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

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| **ROSEMARY LOVE, *et al.*,** | |
| **Plaintiffs,** | |
| **vs.** | **Case No. -8010** |
| | **(Civ. No. 00-2502 (JR))** |
| **ANN VENEMAN, SECRETARY, UNITED STATES DEPARTMENT OF AGRICULTURE,** | |
| **Defendant.** | |

**PLAINTIFFS' PETITION FOR PERMISSION TO TAKE AN INTERLOCUTORY APPEAL PURSUANT TO FED. R. CIV. P. 23(F)**

Plaintiffs respectfully petition this Court pursuant to Fed. R. Civ. P. 23(f) and Fed. R. App. P. 5 for permission to appeal an interlocutory order of the District Court that denied Plaintiffs' Motion for Class Certification that was entered on September 29, 2004.[1]

**PRELIMINARY STATEMENT**

In their Petition for Appeal, Plaintiffs request that this Court review certain erroneous legal findings made by the District Court when it denied Plaintiffs' Motion for Class Certification. This Court should consider this appeal now rather than waiting for final judgment on the remaining portion of the case because of the grave impact this ruling will have on thousands of litigants who have brought, are bringing, or will bring class actions in this Circuit. By this appeal, Plaintiffs seek clarification of the class certification requirements in light of the

[1] The Memorandum Order Denying Class Certification, entered on September 29, 2004 ("Opinion" or "Op."), is attached as Addendum 1.

differing rulings in similar cases within this Circuit that have resulted in dissimilar decisions and that will confuse litigants.

Currently, there are materially inconsistent decisions within this Circuit relating to the requirements for class certification. To date, the district court for the District of Columbia has ruled on motions for class certification in four different cases that each allege that the United States Department of Agriculture ("USDA") has wrongfully discriminated against loan applicants and borrowers: *Pigford v. Glickman,* 185 F.R.D. 82 (D.D.C. 1999) (Friedman, J.) (discrimination against African American farmers); *Keepseagle v. Veneman,* C.A. No. 99-03119 (Sullivan, J.) (discrimination against Native American farmers); *Garcia v. Veneman,* C.A. No. 00-2445 (Robertson, J.) (discrimination against Hispanic farmers); and the instant matter, *Love v. Veneman,* C.A. No. 00-2502 (Robertson, J.) (discrimination against women farmers).[2]

Despite the similarities among these four cases, the district court rulings with respect to class certification have differed significantly. In *Pigford* and *Keepseagle,* the district court determined that the plaintiffs met the requirements of Rule 23 and granted class certification. *See Pigford,* 182 F.R.D. 341, 349, 351 (D.D.C. 1998); *Keepseagle,* Memorandum Op. (Dec. 12, 2001), attached as Addendum 3, at 18-26.[3] But in the *Garcia* and *Love* cases, the District Court found that the requirements of Rule 23 were not met, indeed could not be met, and denied class

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[2] In *Love*, Plaintiffs' Third Amended Complaint (Apr. 14, 2003), attached as Addendum 2, at 3, sets forth three distinct subclasses of women farmers who were discriminated against by USDA in obtaining farm loans on the basis of their gender. Those three subclasses are: (1) women who were denied loan applications because of gender discrimination; (2) women who applied for loans but never received them because of gender discrimination; and (3) women who obtained at least one farm loan but who experienced delays in receiving the loans or difficulty in obtaining loan servicing or were discriminatorily refused other loans.

[3] After certification was granted in *Pigford,* the case settled and this Court approved the consent decree. *Pigford v. Glickman,* 206 F.3d 1212, 1212 (D.C. Cir. 2000). As for *Keepseagle,* after the class was provisionally certified under Rule 23(b)(2), this Court denied USDA's petition for permission to appeal under Rule 23(f). *See In re Veneman,* 309 F.3d 789, 796 (D.C. Cir. 2002).

certification.[4] Moreover, in another recent class certification decision within this Circuit, *McReynolds v. Sodexho Marriott Servs., Inc.*, 208 F.R.D. 428 (D.D.C. 2002), the district court rejected the argument that a nationwide class could not be certified because of decentralized decision-making, the same argument that the District Court found persuasive in the *Love* and *Garcia* cases. These conflicting decisions illustrate the uncertainty now existing in this Circuit with regard to the application of class certification requirements.

The District Court's Opinion in the instant matter is at odds with other class certification decisions in this Circuit on three discrete points: (1) decentralized decision-making at a local level does not preclude a finding of commonality as required by of Rule 23(a); (2) the standard for subjective decision-making for the purpose of Rule 23(a) commonality does not require that the criteria be completely subjective; and (3) monetary damages do not predominate in light of the significant injunctive relief requested. Without this Court's immediate intervention and guidance, confusion about the law in this Circuit on these issues will proliferate. Moreover, without an immediate review of the District Court's rulings and an articulation of the requirements in this Circuit, claimants in this and other cases will be litigating for years without knowing the Rule 23 standards that will ultimately be adopted by this Court. As a result of the split within the Circuit, it is critical that this Court review the issues raised in Plaintiffs' Petition to Appeal at this time.

## I. QUESTIONS PRESENTED

This Petition for Permission to Take an Interlocutory Appeal presents the following questions for review:

[4] The *Garcia* plaintiffs have also filed a petition for permission to take an interlocutory appeal under Rule 23(f), and that petition is currently pending before this Court.

1. Did the District Court err in denying class certification for subclass 1 by requiring Plaintiffs to demonstrate that the Defendant had an articulated policy of discrimination against women and in analyzing an entirely objective criterion as though it were subjective?

2. Did the District Court err in denying class certification for subclass 2 by effectively requiring *entirely* subjective criteria to qualify a nationwide discrimination class action?

3. Did the District Court err in denying class certification for subclasses 1 and 2 under Rule 23(b)(2) of the Federal Rules of Civil Procedure when the claims for injunctive relief predominate over monetary relief that the subclasses also request?

## II. RELIEF SOUGHT

Plaintiffs request that the Court grant their petition to take an interlocutory appeal from the District Court's Opinion so that this Court may resolve the different rulings in this Circuit and bring consistency to the class certification requirements.

## III. STATEMENT OF THE CASE

### A. Regulatory Background

USDA administers national farm loan programs through the Farm Service Agency ("FSA").[5] The FSA is responsible for creating uniform criteria used by all local USDA offices when determining whether loan applicants should receive farm loan applications and loans. These criteria are codified in Title 7 of the Code of Federal Regulations and are further interpreted through internal directives that USDA provides to local county offices.

[5] Prior to 1995, the arm of the USDA that administered these loans was the Farmer's Home Administration ("FmHA"). In connection with a reorganization of the USDA, the Farm Service Administration ("FSA") became the operative agency in 1995. For ease of reference, both agencies are referred to herein as "FSA."

The FSA administers and oversees the farm loan programs, including the collection of loan data in national databases. Despite national USDA oversight of FSA's farm loan programs, FSA's dissemination of loan applications and its loan granting decisions are made at the local level by county FSA offices. While every person who requests an application is required by FSA regulations to receive one, *see* 7 C.F.R. § 1910.4(b), the standards for whether to actually grant a loan are very subjective, *see* 7 C.F.R. § 1941.12 (1981) (operating loan eligibility requirements); 7 C.F.R. § 1943.12 (1981) (ownership loan eligibility requirements).

The USDA has chosen to turn a blind eye to what happens at the local level, thus permitting county committees to act with impunity in making those decisions. As explained by Plaintiffs' expert, Lou Ann Kling, this system has been used to the detriment of women who have attempted to obtain farm loans. Expert Report of Lou Ann Kling (Jan. 9, 2004), attached as Addendum 4, at 2. FSA officials have refused to provide loan applications to women and have used the subjective loan criteria to deny women loans, both on the basis of gender.

In the recent past, women have comprised approximately seven percent of the farm operators nationwide but have only received approximately three percent of the credit lent by FSA. Expert Report of Patrick M. O'Brien (Jan. 12, 2004) ("O'Brien Report"), attached as Addendum 5, at 6. Thus, on a nationwide basis, women farmers have only received approximately forty-six percent of the loan funds they should have received had the FSA made loans to women in proportion to their share of the farm operating pool. *Id.* Similarly, when analyzed on a state-by-state basis, the statistics demonstrate that women received on average forty percent or less of the FSA loan proceeds that they could have expected if loans had been made in proportion to the gender make-up of the states' operator pools. *Id.* at 7.

Nor did women fare any better with regard to the number of loans made. The national statistics from 1981 to 2001 show that women actually received only about 3.6 percent (or 21,000) of the loans made, but could have expected to receive 6.9 percent (or 40,000 loans) based on their share of the operator pool. *Id.* at 11. Thus, women farm operators received only fifty-two percent of the number of loans they could have expected had the number of loans equaled their proportionate share of the operator pool. *Id.*

If women farm operators had received a proportionate share of the funds earmarked for socially disadvantaged minorities (which includes women), women should have received 7.9 percent of the loans received, or 46,000 loans, suggesting a shortfall of 25,000 loans. *Id.* at 10, 12. These statistics reflect a pattern of gender discrimination employed by the FSA that has affected thousands of women for decades. *See generally id.*; *see also* Expert Report of Fritz J. Scheuren (Jan. 16, 2004) ("Scheuren Report"), attached as Addendum 6, at 2; *see also* a representative sample of the approximately 2,000 declarations submitted by women farmers in support of class certification, attached as Addendum 7.

Discrimination against women farmers in the operation of the FSA loan program has long been acknowledged. For approximately four decades, beginning in at least 1965, *see* U.S. Comm'n on Civil Rights, *Report on Equal Opportunity in Farm Programs: An Appraisal of Services Rendered by Agencies of the United States Dep't of Agric.*, relevant pages attached as Addendum 8, at 100, and continuing to the present, USDA's pattern and practice of gender discrimination against minority farmers, including women, has been the subject of much criticism. *See, e.g., Civil Rights Legislation and Other Issues: Hearing Before the House Comm. on Agric.*, 105th Cong. (1997) (testimony of Rep. Eva M. Clayton), attached as Addendum 9, at 18. In February 1997, USDA's own Civil Rights Action Team ("CRAT") issued a report (the

"CRAT Report") finding discrimination by county-level USDA employees, advisory boards that administer USDA programs, and USDA managers. *See* USDA Civil Rights Action Team, *Civil Rights at the U.S. Department of Agriculture* (Feb. 1997), attached as Addendum 10, at 2. USDA again acknowledged its inability to eliminate gender discrimination in its farm loan programs in 2000. *See generally USDA Commitment to Progress: Civil Rights at the United States Dep't of Agric.* (Apr. 2000), attached as Addendum 11. As recently as September 2003, the U.S. Commission on Civil Rights issued a report that focused on the continued poor civil rights record of USDA. *See generally* U.S. Commission on Civil Rights, *Ten-Year Check-up: Have Federal Agencies Responded to Civil Rights Recommendations? Volume III: An Evaluation of the Department of Agriculture and the Interior, the Environmental Protection Agency, and the Small Business Administration* (Sept. 2003), attached as Addendum 12. The Civil Rights Commission noted that since 1996, civil rights enforcement has been a low priority for the USDA. *Id.* at 31. The Civil Rights Commission also recognized that "[s]ince the Commission's 1996 report, there is little evidence that [USDA] has changed or improved what the Commission found to be a complicated civil rights enforcement program, nor has it addressed the Commission's recommendations significantly." *Id.* at 2. The Civil Rights Commission concluded that the USDA "has not made significant strides to . . . improve civil rights enforcement." *Id.* at xi. In short, USDA has discriminated against minorities and women in its farm loan program for decades but has done virtually nothing to alter its policies and systems to eliminate that discrimination.

### B. Proceedings in the Instant Case

Plaintiffs in this case are women who farmed or attempted to farm and who were denied loan applications or loans on the basis of gender. Plaintiffs' class claims arise under the Equal

Credit Opportunity Act ("ECOA"), 15 U.S.C. §§ 1691 *et seq.* (2004),[6] which prohibits general discrimination in the extension of credit.[7] Plaintiffs filed their Motion for Class Certification on January 16, 2004, seeking class certification for two of the subclasses set forth in their Third Amended Complaint: (1) women who were denied applications to apply for farm loans on the basis of gender, and (2) women who actually applied for farm loans but were denied on the basis of gender.[8] On September 29, 2004, the District Court denied class certification. The District Court stayed the proceedings so that Plaintiffs could seek immediate appellate review of the class certification questions raised in its Opinion.

## IV. REASONS FOR GRANTING PETITION

Under Rule 23(f), the Court may entertain an interlocutory "appeal from an order of a district court granting or denying class action certification . . . if application is made to it within ten days after entry of the order." Fed. R. Civ. P. 23(f). The District Court's Opinion denying Plaintiffs' Motion for Class Certification was entered on September 29, 2004. This Petition is timely filed.

### A. The Standard of Review

This Court has set forth the factors it considers in reviewing Rule 23(f) petitions:

> (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.

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[6] Plaintiffs' initial complaint, as well as their first two amended complaints, also asserted a claim under the Administrative Procedure Act, 5 U.S.C. §§ 701 *et seq.* ("APA"). The APA claim was dismissed by the District Court on December 13, 2001.

[7] Although ECOA contains a two-year statute of limitations, *id.* at § 1691e(f), Congress enacted legislation that retroactively extended the limitations period back to 1981 for certain claims against USDA, including Plaintiffs' claims. 7 U.S.C. § 2279 (1998).

[8] The Plaintiffs have not yet pursued class certification for the third subclass, women who were unnecessarily delayed in getting farm loans and denied loan servicing on the basis of gender.

*In re Veneman*, 309 F.3d 789, 794 (D.C. Cir. 2002) (quoting *In re Lorazepam & Clorazepate Antitrust Litig.*, 289 F.3d 98, 105 (D.C. Cir. 2002)). This Court has also made clear that "[e]ven if a case falls into none of these categories, [it] will grant 23(f) interlocutory review in 'special circumstances' . . . ." *Id.* (quoting *Lorazepam*, 289 F.3d at 105-06). Immediate appellate review of the District Court's certification decision is appropriate here on each of these bases.

### B. The District Court's Opinion Presents Special Circumstances Warranting this Court's Review

In *Pigford, Keepseagle, Garcia, Sodexho,* and the instant matter, judges in the district court reached different conclusions as to what is sufficient to meet the requirements of Rule 23. The split in the Circuit has created much uncertainty. There is a need for immediate guidance from this Court so that the requirements of Rule 23 are viewed in a uniform fashion by all of the district court judges of this Circuit. This presents particularly compelling "special circumstances" that justify the requested review.

The inconsistency among the district court judges of this Circuit is illustrated by the different approaches they are taking in the context of national class actions when subjective decisions are made at a local level. Although the District Court conceded that footnote 15 of *General Tel. Co. v. Falcon*, 457 U.S. 147, 159 n.15 (1982), does not require a showing of *entirely* subjective criteria, in applying the subjectivity test set forth in *Falcon,* the District Court, in effect, required such a showing, and fashioned its own test involving a "spectrum" of subjectivity. Op. at 6-10. The District Court's application of *Falcon* is contrary to the interpretation of the district court in *Sodexho*, in which commonality for a nationwide class with decentralized and excessively subjective decision-making was found. *Sodexho,* 208 F.R.D. at 441-42. This split in the Circuit begs for review and direction from this Court.

In this case, the District Court's interpretation of Rule 23(b)(2) is also contrary to the law of this Circuit. The District Court held, in effect, that class certification under Rule 23(b)(2) is not appropriate any time plaintiffs pursue any monetary damages in addition to injunctive relief. This interpretation of Rule 23(b)(2) is inconsistent with the law of this Circuit, which requires a district court to evaluate the requested monetary relief in light of the injunctive relief requested. It is also contrary to the decisions in *Keepseagle* and *Pigford*, in which the district courts did not deny class certification despite the plaintiffs' request for monetary damages. The District Court's analysis of this putative class's request for relief is materially different from the analyses of other district courts in this Circuit and fundamentally alters the requirement for class actions in this Circuit.

The District Court also held that provisional certification of the subclasses should not be allowed. Op. at 12. The District Court's decision, however, disregarded decisions rendered by this Court and others, in which classes have been certified provisionally, and the district courts have used their discretion to allow class members to opt out of the class to pursue their damages claims individually. *See Eubanks v. Billington,* 110 F.3d 87, 95, 96 n.4 (D.C. Cir. 1997) (holding that the district court may certify a Rule 23(b)(2) class for liability purposes while waiting to select the appropriate mechanism by which to determine damages, and stating that the district court has the discretion to grant opt out rights to class members); *see also Sodexho*, 208 F.R.D. at 448 (granting provisional certification under Rule 23(b)(2)); *Williams v. Burlington N., Inc.,* 832 F.2d 100, 103 (7th Cir. 1987) (district courts have the discretion to grant opt out rights to class members in 23(b)(2) actions); *Crawford v. Honig,* 37 F.3d 485, 487 n.2 (9th Cir. 1995) (same).

Both the *Pigford* and *Keepseagle*[9] cases were provisionally certified pursuant to Rule 23(b)(2). *Pigford,* 182 F.R.D. at 35; *Keepseagle*, Addendum 3, at 30-33.

Finally, the District Court's earlier decision to dismiss Plaintiffs' claim under the APA, 5 U.S.C. §§ 701 *et seq.*, creates a further split in the Circuit and mandates review by this Court. Plaintiffs asserted a claim under the APA, which was dismissed by the District Court in 2001.[10] In its APA Decision, the District Court determined that USDA's failure to investigate and decide civil rights complaints was not actionable.[11] *See* APA Decision, Addendum 13, at 13. The APA Decision, however, conflicts with the district court's decision permitting plaintiffs' APA claim to go forward in *Keepseagle. See Keepseagle*, Addendum 3, at 2-3. The District Court has recognized the importance of its ruling with respect to the APA claim as it has invited Plaintiffs to petition to certify the dismissal of the APA claim for an interlocutory appeal under 20 U.S.C. § 1292(b).[12] Op. at 15.

### C. The District Court's Decision Is the Death Knell to Many Thousands of Valid Claims

In *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469-70 (1978), the Supreme Court explained that the "'death knell' doctrine assumes that without the incentive of a possible group recovery, [an] individual plaintiff may find it economically imprudent to pursue his lawsuit to a

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[9] In its Opinion, the District Court interpreted this Court's finding relating to provisional certification in *In re Veneman* to mean that this Court questions provisional certification, notwithstanding that the Court did not disturb the district court's finding of class certification. Op. at 12. For this reason alone, guidance from this Court is necessary.

[10] The Memorandum Decision, entered on December 13, 2001 ("APA Decision"), is attached as Addendum 13.

[11] Judge Robertson in the *Garcia* case also dismissed the plaintiffs' claim under the APA. The *Garcia* plaintiffs have filed a motion to certify the dismissal of their APA claim for interlocutory review, which was recently granted by the district court. The district court's order is attached as Addendum 14.

[12] Pursuant to the District Court's invitation in its Opinion on class certification, *see* Op. at 15, Plaintiffs intend to petition the court to certify the dismissal of the APA claim for an interlocutory appeal under 20 U.S.C. § 1292(b).

final judgment." *Id.*; *see also In re: Lorazepam & Clorazepate*, 289 F.3d at 102 (citing *Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 834 (7th Cir. 1999) (finding that a death knell situation may result from the denial of class certification when an individual plaintiff's claim is too small to justify the expense of litigation)); Alba Conte & Herbert Newberg, *Newberg on Class Actions* § 7.38 (4th ed. 2002) (explaining that interlocutory appeals should be granted "where a denial of class status means that the stakes are too low for the named plaintiffs to continue") (quoting *Prado-Steiman ex rel. Prado v. Bush*, 221 F.3d 1266, 1274-76 (11th Cir. 2000)).

Plaintiffs in the instant matter are women who own or operate or attempted to own or operate small farms. The pursuit of individual litigation would be cost prohibitive and would make it virtually impossible for these women to obtain relief. Moreover, despite the District Court's conclusion that Plaintiffs could succeed through individual suits to obtain system-wide injunctive relief comparable to the relief they are seeking through a class action, with due respect, it is unlikely that a trial on the individual claims raised by one or more of the individual Plaintiffs could result in the broad reform the putative class members are seeking.[13] It is also unlikely that in an individual case the court would order injunctive relief beyond that applicable to the individual plaintiff whose claims are before the court.

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[13] The District Court also analyzed this issue in the context of Rule 23(b)(3), and suggested that individual trials would, in fact, be a superior mechanism for obtaining non-monetary relief, noting the problems with the *Pigford* class settlement and the record in *Mavity v. Glickman*, 1:00-cv-02518-JR (D.D.C.). *See* Op. at 13-14. The notoriety, however, created by the difficulties in implementing the settlement in *Pigford* is not an appropriate basis for refusing to certify the instant case. The problems in *Pigford* were created by a complicated settlement agreement, not by class certification. If this case were settled, the difficulties in *Pigford* may be relevant. They are not relevant, however, at the class certification stage. Moreover, the result in *Mavity* illustrates how difficult it is for an individual plaintiff to pursue a discrimination case on her own. In *Mavity*, Judge Robertson denied relief to the plaintiff after a full trial on the merits, finding that she had failed to prove that she had been discriminated against by FSA on the basis of gender. *See Mavity v. Veneman*, C.A. No. 00-2518(JR) (D.D.C. July 3, 2002), attached as Addendum 15.

Plaintiffs submitted 1,823 declarations from declarants in thirty-two different states and 175 different counties in support of their Motion for Class Certification. Should the courts be burdened with 1,823 separate lawsuits alleging identical causes of action? The inevitability of inconsistent and contradictory decisions from courts all over the country is manifestly clear. This is exactly what the class action mechanism is designed to prevent. Has there ever been a case in which 1,823 putative plaintiffs submitted declarations before the class was certified? Because the District Court's decision sounds the death knell to many thousands of women farmers with valid discrimination claims, this case cries out for class treatment. Consequently, this Court should immediately review the District Court's denial of class certification.

### D. The District Court's Decision Is Clearly Erroneous

#### 1. The District Court Erred in Denying Class Certification for Subclass 1 by Requiring Plaintiffs To Demonstrate that the Defendant Had an Articulated Policy of Discrimination against Women and in Analyzing an Entirely Objective Criterion as though It Were Subjective

The District Court conceded that subclass 1 "satisf[ied] the requirement of the commonality cases as a matter of form," Op. at 9, and that Plaintiffs had successfully demonstrated that "responsibility for . . . (decisions about whether or not to give loan application forms to women) lies centrally with USDA, because USDA abetted or failed to prevent the unlawful acts of local officials or county committees for 22 years, even if only by looking the other way." *Id.* at 11. Nonetheless, the District Court found that Plaintiffs had failed to show a common policy of discrimination at the national level that resulted in women being denied loan applications on the basis of their gender. Op. at 10. Consequently, the District Court, denied class certification for subclass 1. This was error for two principal reasons. First, the District

Court was wrong in finding it dispositive that "Plaintiffs have adduced no evidence . . . establishing that it is or ever was actually USDA policy to refuse to give loan application forms to women farmers." *Id.* at 13. Second, the District Court erred in analyzing the entirely objective FSA requirement to disseminate loan applications to all who request them as though it were subjective.

The District Court's assessment that Plaintiffs had failed to demonstrate a specific USDA policy to refuse to give loan applications to women creates an impossible hurdle to class certification. Neither the USDA nor any other lender or employer is ever likely to have an express policy sanctioning gender discrimination. Moreover, there is no requirement that in order to maintain an action for discrimination a plaintiff must prove that the defendant has articulated an overt, express policy of discrimination. In fact, disparate treatment analysis clearly contemplates lawsuits that challenge discriminatory actions based on facially neutral decision-making practices as pretext.[14] *See McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 800-01 (1973) (explaining that disparate treatment claims may challenge practices that appear neutral but in fact "'invidiously . . . discriminate on the basis of . . . impermissible classification.'" (citation omitted)).

The District Court also erred by incorrectly analyzing an entirely objective criterion as though it were subjective. Op. at 4-10. The USDA regulation mandates than an application for a farm loan be given to whomever requests one. *See* 7 C.F.R. § 1910.4(b). There is no subjectivity whatsoever in this regulation. Nor is there any decision-making permitted by the regulation. USDA officials have blatantly and persistently denied loan applications to women

[14] The District Court also asserted that Plaintiffs' failure to show a common policy of discrimination at the national level figured into its decision to deny certification of subclass 1 under Rule 23(b)(3). As discussed above, however, there is no such requirement, and the District Court's ruling to that effect was further error.

farmers despite the regulation mandating that they do so.[15] This widespread practice has been allowed to flourish because of the lack of supervision, accountability, and checks and balances in the USDA loan system notwithstanding persistent criticism of USDA's treatment of women and minorities.

Thus, Plaintiffs have demonstrated a common action emanating from USDA nationally that resulted in women farmers being harmed - - refusal of the local offices to disseminate loan applications that was not policed by USDA at the national level. The District Court's application of the precedents in *Hartman v. Duffey*, 19 F.3d 1459 (D.C. Cir. 1994), and *Falcon*, 457 U.S. at 159 n.15, which pertain to decision-making in systems that are characterized by excessive subjectivity, was error because USDA's regulation mandating the dissemination of loan applications involved no subjectivity. Accordingly, this Court should review and then reverse the District Court's decision.

### 2. The District Court Erred in Denying Class Certification for Subclass 2 by, in Effect, Requiring *Entirely* Subjective Criteria to Qualify a Nationwide Class

The District Court erred in denying class certification for subclass 2 by acknowledging that an entirely subjective system is not necessary, but then applying a test that in reality does require complete subjectivity. Because various reasons were given to the 859 declarants who had their loans denied, the District Court ruled that Plaintiffs had failed to provide "a substantial showing that would permit the inference that members of the class suffered from a *common policy of discrimination* that pervaded all of the challenged decisions." Op. at 9-10 (emphasis in original). This Court and others, however, have found just such a common policy in the

[15] Plaintiffs have received 1,082 declarations from women farmers who were denied loan applications because of their gender.

operation of significantly subjective decision-making on a national basis. The District Court ignored this teaching.

The District Court denied class certification for subclass 2 because Plaintiffs could not establish that USDA's decision-making processes were, in effect, entirely subjective.[16] Over the course of this case, as well as in *Garcia*, the District Court's view of the objectivity of USDA's loan criteria has evolved. Initially, in denying class certification in *Garcia,* the District Court held that "at least eight" of the criteria[17] were objective, which the District Court felt defeated any possible finding of a system of subjective decision-making. *Garcia*, 211 F.R.D. at 21. Thereafter, in a subsequent opinion in *Garcia*, the District Court conceded that the *Garcia* plaintiffs had "increase[d] the subjectivity quotient of the USDA processes," by pointing out that nearly all of the facially objective criteria were in actuality subjective. *Garcia v. Veneman*, C.A. No. 00-2445(JR), attached as Addendum 16, at 18 (Sept. 10, 2004).

In the instant decision, the District Court has noted that "plaintiffs are certainly correct that the criteria set forth in USDA's regulations for making farm loans during the years in

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[16] The District Court also erred in finding that Plaintiffs had no support from *Cook v. Billington*, C.A. No. 82-0400, 1992 WL 276936 (D.D.C. Aug. 14, 1992), because it was not a class action. Op. at 7. This is manifestly incorrect. Significantly, the case was a class action, and in order to be a class member, an applicant had to possess "minimum objective qualifications." *Cook v. Billington*, C.A. No. 82-0400, 1988 WL 142376, *1 (D.D.C. Dec. 13, 1988). Once applicants' "minimum objective qualifications" were verified, these class members were subsequently denied equal employment opportunities within the Library of Congress based on their race through the use of highly subjective selection practices. *Id.* at *5. The "minimum objective qualifications" in *Cook* are analogous to USDA's two solely objective criteria used to determine which applicants may receive a farm loan – United States citizenship and legal capacity to incur loan obligations. No putative class member in this case could recover if she did not meet these two threshold requirements. As in *Cook*, however, the other criteria are subjective and permit rampant discrimination in thousands of individual decisions. *See* 7 C.F.R. §§ 1941.12; 1943.12 (1989). *Cook* is directly on point and was entirely misread by the District Court.

[17] In its original *Garcia* opinion denying class certification, the District Court identified these eight criteria as objective: (1) United States citizenship; (2) the legal capacity to incur loan obligations; (3) inability to obtain credit elsewhere; (4) farm size (the farm to be no larger than a family farm; (5) and (6) loan history; (7) no previous debt forgiveness causing a loss to the FSA; and (8) no delinquency on any federal debt. *Garcia v. Veneman*, 211 F.R.D. 15, 21 (D.D.C. 2002).

question were subjective *in many of their* parts," Op. at 7 (emphasis added), but then found that a few of the reasons given for denials of loans "register more nearly at the 'objective' end of the subjectivity spectrum," thereby defeating commonality. The reasons for denial cited by the District Court as being more nearly objective than subjective are: (1) failure to meet collateral requirements; (2) poor credit; and (3) insufficient income. Op. at 7. Even those few reasons, however, can be shown to be susceptible to FSA manipulation and thus, truly subjective in their implementation by local officials. Moreover, the Supreme Court in *Falcon* does not speak of degrees of subjectivity, or a "spectrum" of subjectivity and it is error for the District Court to fashion its own standard. The District Court has created a confusing test whereby no class can be certified if there are criteria that seem to "register more nearly at the 'objective' end of the subjectivity spectrum." Op. at 7.

The District's Court's reliance on two objective criteria in the face of many other subjective criteria is also inconsistent with *Sodexho*. In *Sodexho*, the district court pointed out that the defendant's arguments that the company's promotions were not based on entirely subjective criteria "miss[ed] the point of *Falcon*'s footnote 15." *Sodexho*, 208 F.R.D. at 441-42. As the district court explained, the footnote "carved out an exception to the across-the-board rule for 'entirely subjective *decisionmaking processes*,' rather than requiring entirely subjective hiring criteria." *Id.* (emphasis in original). Like the decision makers in *Sodexho*, USDA local officials were given nearly unfettered discretion to apply national loan criteria, and USDA at the national level knowingly permitted this subjective discriminatory application of its criteria to continue unchecked.

The District Court also erred by mischaracterizing as varied the reasons given by USDA to reject women's farm loan applications. The District Court put much stock in the variety of

reasons given to women farmers when their loan applications were denied, but ignored the evidence that local USDA officials gave women applicants pretextual reasons for the loan denials, as directed by USDA at the national level. *See* USDA FmHA Directive AN No. 1053 (Aug. 1, 1984), attached as Addendum 17. Moreover, the District Court overlooked the fact that many women were never even provided with reasons for their denial (as required) or otherwise. USDA itself conceded that only forty percent of the nearly 2000 declarants in this case ever received a substantive response to their application. These critical errors require reversal of the District Court's decision.[18]

For these reasons, this Court should permit an immediate appeal of the District Court's ruling and then reverse the District Court's denial of class certification for subclass 2.

### 3. The District Court Erred by Failing to Analyze Plaintiffs' Monetary Damages in Light of Their Requested Injunctive Relief

In the instant matter, the District Court found that Plaintiffs successfully argued that USDA had acted in a manner "generally applicable to the class, consequently making entry of declaratory or injunctive relief appropriate." Op. at 10, 11. Nonetheless, the District Court held that certification under Rule 23(b)(2) was inappropriate because Plaintiffs' claims for monetary damages predominate over their claims for equitable relief. *Id.* (citing to Fed. R. Civ. P. 23(b)(2)). In making this determination, the District Court focused on the fact that Plaintiffs had not forsworn a claim for damages, rather than the significance of the injunctive relief requested. Without any basis in the record, the District Court held that "money damages are far from incidental." Op. at 11. The District Court's interpretation of the relief sought by Plaintiffs and of Rule 23(b)(2) forecloses the ability of *any* plaintiffs to obtain class certification if they seek

[18] The District Court erred for the same reasons when it made a similar finding under Rule 23(b)(3) that "the number of different reasons given to women farmers," Op. at 13-14, made it inappropriate to certify subclass 2 as a hybrid class. As described above, this finding lacks merit.

*any* measure of monetary damages. That is certainly not the intent of Rule 23(b)(2). *See, e.g.*, Fed. R. Civ. P. 23(b)(2) advisory committee notes.

Nor is it the law in this Circuit. This Circuit has traditionally permitted class certification under Rule 23(b)(2) notwithstanding the existence of sizable monetary claims, provided that those monetary claims are considered incidental when viewed in light of the requested injunctive or declaratory relief. *See Eubanks,* 110 F.3d at 92 (holding that Rule 23(b)(2) certification is appropriate when "monetary relief does not predominate"); *Thomas v. Albright,* 139 F.3d 227, 235 (D.C. Cir. 1998) (Rule 23(b)(2) class recovered $3.8 million, as well as significant injunctive relief); *Walsh v. Ford Motor Co.*, 807 F.2d 1000, 1003 n.7 (D.C. Cir. 1986); *see also Keepseagle,* Addendum 3, at 32; *Pigford*, 182 F.R.D. at 350-51; *In re Visa Check/MasterMoney,* 192 F.R.D. 68 (E.D.N.Y. 2000), *aff'd,* 280 F.3d 124 (2d. Cir. 2001) (class certified under Rule 23(b)(2) when preliminary damages estimate was $8 billion because the significant injunctive relief was as important as the money damages sought).

While Plaintiffs in both subclasses seek some measure of monetary damages, the District Court has failed to cite to *any* evidence to support its finding that Plaintiffs' monetary damages, when compared with the significant injunctive relief requested, predominate over injunctive relief. [19] Moreover, the District Court's finding is in direct conflict with the decision in *Keepseagle*, where the district court found that monetary relief requested by the plaintiffs was incidental to the injunctive relief requested. *See Keepseagle*, Addendum 3, at 30-32.

[19] In the Third Amended Complaint, the injunctive relief requested by Plaintiffs includes, among other things, the revitalization of an adequately trained and staffed civil rights division that will effectively investigate discrimination complaints, the adoption of appropriate lending practices, and the establishment of mechanisms to prohibit discriminatory lending practices. *See* Third Amended Complaint, Addendum 2, at 28-30.

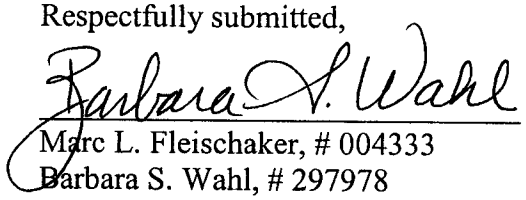
Accordingly, the Court should allow an immediate appeal of the District Court's ruling with regard to the standard applicable to Rule 23(b)(2).

## CONCLUSION

For the foregoing reasons, Plaintiffs should be granted permission to take an interlocutory appeal from the District Court's order denying class certification.

Date: October 14, 2004

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I hereby certify that on October 14, 2004, I served a true and correct copy of Plaintiffs' Petition for Permission to Take an Interlocutory Appeal Pursuant to Fed. R. Civ. P. 23(f) upon all parties, representatives and attorneys in this cause of action, by serving same via messenger on:

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