconsistent with what

⁴ Plaintiff respectfully submit that potential severity of the attempted intimidation is sufficient to warrant referral to the Justice Department to determine whether USDA has engaged in attempted obstruction of justice and/or witness intimidation in violation of 18 U.S.C. §§ 1512(b)-(c) and 1513.

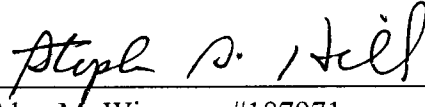
Mr. Davis was told by FSA personnel when he inquired concerning his sudden ineligibility to participate in the cotton subsidy program. Congresswoman Clayton and Congressman Reyes have written Secretary Veneman calling for an investigation of the incident. See Exhibit 5. Each day that the stay remains in place affords defendant an opportunity to continue to destroy documents and to discriminate against and harass plaintiffs.

Finally, as previously noted, while the Court has expressed concern about the destruction of documents and USDA has issued a directive purporting to proscribe the destruction of credit documents, the Court has not entered an express order requiring the defendant to preserve documents. Plaintiffs request that the Court enter such an order so that there can be no doubt with respect to the Court's ability to invoke its contempt powers and other sanctions in the event that defendant continues to destroy documents. Suffice it to say that acts of faith are insufficient given the attitudes and conduct displayed by defendant.

CONCLUSION

Accordingly, for the foregoing reasons, plaintiffs request that the Court lift the stay on discovery, enter the proposed discovery plan and enter an order requiring defendant to preserve all conceivably relevant documents until further order of the Court.

Respectfully submitted,



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GUADALUPE L. GARCIA, JR., et al.

Date: November 15, 2002

EXHIBIT 1

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued September 6, 2002 Decided October 29, 2002

No. 02-5021

In re: Ann M. Veneman, Secretary of Agriculture,
Petitioner

Appeal from the United States District Court
for the District of Columbia
(No. 99cv03119)

Charles W. Scarborough, Attorney, U.S. Department of Justice, argued the cause for petitioner. With him on the briefs were Roscoe C. Howard, Jr., U.S. Attorney, and Robert M. Loeb, Attorney, U.S. Department of Justice.

Joseph M. Sellers argued the cause for respondents. With him on the brief were Suzette M. Malveaux, Alexander Pires, Jr., David Frantz, and Phillip L. Fraas.

Michael L. Foreman, Elaine R. Jones, Norman J. Chachkin, Paul M. Smith, Ian Heath Gershengorn, and John Dossett were on the brief for amici curiae in support of respondents.

Before: Tatel and Garland, Circuit Judges, and Williams, Senior Circuit Judge.

Opinion for the Court filed by Circuit Judge Tatel.

Tatel, Circuit Judge: Rule 23(b)(2) of the Federal Rules of Civil Procedure permits certification of class actions not "exclusively or predominantly [for] money damages." This petition for interlocutory review presents the following question: In a case involving requests for both monetary and equitable relief, may a district court certify a Rule 23(b)(2) class as to equitable relief only without first determining whether, looking at the complaint as a whole, plaintiffs' monetary claims predominate over their equitable claims? Although this issue is both unsettled and fundamental-- factors that may justify interlocutory review pursuant to Rule 23(f)--we nevertheless deny the petition because the critical questions required to resolve it are entirely unbriefed and because we are satisfied that the issue will not escape appellate review.

I.

The United States Department of Agriculture administers several farm credit and benefit programs under the direction of its Farm Service Agency ("FSA"). See Consolidated Farm and Rural Development Act, 7 U.S.C. s 1921 et seq.; 7 C.F.R. s 2.42(28). Farmers seeking FSA loans or subsidies apply to local county committees made up of farmers elected by other farmers. *Pigford v. Veneman*, 206 F.3d 1212, 1214 (D.C. Cir. 2000). If the county committee approves the application, the

farmer receives the benefit. If the committee denies the application, the farmer may appeal to a state committee and then to a federal review board. *Pigford v. Glickman*, 182 F.R.D. 341, 343 (D.D.C. 1998). Farmers believing that their applications have been denied on the basis of race can file complaints either directly with the FSA or with the Department. *Id.*

Alleging that the Department discriminated against them on the basis of race in its administration of these programs, seven Native-American farmers filed this action in the United States District Court for the District of Columbia on behalf of

themselves and others similarly situated. The lawsuit followed the Department's release of a self-critical report that had been prompted by longstanding accusations of racial discrimination in the administration of agricultural programs. Civil Rights Action Team, USDA, Civil Rights at the United States Department of Agriculture 2-3 (1997), available at http://www.usda.gov/news/civil/cr_next.htm. Noting that "discrimination in program delivery ... continues to exist to a large degree unabated," *id.* at 2, the report found significant disparities between the Department's treatment of minority and nonminority farmers, such as "lower participation and lower loan approval rates for minorities in most [agency] programs," and substantial inequalities in loan processing rates, including "disparities between nonminority loan processing and American Indian loan processing" in certain states, *id.* at 21. Since "complaints [were] processed slowly, if at all," *id.* at 25, farmers found "little relief" in the Department's complaint process, "which, if anything, often ma[de] matters worse," *id.* at 22. According to the report, Department officials did little to improve the Department's record of civil rights enforcement; indeed, "during the early and mid-1980's USDA leaders had effectively dismantled USDA's civil rights apparatus," and "numerous reorganizations" since that time had left "civil rights at USDA ... in a persistent state of chaos." *Id.* at 47 (internal quotation marks omitted). Minority farmers, the report concluded, "have lost significant amounts of land and potential farm income as a result of discrimination by [USDA] programs." *Id.* at 30.

Proceeding under the Equal Credit Opportunity Act, 15 U.S.C. ss 1691-1691f, the Administrative Procedure Act, 5 U.S.C. s 706(2)(A), and Title VI of the Civil Rights Act of 1964, 42 U.S.C. s 2000d et seq., the farmers, seeking both equitable and monetary relief, allege discrimination in the Department's handling of applications and in its failure to investigate and process their discrimination complaints. Four similar suits have been filed: An action on behalf of African-American and Latino farmers was dismissed, *Williams v. Glickman*, No. 95-1149 (D.D.C. filed June 16,

1995); another action brought by a class of African-American farmers has been settled, see *Pigford v. Veneman*, 292 F.3d 918 (D.C. Cir. 2002); and actions on behalf of Latino farmers, *Garcia v. Veneman*, No. 00-2445 (D.D.C. filed Oct. 13, 2000), and female and other farmers alleging discrimination on the basis of age, sex, marital status, race, color, national origin, or

religion, *Love v. Veneman*, No. 00-2502 (D.D.C. filed Oct. 19, 2000), remain pending in district court.

In a motion for judgment on the pleadings, or in the alternative, for summary judgment, the Department argued (among other things) that the farmers' claims regarding its failure to process their complaints were actionable under neither the APA nor the ECOA. The district court denied the motion without prejudice, and the farmers moved to certify a class consisting of "[a]ll Native-American farmers and ranchers who believe that USDA discriminated against them on account of their race in their applications for, or USDA's administration of, USDA farm programs ... and who complained of that discrimination to the USDA."

Under the Federal Rules of Civil Procedure, a class can be certified if it meets Rule 23(a)'s four requirements--numerosity, commonality, typicality, and adequacy of representation--and if it falls into one of the three categories of class actions described in Rule 23(b). Fed. R. Civ. P. 23(a), 23(b); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613-16 (1997). Rules 23(b)(2) and (b)(3)--the two categories at issue in this case--have different requirements depending primarily on the nature of the relief sought. Rule 23(b)(2) certification is appropriate where plaintiffs seek declaratory or injunctive relief for class-wide injury. Such certification is particularly well-suited for civil rights actions where "a party is charged with discriminating unlawfully against a class." Fed. R. Civ. P. 23(b)(2) advisory committee notes. According to the Advisory Committee Notes, however, (b)(2) certification is not proper where "the appropriate final relief relates exclusively or predominantly to money damages." *Id.*

In contrast to Rule 23(b)(2), class certification pursuant to Rule 23(b)(3) is appropriate even where plaintiffs seek only

monetary damages so long as "questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and ... a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3). Certification pursuant to Rule 23(b)(3), however, comes with certain procedural requirements: Because members of a class seeking substantial monetary damages may have divergent interests, due process requires that putative class members receive notice and an opportunity to opt out. See Fed. R. Civ. P. 23(c)(2); *Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147, 165-66 (2d Cir. 2001). By contrast, Rule 23(b)(2) imposes no similar requirements because a class seeking primarily equitable relief for a common injury is assumed to be a cohesive group with few conflicting interests, giving rise to a presumption that adequate representation alone provides sufficient procedural protection. See *Robinson*, 267 F.3d at 165 (noting the presumption that an adequate class representative in a (b)(2) action "will generally safeguard absent class members' interests and thereby satisfy the strictures of due process").

Seeking both equitable and monetary relief, the farmers asked the district court to certify a so-called "hybrid" class: a

(b)(2) class for their equitable claims and a (b)(3) class for their monetary claims. In support of this request, the farmers relied on language in *Eubanks v. Billington*, 110 F.3d 87 (D.C. Cir. 1997), which held that district courts may grant opt-out rights in (b)(2) class actions either by certifying a (b)(3) class as to claims for monetary relief or by exercising their discretion under Rule 23(d)(5) to allow opt-outs from the (b)(2). *Id.* at 96. The district court, however, certified only a (b)(2) class and--central to this case--instead of determining whether plaintiffs' monetary claims predominate over their equitable claims, the district court limited the class to pursuing equitable relief, explaining that it lacked a sufficiently developed factual record to rule on the appropriate treatment of the monetary claims. *Keepseagle v. Veneman*, No. 99-3119, mem. op. at 36 (D.D.C. Dec. 12, 2001). Also, the class the district court certified--all Native-American farm-

ers and ranchers who filed a discrimination complaint with the Department between January 1, 1981, and November 24, 1999--was narrower than the one the farmers had sought. *Keepseagle v. Veneman*, mem. op. at 36.

Proceeding under Fed. R. Civ. P. 23(f), which allows courts of appeals, "in their discretion," to entertain interlocutory appeals of class certification decisions, the Department now mounts two challenges to the district court's class certification decision. First, the Department claims that the farmers' complaint-processing allegations fail Rule 23(a)'s commonality and typicality requirements. Second, the Department argues that the district court lacked authority to certify a (b)(2) class without first determining whether the "appropriate final relief relates exclusively or predominately to money damages." Fed. R. Civ. P. 23(b)(2) advisory committee notes.

II.

Before considering the merits of the Department's petition, we must address the farmers' argument that we lack jurisdiction because the petition was untimely. Rule 23(f) gives litigants ten days to petition the court of appeals for review of an order granting or denying class certification. In this case, the Department filed its 23(f) petition on October 12, fourteen calendar days after the district court issued its class certification order. Citing Fed. R. App. P. 26(a), which requires inclusion of all calendar days when computing filing periods, the farmers contend that the Department's petition was late.

Although we agree that the Federal Rules of Appellate Procedure govern the filing of Rule 23(f) petitions, the farmers rely on the wrong rule. Rule 5(a), which governs petitions for permission to appeal, does not refer to Rule 26(a), but instead instructs litigants to file their petitions within "the time specified by the statute or rule authorizing the appeal." In this case, the rule "authorizing the appeal" is Rule 23(f) of the Federal Rules of Civil Procedure. The civil rules have their own time-computation rule, which excludes Saturdays, Sundays, and legal holidays when "computing any period of time prescribed or allowed by [the civil] rules."

Fed. R. Civ. P. 6(a). Because Rule 23(f) is a rule of civil

procedure, Rule 6(a) governs the timing of 23(f) petitions, as every one of our sister circuits to have considered the matter has held. See *Shin v. Cobb County Bd. of Educ.*, 248 F.3d 1061, 1065 (11th Cir. 2001); see also *In re Sumitomo Copper Litig.*, 262 F.3d 134, 137 n.1 (2d Cir. 2001); *Lienhart v. Dryvit Sys., Inc.*, 255 F.3d 138, 142 n.1 (4th Cir. 2001); *Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 837 (7th Cir. 1999).

Under Rule 6(a), the petition was timely. Although the Department filed it fourteen calendar days after the district court issued its class certification order, those fourteen days included four weekend days, and $14 - 4 = 10$.

III.

This brings us to the question of whether to exercise our discretion under Rule 23(f) to entertain the Department's challenges to the district court's class certification order. In this circuit, interlocutory review of class certification decisions pursuant to Rule 23(f) is ordinarily appropriate in three circumstances: (1) when a "questionable" class certification decision creates a "death-knell situation" for either party; (2) when the certification decision presents "an unsettled and fundamental issue of law relating to class actions ... that is likely to evade end-of-the-case review"; and (3) when the certification decision is manifestly erroneous. *In re Lorazepam & Clorazepate Antitrust Litig.*, 289 F.3d 98, 105 (D.C. Cir. 2002). Even if a case falls into none of these categories, we will grant 23(f) interlocutory review in "special circumstances," though we have cautioned that such review should be "granted rarely." *Id.* at 105-06.

If the Department had challenged only the district court's application of Rule 23(a), we would have no trouble rejecting the petition, for it falls into none of the Lorazepam categories. Beginning with the first category, we do not see how the certification of a class limited to injunctive and declaratory relief can create the sort of high-stakes situation that puts "substantial pressure on the defendant to settle independent of the merits of the plaintiffs' claims." *Id.* at 102 (citing

Blair, 181 F.3d 832 at 834). The Department insists that the district court's limitation of the class to equitable relief is "irrelevant" because "this case is, at bottom, about compensatory relief for past wrongs," creating a "threat of 'hydraulic' pressure to settle." Petitioner's Reply Br. at 12. As this case now stands, however, the farmers may not seek compensatory relief, so the Department faces no possibility of a massive damage judgment. A "death knell" will come, if at all, when and if the district court authorizes the class to proceed with its monetary claims.

Nor do we see anything either novel or manifestly erroneous (the second and third Lorazepam categories) about the district court's conclusion that the farmers' allegations concerning the Department's "failure to properly process, account for, and/or investigate discrimination complaints," which "affected each class member," satisfy Rule 23(a)'s commonality and typicality requirements. *Keepseagle*, mem.

op. at 19-20. According to the Department, the farmers' complaint-processing allegations are a sham: the farmers, it says, designed those allegations "solely to manufacture the illusion of commonality" for class-certification purposes and "have no intention of actually litigating this claim." Petitioner's Opening Br. at 29-30. As the district court observed, however, nothing so far bears out the Department's dire predictions, *Keepseagle*, mem. op. at 22 n.8, and we think that the district court is in a far better position than we to evaluate claims of this sort. The Department's concern that the farmers will one day abandon their complaint-processing claim is too speculative to justify Rule 23(f) review.

In support of its challenge to the district court's 23(a) findings, the Department also argues that the farmers' complaint-processing claim is actionable under neither the ECOA nor the APA. But this argument, which the Department also made in its unsuccessful motion for judgment on the pleadings, has no bearing on the question of class certification. As the Supreme Court has long held, courts may not examine whether "plaintiffs have stated a cause of action or will prevail on the merits" in order to determine whether class certification is appropriate. *Eisen v. Carlisle & Jacquelin*,

417 U.S. 156, 178 (1974) (internal quotation marks and citation omitted). To entertain the Department's claims concerning ECOA and APA coverage, now dressed up as challenges to class certification, would "inappropriately mix the issue of class certification with the merits." *Lorazepam*, 289 F.3d at 107.

The Department's challenge to the district court's application of Rule 23(b) presents a closer question. According to the Department, the district court lacked authority to certify only some of the plaintiffs' claims while leaving the rest "in limbo--not dismissed, but merely deferred." Petitioner's Reply Br. at 27. Unlike the other questions the Department raises in its petition, the question of whether district courts may certify a (b)(2) class solely for purposes of equitable relief without first determining if plaintiffs' claims for monetary relief predominate over their equitable claims is both unsettled--we know of no circuit that has addressed that issue--and fundamental. It is not, however, likely to evade end-of-the-case review. And while we might nonetheless regard the case as presenting "special circumstances," *Lorazepam*, 289 F.3d at 106, we think the question inappropriate for 23(f) review because the parties have failed to raise the issues critical to its resolution.

Rule 23(c)(4)(A), which authorizes certification of class actions "with respect to particular issues," would at first glance seem to provide authority for the district court's order in this case. The issue, however, is not so clear. To begin with, Department counsel pointed out at oral argument that the Advisory Committee Notes to Rule 23(b)(2) provide that certification "does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages." Fed. R. Civ. P. 23(b)(2) advisory committee notes (emphasis added). If by using the word "cases," the Advisory Committee meant to refer to the entire set of issues that a

complaint raises, then partial certification under 23(c)(4)(A) could occur only after the district court makes the (b)(2) predominance determination. But if, as counsel for the farmers contended at oral argument, the phrase "appropriate final relief," not the word "cases," functions as the operative portion of the Advisory Committee Notes, then where the district court limits the class to seeking injunctive and declar-

atory relief (as the district court did here), the appropriate final relief in the "case" is equitable, not monetary.

More important, the introduction to subsection (c)(4) provides that certification "with respect to particular issues" may be ordered only "where appropriate." As the court observed at oral argument, whether partial certification is "appropriate" turns at least in part on its effect on two concerns surrounding Rule 23 class actions: first, how class certification affects the due process rights of absent class members to have their own day in court, and second, whether parties are bound to the judgment. As to the first point, the Supreme Court established in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), that (1) before a court can bind absent class members "concerning claims wholly or predominantly for money damages," due process requires that they receive adequate notice and an opportunity to opt out of the action, *id.* at 811-13, and (2) the defendant in such an action has a right ("standing") to demand that adequate notice be given to class members, so as to avoid a situation where the defendant would be bound by a loss yet class members would not be bound by its win, *id.* at 804-06. To complicate matters further, the Supreme Court has expressly left open the question of whether a judgment in a no-opt-out class action (like the one the district court certified here) can ever preclude absent class members from bringing their own individual lawsuits for monetary damages. *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117 (1994) (*per curiam*) (raising, without deciding, the question of whether due process forbids enforcing a class-action judgment against an absent plaintiff who wishes to bring her own individual lawsuit for money damages, where the class was properly certified as a no-opt-out class action). Second, the constitutional concerns raised in *Shutts* and *Ticor* may also implicate the concerns underlying Rule 23. The drafters of the 1966 amendments, which gave rise to the rule as we know it today, were concerned with the binding effect of class actions and the due process protections required for parties to be bound. Fed. R. Civ. P. 23 advisory committee notes (noting the need to "assure procedural fairness, particularly giving notice to members of the class, which

may in turn be related in some instances to the extension of the judgment to the class"). They drafted the rule to clarify that "all class actions maintained to the end as such will result in judgments including those whom the court finds to be members of the class, whether or not the judgment is favorable to the class." *Id.*

Because of the importance of these issues to the interpretation of Rule 23 and because their implications for this case are entirely unbriefed, we think it best to decline to exercise our Rule 23(f) discretion to consider the Department's argu-

ments at this time. Following full briefing in the district court and any revised order issued by that court, the Department remains free to seek appellate review, either in another 23(f) petition or otherwise.

The Department's petition is denied.

So ordered.

EXHIBIT 2

SILVESTRE REYES
18TH DISTRICT, TEXAS

COMMITTEE ON ARMED SERVICES

SUBCOMMITTEE ON
MILITARY INSTALLATIONS AND FACILITIES

SUBCOMMITTEE ON
MILITARY RESEARCH AND DEVELOPMENT

SPECIAL OVERSIGHT PANEL ON TERRORISM

COMMITTEE ON VETERANS' AFFAIRS

RANKING MEMBER
SUBCOMMITTEE ON BENEFITS

PERMANENT SELECT COMMITTEE
ON INTELLIGENCE

CONGRESSIONAL HISPANIC CAUCUS
CHAIRMAN



Congress of the United States
House of Representatives
Washington, DC 20515

WASHINGTON OFFICE:
1527 LONGWORTH HOUSE OFFICE BUILDING
WASHINGTON, DC 20515
(202) 225-4831
FAX: (202) 225-2016

DISTRICT OFFICE:
310 NORTH MESA, SUITE 400
EL PASO, TX 79901
(915) 534-4400
FAX: (915) 534-7426

<http://www.house.gov/reyes/>

November 7, 2002

The Honorable Ann Veneman
Secretary
United States Department of Agriculture
1400 Independence Avenue, S.W.
Room 200A
Washington, D.C. 20250

Dear Secretary Veneman:

As you know, Mr. Edward Provencio is a member of the putative class in the pending class action lawsuit between the United States Department of Agriculture (USDA) and Hispanic farmers (*Garcia vs. Veneman*).

It has been brought to my attention that Mr. Provencio and other Hispanic farmers (Lupe Garcia; Gilbert Garcia; G.A. Garcia; George Provencio; Alfred Provencio; and Alberto Acosta) are having difficulty obtaining copies of their Farm Services Agency (FSA) loan files. Mr. Provencio was told by Ms. Georgia Perry, the District Director in the Las Cruces, N.M. FSA office, that his and numerous other FSA loan files were sent to the USDA Washington D.C. office in 2001. None of the individuals listed above whose files were sent to Washington D.C. have been able to receive copies of these files. Furthermore, Mr. Provencio was recently told by Mr. Jim Eichhorst, Director of External Affairs for the FSA, that "no record exists." This statement concerns me, and I would appreciate your verification of the existence of these important loan files.

Second, even though Mr. Provencio made a Freedom of Information Act (FOIA) request to gain access to his loan file, I believe that he and the other farmers referenced in this letter do not need to file FOIA requests to obtain this information. They have the right to receive copies of their files and in fact, an existing Farmers Home Administration (FmHA) instruction states: "Borrowers are not required to submit a Privacy Act or FOIA request to review the information in their own files. Borrowers may review or copy their files in accordance with FmHA Instruction 2015-E, which is based on the Privacy Act of 1974 (5 U.S.C. 552a). It is FSA policy to provide one (1) copy of a borrower's file at no cost."

Finally, I am supportive of Mr. Provencio's FOIA appeal (attached), and believe that he and the other farmers referenced in this letter should be given copies of their FSA loan files as soon as

possible. I respectfully request a response regarding the status of making the FSA loan files available to them, as well as verification of the existence of these files. In addition, I would like to know the steps farmers need to take to gain access and obtain copies of their FSA loan files. If I can be of further assistance, please feel free to contact me or my Senior Legislative Assistant, Philip LoPiccolo. Your attention to this matter is greatly appreciated.

Sincerely,

A handwritten signature in black ink, appearing to read "Silvestre Reyes", with a horizontal line extending to the right.

Silvestre Reyes
Member of Congress

CSR/ppl

October 31, 2002

Mr. Edward Provencio
P.O. Box 38
Chamberino, NM 88027

Administrator
United States Department of Agriculture
Farm Services Agency, Stop Code 0501
1400 Independence Avenue, SW
Washington, DC 20250-0501

RE: Freedom of Information Act Appeal (FSA FOIA/PA 2002-0343)

Dear Administrator:

I am in receipt of an October 15, 2002 letter from Jim Eichhort, of the USDA FOIA Unit, regarding my August 15, 2002 FOIA request for a copy of my FSA loan file. In the October 15, 2002 letter, Mr. Eichhorst stated that the Civil Rights and Small Business Utilization Staff has searched records that are responsive to my request and have determined that no records exist. I am asserting my right to appeal this finding. I know for a fact and have been told on several occasions by Georgia Perry, the farm loan director in the Dona Ana County Las Cruces FSA office, that my file was sent to the USDA's Washington, DC Office of Civil Rights in 2001. I have made numerous requests for a copy of my FSA file and have always been given the same answer: "your file is in the USDA's Washington, DC office."

In 2001, Tony Califa from the USDA's Office of Civil Rights came to Las Cruces New Mexico to investigate numerous complaints of discrimination taking place in the local FSA office. Mr. Califa had all the files of individuals who had pending administrative complaints transferred to the USDA's Washington DC office. On October 15, 1999, I filed a discrimination complaint with the USDA's Office of Civil Rights. My administrative complaint number is 1017165. My file was one of the many files sent to the USDA's Washington DC office at Mr. Califa's request. I know for a fact that my administrative complaint file is in Washington DC. I also know that the administrative complaint file is missing my FSA loan documents. I would like to know why I am being told that my file is no longer in existence. This is a matter of grave concern and I expect the utmost care in resolving this issue. I am currently receiving letters from the FSA Kansas office threatening future foreclosure on my farm. I need a copy of my complete loan file in order to put a stop to these types of letters during my administrative appeal. I am troubled that the USDA has lost my loan file within a year of it being transferred to the USDA's Office of Civil Rights in Washington DC. This is further proof of the discriminatory treatment Hispanic farmers are faced with every day at the hands of the USDA. I expect a prompt reply and investigation into my FOIA appeal.

Sincerely,



Edward Provencio

cc: Secretary Ann Veneman
Senator Pete Domenici
Senator Jeff Bingaman
Representative Joe Skeen

UNITED STATES DEPARTMENT OF AGRICULTURE
Farm Service Agency
P.O. Box 2415
Washington, DC 20013-2415

Notice FC-76
2015-E

For: State and County Offices

OCT 15

Access to Information in a Borrower's Case File Upon Request

Approved by: Deputy Administrator, Farm Credit Programs

Carolyn B. Potholke

1 Overview

A Background

There has apparently been some confusion about FSA's policy regarding borrowers' access to information in their case files.

B Purpose

This notice provides general guidance concerning a borrower's access to information in his or her case file.

2 Allowing Access to Case Files

A Access

Borrowers are not required to submit a Privacy Act or FOIA request to review the information in their own files. Borrowers may review or copy their files in accordance with FmHA Instruction 2015-E, which is based on the Privacy Act of 1974 (5 U.S.C. 552a). It is FSA policy to provide 1 copy of a borrower's file at no fee.

Continued on the next page

<p>Disposal Date</p> <p>December 1, 1996</p>	<p>Distribution</p> <p>State Offices; State Offices relay to County Offices</p>
---	--

Notice FC-76

2 Allowing Access to Case Files (Continued)

**B
Exemptions**

Confidential information **should not** be provided to the borrower under the Privacy Act. The information compiled in reasonable anticipation of a civil action or proceeding should be placed in an envelope marked "confidential" and removed from the case file before being reviewed by the borrower.

Confidential information may include records such as:

- appraisal reports prepared for foreclosure proceedings
- tort claim files
- investigative reports from OIG
- other communications with OIG or OGC.

Notes: It is not sufficient to cite a Privacy Act exemption alone to withhold information from the subject of the record. The head of the records holding office must also cite an appropriate exemption under FOIA to withhold information from a borrower seeking his or her own records.

Confidential information would generally be exempt from release under 1 or more FOIA exemptions, in accordance with 2-INFO.

Additional guidance should be obtained from FmHA Instruction 2015-E and 2-INFO before releasing or denying access to ensure that proper procedures are followed and appropriate appeal rights are provided if the request is denied.

Until otherwise instructed, follow FmHA Instruction 2015-E and 2-INFO when reviewing Privacy Act requests.

**C
Questions**

Direct questions concerning access to, and release of, borrower information to the appropriate State Office representative (such as the Administrative Officer or FOIA Officer).

o/s Jennifer



United States
Department of
Agriculture

Farm and Foreign
Agricultural
Services

Farm Service
Agency

Legislative Liaison,
Executive
Secretariat and
Public Affairs

Freedom of
Information &
Privacy Act
(FOIA/PA) Unit

1400 Independence
Avenue, SW
Stop 0506
Room 3623-S
Washington, DC
20250-0506

FSA FOIA/PA 2002-0343

OCT 15 2002

Mr. Edward Provencio
P.O. Box 38
Chamberino, New Mexico 88027

Dear Mr. Provencio:

This responds to your Freedom of Information Act/Privacy Act (FOIA/PA) request dated August 15, 2002, to the United States Department of Agriculture (USDA), New Mexico State Farm Service Agency (FSA) Office. The New Mexico State FSA Office has referred your request to the FOIA/PA Office in Washington, DC. The FSA FOIA/PA Office received a copy of your request on August 27, 2002.

Your requested a copy of your file regarding your FSA loans and/or benefits.

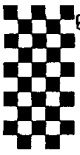
Our Civil Rights and Small Business Utilization Staff (CRSBUS) has searched for records that are responsive to your request, and have determined that no records exist.

You may appeal this determination within 45 days of receipt of this letter. Both the letter and the envelope should be clearly marked "Freedom of Information Act Appeal." The address is:

Administrator
United States Department of Agriculture
Farm Service Agency, Stop Code 0501
1400 Independence Avenue, SW
Washington, DC 20250-0501

Sincerely,

Jim Eichhorst
Director
Office of External Affairs



QH Jennifer

United States
Department of
Agriculture

Farm and Foreign
Agricultural
Services

Farm Service
Agency

Legislative Liaison,
Executive
Secretariat and
Public Affairs

Freedom of
Information &
Privacy Act
(FOIA/PA) Unit

1400 Independence
Avenue, SW
Stop 0506
Room 3623-S
Washington, DC
20250-0506

FSA FOIA/PA 2002-0343

SEP 24 2002

Mr. Edward Provencio
P.O. Box 38
Chamberino, New Mexico 88027

Dear Mr. Provencio:

This responds to your Freedom of Information Act/ Privacy Act (FOIA/PA) request dated August 15, 2002, to the United States Department of Agriculture (USDA), New Mexico State FSA Office. The New Mexico State FSA Office has referred your request to the FSA in Washington, DC. The FSA FOIA/PA Office received a copy of your request letter on August 27, 2002.

This letter is an acknowledgement of receipt of your FOIA/PA request for information from the USDA-FSA. Please refer to the above FOIA number assigned to your request in any additional correspondence.

The FSA FOIA/PA Office processes cases on "first in, first out" basis. The Federal courts approved this first-in, first-out principle in the case of Open America v. Watergate Special Prosecution Force, 547 F.2d 605 (D.C. Cir. 1976). The actual processing time will depend upon the complexity of the request and whether or not it involves sensitive or voluminous records, extensive searches and/or consultations, and administrative backlog.

Additionally, I must advise you that, in accordance with Department of Agriculture regulations Title 7, CFR, Appendix A, to Subpart A, § 4, your request is deemed to constitute an agreement to pay any fees that may be chargeable up to \$25.00. Fees may be charged for searching for records sought at the respective clerical, professional, and/or managerial rates of \$2.50/\$5.00 per quarter hour, and for duplication of copies at the rate of \$.20 per copy. The first 100 copies and two hours of search time are not charged, and the remaining combined charges for search and duplication must exceed \$25.00 before we will charge you any fees.

Sincerely,

Jim Eichhorst
Director
Office of External Affairs

Today's Date: August ___ 2002

Dear Farm Service Agency Manager:

Please provide us with a copy of our entire individual FSA file. We would like a copy of ALL documents in our individual file regarding our FSA loan and/or benefit application(s).

We thank you for your assistance.

Alfred Provencio
P.O. Box 243
Chamberino, NM 88027
505-496-8274

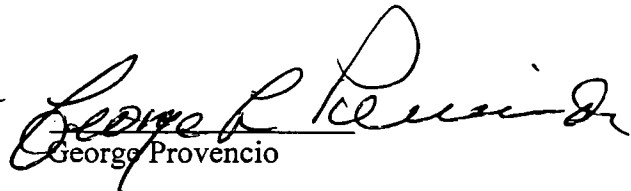
Edward Provencio
P.O. Box 38
Chamberino, NM 88027
505-523-7433

George Provencio
2208 West Washington
Anthony, NM 88021
505-882-2334

Sincerely,


Alfred Provencio


Edward Provencio


George Provencio

cc: Paul Gutierrez, State Executive Director
Christian Andersen, Acting Farm Loan Chief

EXHIBIT 3

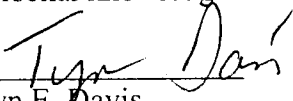
Declaration of Tyn E. Davis

I, Tyn E. Davis, hereby state and declare the following:

1. I am over 18 years of age, a U.S. citizen and a Hispanic American. My date of birth is June 08, 1961. My mailing address is P.O. Box 751, Fort Hancock, Texas, 79839.
2. In 1998, I was forced to file a chapter 12 reorganization bankruptcy to save my farm. The circumstances surrounding my bankruptcy are linked to the discriminatory treatment I received by William McAnally, the farm loan manager at the El Paso Farm Service Agency ("FSA").
3. In early July 2002, I was advised by the FSA, that I was eligible again to participate in the USDA cotton subsidy program. I have been participating in this program since its inception in 1996. Because of this program, I have been able to maintain my farm and make all of my bankruptcy payments on time.
4. On July 11, 2002, I signed a declaration chronicling my interactions with Mr. McAnally and his attempts to foreclose on my farm. This declaration was used as an exhibit to a Motion for Class Certification submitted to the Washington D.C. District Court on July 17, 2002. Prior to signing my declaration, I had already been advised of my eligibility to participate in the Cotton Subsidy program.
5. On September 25, 2002, I attended a hearing on Capitol Hill regarding the treatment of minority farmers by the USDA. During this hearing, Chairman Goodlatte read my declaration into the hearing record. Chairman Goodlatte ordered an investigation of the allegations made in my declaration.
6. On Sunday October 13, 2002, the Houston Chronicle ran a story highlighting my treatment by Mr. McAnally and the El Paso FSA office.
7. I am currently harvesting my cotton crop. On Friday October 11, 2002, I went to my cotton broker, the Southwestern Irrigated Cotton Growers Association ("SWIG"), to make arrangements for delivery of my cotton crop. At this time I was informed by SWIG that they had received a letter from the El Paso FSA office indicating that I was no longer eligible to participate in the cotton subsidy program because I had previously filed a bankruptcy. SWIG indicated to me that this was the first time anyone was ever eliminated from a program due to a bankruptcy.

8. I filed for bankruptcy over five years ago, and every year until now, I was eligible to participate in the cotton subsidy program. I went to the El Paso office to see why they had eliminated me. I was unable to talk with Mr. McAnally. While I was at the El Paso office, an FSA employee told me that Mr. McAnally had told them to make me ineligible for the program. Clearly this was an act of retaliation for my participation in the Garcia Hispanic farmers lawsuit, and my July 11, 2002 signed declaration.
9. Currently, the price of cotton used for advancing loans by SWIG is 54 to 55 cents per pound, which includes a subsidy of 25 cents per pound. Without the corn subsidy program, I will lose approximately \$100,000. My farming operations can not sustain a loss like this and I will lose my farms. Mr. McAnally's harassment and retaliation will have the effect of driving me out of farming. Farming is in my blood, and this will ruin me.
10. I believe that Mr. McAnally and the USDA have retaliated against me because I am Hispanic and a member of the Garcia class action lawsuit.

I have reviewed the foregoing Declaration, consisting of (10) Ten numbered paragraphs, and declare, under penalty of perjury that it is true and correct and to the best of my personal knowledge.


Tyn E. Davis



Date

EXHIBIT 4

SILVESTRE REYES
16TH DISTRICT, TEXAS
COMMITTEE ON ARMED SERVICES

SUBCOMMITTEE ON
MILITARY INSTALLATIONS AND FACILITIES
SUBCOMMITTEE ON
MILITARY RESEARCH AND DEVELOPMENT
SPECIAL OVERSIGHT PANEL ON TERRORISM
COMMITTEE ON VETERANS' AFFAIRS

RANKING MEMBER
SUBCOMMITTEE ON BENEFITS
PERMANENT SELECT COMMITTEE
ON INTELLIGENCE
CONGRESSIONAL HISPANIC CAUCUS
CHAIRMAN



Congress of the United States
House of Representatives
Washington, DC 20515

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1527 LONGWORTH HOUSE OFFICE BUILDING
WASHINGTON, DC 20515
(202) 225-4831
FAX: (202) 225-2018

DISTRICT OFFICE:
310 NORTH MEA, SUITE 400
EL PASO, TX 79901
(915) 534-1100
FAX: (915) 534-7426

<http://www.house.gov/rreyes/>

October 18, 2002

The Honorable Ann Veneman
Secretary
United States Department of Agriculture
1400 Independence Avenue, S.W.
Room 200A
Washington, D.C. 20250

Dear Secretary Veneman:

Yesterday, I received the enclosed letter from Stephen S. Hill, one of the attorneys who is representing the plaintiffs in the pending class action lawsuit between the United States Department of Agriculture (USDA) and Hispanic farmers (Garcia vs. Veneman). Mr. Davis, the cotton farmer who is referenced in the letter, is one of my constituents.

The letter raises an issue of retribution towards Mr. Davis due to his testimony on September 25, 2002, during hearings before the House Agriculture Committee, Subcommittee on Department Operations, Oversight, Nutrition and Forestry. The letter states that Mr. Davis is being denied participation in the cotton subsidy program due to the actions of Mr. McAnally, a Farm Services Agency (FSA) loan officer stationed in Ft. Stockton, Texas.

I would greatly appreciate you addressing this issue and responding back to me by close of business next Wednesday. The resolution of this issue is critical due to the fact that Mr. Davis needs his subsidy payments in order to harvest his cotton during November. If I can provide any assistance, please feel free to contact me or my Senior Legislative Assistant, Philip LoPiccolo. I appreciate your attention to this matter.

Sincerely,


Silvestre Reyes
Member of Congress

CSR/ppl



1299 PENNSYLVANIA AVE., NW
WASHINGTON, DC 20004-2402
PHONE 202.783.0800
FAX 202.383.6610
A LIMITED LIABILITY PARTNERSHIP

STEPHEN S. HILL
PARTNER
202.383.6967
hillstephen@howrey.com

October 17, 2002

HAND DELIVERY

Honorable Bob Goodlatte
Chairman
Committee on Agriculture
Subcommittee on Department Operations
Oversight, Nutrition, and Forestry
2240 Rayburn House Office Building
Washington D.C. 20515-4602

Re: Tyn Davis and Garcia v. Veneman

Dear Chairman Goodlatte:

We are writing on behalf of Mr. Tyn Davis one of the plaintiffs in the class action pending in the United States District Court for the District of Columbia styled *Garcia v. Veneman*, CA. No. 1:00CV 2445 to bring to your attention an egregious case of harassment and retaliation by the United States Department of Agriculture ("USDA") against Mr. Davis. As you may recall, during the hearings before your subcommittee on September 25, 2002 you read into the record portions of Mr. Davis' July 11, 2002 declaration in which Mr. Davis described the discrimination he encountered at the hands of Mr. McAnally of the Farm Service Agency ("FSA") in Ft. Stockton, Texas, once Mr. McAnally learned that Mr. Davis was part Hispanic. (A copy of that declaration is enclosed for your convenience.) After reading the declaration into the record, you ordered USDA to investigate the situation and report back to you.

Mr. Davis recently learned that Mr. McAnally has instructed FSA to withdraw Mr. Davis from participation in the cotton subsidy program. Inasmuch as Mr. Davis is just now beginning to harvest his cotton, the effect of Mr. McAnally's action is potentially devastating. The facts are as follows: In or about July 2002, Mr. Davis was advised by FSA that he was eligible again this year to participate in the cotton subsidy program. He has been participating in the subsidy program for many years. Indeed, his participation in the subsidy program both pre-date and post-date a reorganization in bankruptcy, which Mr. Davis filed approximately six years ago. (Mr. Davis is current in all of his reorganization plan payments.)

On July 11, 2002, Mr. Davis executed the declaration which was filed with the Court and served upon USDA on July 17, 2002 as part of Plaintiffs' Second Supplemental Memorandum In Support Of Their Motion For Class Certification. Approximately one month later on August 14, 2002, FSA apparently notified Mr. Davis' cotton broker, the Southwestern Irrigated Cotton

Growers Association ("SWIG") that Mr. Davis was no longer eligible to participate in the cotton subsidy program. Mr. Davis did not learn of the FSA's action until he was informed by SWIG last Friday as he was preparing to harvest his cotton.

Upon inquiring as to the reason for this sudden turn of events, Mr. Davis was told by FSA personnel that Mr. McAnally had instructed FSA to declare Mr. Davis ineligible to participate in the subsidy program. The ostensible reason given was that Mr. Davis had previously filed for bankruptcy reorganization. Significantly that fact had never disqualified Mr. Davis from participation in the program in any of the prior years subsequent to his bankruptcy filing approximately six years ago. In that connection, we have spoken with Jack Langenegger, Vice President Member Relations, and Gill Jones, Senior Vice President Administration and Operation of SWIG, who have advised us that in their years of working with the subsidy program, this is the first time a farmer has been denied participation in the subsidy program because of a prior bankruptcy filing.

Currently, the price of cotton used for advancing loans by SWIG is 54 to 55 cents per pound, which includes a subsidy of 25 cents per pound. As a result of Mr. McAnally's harassment and retaliation, Mr. Davis stands to lose 25 cents a pound on this cotton the year or approximately \$100,000. Suffice it say that such a loss would be devastating to Mr. Davis and could well drive him out of farming. We think that there is simply no place in society for this type of blatant and wanton discrimination and retaliation against a farmer who has only sought to affirm his right to equal and fair treatment by USDA. We implore you to use your good offices to see to it that this injustice is immediately corrected and Mr. Davis is not further penalized for trying to seek equal treatment. In that connection, we note that while SWIG has been fully cooperative and is sympathetic to Mr. Davis' plight, SWIG advises us that there is about a two week window in which to resolve this matter before there are potential adverse financial consequences for it. After that, SWIG will be forced to process Mr. Davis' loan without the benefit of the subsidy payment to which he is clearly entitled.

Let us take this opportunity to thank you in advance for any assistance that you and your colleagues on the Committee and in Congress can give us on this matter. If you have any questions or need my further information, please do not hesitate to call us.

Respectfully,


Stephen S. Hill

Enclosure:

Honorable Bob Goodlatte
October 17, 2002
Page 3

cc: Honorable Eva Clayton
Honorable Charles W. Stenholm
Honorable Sylvestre Reyes
Honorable Joe Baca
Honorable Larry Combest

EXHIBIT 5

Congress of the United States
Washington, DC 20515

October 30, 2002

The Honorable Ann Veneman
Secretary
United States Department of Agriculture
Jamie L. Whitten Building
12th and Jefferson Streets, S.W.
Washington, DC 20250

Re: Tyn Davis and Garcia v. Veneman

Dear Secretary Veneman:

We are writing on behalf of Mr. Tyn Davis, one of the plaintiffs in the *Garcia v. Veneman* class action pending in the United States District Court for the District of Columbia, to request that you investigate what we believe to be a likely case of harassment and retaliation by the United States Department of Agriculture. We also request that you report to us in writing by December 1 the result of your investigation and the steps you have taken or will take to insure that an incident such as this is not repeated.

As you no doubt recall, on September 25, 2002, the House Agriculture Subcommittee on Department Operations, Oversight, Nutrition and Forestry conducted hearings on the treatment of minority farmers by the USDA. During the hearings, Chairman Goodlatte read into the record portions of Mr. Davis' July 11, 2002 declaration. In his declaration, Mr. Davis described the discrimination he encountered at the hands of Mr. McAnally of the Farm Service Agency in Ft. Stockton, Texas after Mr. McAnally learned that Mr. Davis was part Hispanic. As parties aware of and interested in issues pertaining to civil rights discrimination at the Department of Agriculture, we are dismayed that such conduct could still be occurring.

The facts, as reported by Mr. Davis and his legal counsel at Howrey and Simon, are as follows: In or about July 2002, Mr. Davis was advised by FSA that he was eligible again this year to participate in the USDA cotton marketing loan program, in which he had been participating for a number of years. Indeed, his participation in the subsidy program both pre-dates and post-dates a reorganization in bankruptcy that Mr. Davis filed approximately six years ago. (Mr. Davis is current in all of his reorganization plan payments.)

On July 11, 2002, Mr. Davis executed the declaration which was filed with the Court and served upon USDA on July 17, 2002 as part of Plaintiffs' Second Supplemental Memorandum In Support Of Their Motion For Class Certification. Approximately one month later on August 14, 2002, FSA apparently notified Mr. Davis' cotton broker, the Southwestern Irrigated Cotton Growers Association, that Mr. Davis was no longer eligible to participate in the cotton program. Mr. Davis did not learn of the FSA's action until he was informed by SWIG on October 11, 2002, as he was preparing to harvest his cotton.

Upon inquiring as to the reason for this sudden turn of events, Mr. Davis was told by FSA personnel that Mr. McAnally had instructed FSA to declare Mr. Davis ineligible to participate in the cotton program. The reason given was that Mr. Davis had previously filed for bankruptcy reorganization, a fact which had not affected his participation in the program after his bankruptcy filing 6 years ago. Jack Langenegger, Vice President of Member Relations, and Gill Jones, Senior Vice President for Administration and Operation of SWIG, advised Mr. Davis that in their years of working with the program, this was the first time a farmer had been denied participation in the program because of a prior bankruptcy filing.

Once this situation was brought to our attention, several congressional offices contacted your office and demanded to know why Mr. Davis was removed from the cotton program. On October 21, 2002, Congressman Reyes' office was contacted by your office and informed that the removal of Mr. Davis from the cotton program had been due to a "computer glitch" and that Mr. Davis was now back in the program.

We are pleased to hear that Mr. Davis is back in the cotton program; however, we feel that this matter warrants further investigation. We are concerned that Mr. Davis is a victim of retaliation by Mr. McAnally and the USDA for his involvement in the Garcia lawsuit. If this is true, there is simply no place for this type of blatant and wanton discrimination and retaliation against a farmer who has only sought to affirm his right to equal and fair treatment by USDA. We implore you to see to it that Mr. Davis and other minority farmers are not further penalized for trying to seek equal treatment.

In that connection, we request that you conduct a full investigation into this matter. Particularly, we request a full explication of the facts and circumstances surrounding the determination that Mr. Davis was ineligible to participate in the cotton subsidy program and Mr. McAnally's role, if any, in that determination. We would like to request the following information:


- What was the exact nature of the so-called "computer glitch" that resulted in Mr. Davis being declared ineligible to participate in the cotton subsidy program?
- If it was indeed a "computer glitch", why did FSA personnel tell Mr. Davis that Mr. McAnally had instructed FSA to declare Mr. Davis ineligible to participate in the cotton subsidy program due to a bankruptcy filing six years earlier?
- If it was indeed a computer glitch, how many other farmers seeking loans through the El Paso FSA office in question were subject to the same problem and has there been a restoration of their rights?
- How do you explain the varying explanations given for the suspension of Mr. Davis from cotton program participation? Why was Mr. Davis told by FSA personnel that Mr. McAnally was responsible for Mr. Davis' being declared ineligible to participate in the cotton subsidy program when USDA has communicated to Congressman Reyes that the suspension was due to computer error?
- Given the extensive time devoted during the September 25th subcommittee hearing to the issue of the appropriate investigation of civil rights complaints as well as the lack of disciplinary action taken by USDA against employed accused of discrimination, are you taking particular care to investigate this incident?
- If an investigation finds that Mr. Davis was subject to discrimination and disparate treatment due to his status as a participant in the Garcia v. Veneman suit, what do you believe would be appropriate disciplinary action against the offending employees?
- In light of what we understand to be Mr. McAnally's long history of antagonism toward Hispanic farmers and ranchers (see attachment 2), has the USDA undertaken an investigation into Mr. McAnally's serial discrimination?

Discriminatory conduct against minority farmers and ranchers embarrasses USDA, provokes litigation, and wastes taxpayer resources. USDA's failure to deal with such problem employees suggests that significant

problems exist in FSA offices throughout the country. Until incidents such as this are treated with the requisite seriousness and vigilant oversight, the long-entrenched problem will remain just that.

We look forward to your prompt attention to this matter and request a written report by December 1, 2002 setting forth the results of your thorough investigation into this matter. You will see from attachment #1 that Mr. Davis has authorized the release of records pertaining to this matter. If you have any questions or need further information, please do not hesitate to contact us.

Sincerely,

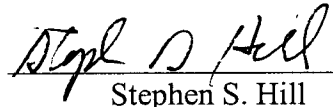

Eva Clayton
Member of Congress


Silvestre Reyes
Member of Congress

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Plaintiffs' Motion To Lift The Stay On Discovery, To Adopt A Discovery Plan, To Require Defendant To Preserve All Conceivably Relevant Documents And Tangible Things During The Pendency Of This Case was served by hand delivery, this 15th day of November, 2002 upon the following:

Michael Sitcov, Esquire
Lisa Olson, Esquire
UNITED STATES DEPARTMENT OF JUSTICE
Civil Division
20 Massachusetts Ave., N.W.
Room 6118
Washington, DC 20530



Stephen S. Hill