

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

ROSEMARY LOVE, <i>et al.</i> ,)	
)	
Plaintiffs,)	Judge: Robertson, J.
)	
v.)	
)	
CHARLES F. CONNER, ACTING SECRETARY, UNITED STATES DEPARTMENT OF AGRICULTURE,)	Case No: 1:00-cv-02502 (JR)
)	
Defendant.)	
)	

**PLAINTIFFS' MOTION TO AMEND AND CERTIFY ORDER FOR
INTERLOCUTORY REVIEW PURSUANT TO 28 U.S.C. § 1292(b)**

Pursuant to Local Rule 7 and 28 U.S.C. § 1292(b), Plaintiffs respectfully move this Court to certify for interlocutory review its November 30, 2007 Memorandum and Order on the question of whether Plaintiffs have stated causes of action under the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.*, arising from the failure of United States Department of Agriculture (“USDA”) to investigate their discrimination complaints, and USDA’s discriminatory denial of non-credit benefits to women farmers. These issues involve controlling questions of law, are the subject of substantial difference of opinion within this Circuit, and are of material importance to the advancement of this litigation. Plaintiffs also request that the Court amend its November 30, 2007 Order to state the necessary conditions for interlocutory review under 28 U.S.C. § 1292(b) have been met.

As required by Local Rule 7(m), Plaintiffs' counsel has conferred with Defendant's counsel, Carlotta Wells, Esq., concerning Plaintiffs’ motion. Ms. Wells has conveyed that Defendant opposes Plaintiffs’ instant motion.

For these reasons, which are detailed in the accompanying memorandum of points and authorities, Plaintiffs respectfully request that this Court certify its November 30, 2007 Order for interlocutory review, and that the Court amend its November 30, 2007 Order to state that the necessary conditions for interlocutory review have been met.

Respectfully submitted,

/s/ Kristine J. Dunne

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Dated: December 14, 2007

BACKGROUND

Plaintiffs' action is brought on behalf of a putative class of women farmers who allege that USDA has unlawfully discriminated against them because of their gender in connection with their efforts to obtain farm loans, loan servicing or non-credit benefits, and that USDA unlawfully and discriminatorily failed to process and investigate women farmers' discrimination complaints, in violation of the Equal Credit Opportunity Act ("ECOA"), 15 USC § 1691 *et seq.*, and/or the APA.

In 1998, Congress enacted legislation that retroactively extended the limitations period for certain discrimination-related claims against USDA dating back to 1981 until October 21, 2000, two years after the enactment of the legislation. *See* Agriculture Rural Development, Food and Drug Administrative and Related Agencies Appropriations Act, 1999. Pub. L. No. 105-277 (codified at 7 U.S.C. § 2297 Note). Plaintiffs timely filed their class action complaint in this case, asserting claims against USDA under APA and ECOA.

At an early stage of the case, the Court dismissed Plaintiffs' APA claims. *See* Order of December 13, 2001. Later, after filing their Third Amended Complaint, Plaintiffs sought certification of two subclasses for claims brought pursuant to ECOA. On September 29, 2004, the Court issued an order denying Plaintiffs' motion for class certification, and staying the proceedings pending further action of the Court. Thereafter, Plaintiffs sought to appeal the Court's order denying class certification, pursuant to Rule 23(f), and its order denying the APA claims, pursuant to 28 U.S.C. § 1292(b). This Court certified for interlocutory review its December 13, 2001 Order dismissing Plaintiffs' APA and/or ECOA claims. The D.C. Circuit granted and consolidated the two grounds for appeal. The D.C. Circuit ultimately affirmed this Court's decision on class certification and remanded Plaintiffs' APA claims for "further proceedings." 439 F.3d 723, 733 (D.C. Cir. 2006) (remanding for further proceedings in the

district court because “the record is little developed on that argument and the parties’ briefs have given short-shrift” to that issue). On remand, the parties submitted briefs on the APA claims. The Court has again dismissed Plaintiffs’ APA claims pursuant to its November 30, 2007 Order. Plaintiffs now seek interlocutory review of the November 30, 2007 Order.¹

ARGUMENT

A district court shall certify an order to the court of appeals for interlocutory review under 28 U.S.C. § 1292(b) when the district judge believes that the order involves "a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b) (2007). In determining whether certification is appropriate, the district court must consider: (1) whether the order involves a controlling question of law; (2) whether substantial contrary authority or other grounds for a difference of opinion exist; and (3) whether an immediate appeal would materially advance the disposition of the litigation. *See United States v. Phillip Morris USA, Inc.*, No. 99-2496 (GK), 2004 WL 1514215 (D.D.C. June 25, 2004); *Virtual Defense & Development International, Inc. v. Republic of Moldova*, 133 F. Supp. 2d 9, 22 (D.D.C. 2001) (citing *Trout v. Garrett*, 891 F.2d 332, 335 n.5 (D.C. Cir. 1989)).

Here, the Court has followed the Court of Appeals’ remand instructions to conduct further briefing with regard to Plaintiffs’ APA claims, and has again dismissed the claims. The Court should now certify for interlocutory review the November 30, 2007 Order, since there is a controlling question of law, substantial differences of opinion, and an immediate appeal would advance the disposition of this litigation.

I. The Issue Presents a Controlling Issue of Law.

¹ By Order of December 3, 2007, this Court has continued to the stay of all proceedings in this case, pending further order of the Court. Plaintiffs construe the stay to mean that individual claims will not go forward while the stay remains in effect.

A question constitutes a "controlling issue of law" if resolution of the question could determine the outcome or future course of the litigation. *See Judicial Watch, Inc. v. National Energy Policy Dev. Group*, 233 F. Supp. 2d 16, 19 (D.D.C. 2002) (citing *Johnson v. Burken*, 930 F.2d 1202, 1206 (7th Cir. 1991) (a question is controlling if "interlocutory reversal might save time for the district court and time and expense for the litigants"). *See also In re Vitamins Antitrust Litigation*, No. 99-197 (TFH), 2000 WL 673936 at *2 (D.D.C. Jan. 27, 2000).

Here, the issue proposed for certification -- whether Plaintiffs have alleged a cause of action under the APA arising from USDA's failure to investigate their discrimination complaints and the USDA's discriminatory denial of non-credit benefits -- is a controlling issue of law. As previously recognized by this Court, the dismissal of the APA claims removes these claims as potential grounds for establishing a class action, in light of the Court having found no other cognizable basis for commonality. *See* January 10, 2002 Transcript of Scheduling Conference, at 2 (recognizing that the APA failure to investigate claims are the "glue that hold those classes together" in the related cases *Pigford v. Glickman* and *Keepseagle v. Conner*, and without the APA claims in the instant case, "I'm not quite sure where the commonality is"). *See also Garcia v. Conner*, Transcript of Scheduling Conference (D.D.C. June 28, 2006) (Robertson, J.) ("If there's an APA claim, there's an APA claim, and it may follow almost automatically that there's class certification."). Inability to pursue the case as a class action will likely be a death knell to the putative class members' claims because it is unlikely that many of the putative class members will be able to pursue their claims individually. Courts have repeatedly treated class certification issues as controlling questions of law that are appropriate for interlocutory review. *See, e.g., Fellows v. Universal Rests., Inc.*, 701 F.2d 447, 447-48 (5th Cir.), *cert. denied*, 464 U.S. 828 (1983) (dismissal of class discrimination claims were reviewable under § 1292(b)). *See also* 16

C. Wright & A. Miller, Federal Practice & Procedure § 3931 (2d ed. 2007).

II. A Substantial Ground for Differences of Opinion Exists.

The existence of contrary, inconsistent or unclear authority constitutes a "difference of opinion," warranting interlocutory review under 28 U.S.C. § 1292(b). *See APCC Servs. v. Sprint Commc'ns Co.*, 297 F. Supp. 2d 90, 97-98 (D.D.C. 2003), *rev'd on other grounds*, 418 F.3d 1238 (D.C. Cir. 2005), *cert. granted and judgment vacated*, 127 S. Ct. 2094 (2007).

Certification of interlocutory review is appropriate even in the absence of difference of opinions, where "the case law is confused." *See Johnson v. Washington Area Transit Auth.*, 790 F. Supp. 1174, 1180 (D.D.C. 1991) (certifying interlocutory review on district court's decision issued on remand). In this Circuit, there is still unclear and inconsistent authority as to whether causes of action for the failure to investigate discrimination complaints may be maintained under the APA. In other cases virtually identical to the one at bar, other judges within this Circuit have held that plaintiffs could assert a cognizable claim under the APA for USDA's failure to investigate discrimination claims, and then found those claims to be a basis for class certification. *See Pigford v. Glickman*, 185 F.R.D. 82 (D.D.C. 1999) (Friedman, J.); *Keepseagle v. Veneman*, No. 1:99-cv-3119 (EGS/AK), 2001 WL 34676944 (D.D.C. Dec. 12, 2001) (Sullivan, J.).²

A. APA Claim for Failure to Investigate

There are significant differences of opinion as to whether Plaintiffs may assert causes of action under the APA for the USDA's failure to investigate their discrimination complaints. Plaintiffs here and in *Garcia* have maintained that these claims are both allowable. Their assertions are supported by the USDA's own regulations which authorize complaints as a means

² In recognition of the similar nature of these case, the government filed in the Native-American farmers case, *Keepseagle v. Conner*, a motion for judgment on the pleadings, seeking to dismiss the plaintiffs' APA claims based on the Court's dismissal orders issued in this case and *Garcia v. Conner*. *See Keepseagle v. Conner*, C.A. No. 1:99-cv-03119-EGS-AK (Docket No. 449 Dec. 11, 2007) (Sullivan, J.).

of enforcing ECOA. *See* 7 C.F.R. § 15.6 (2004). The Court even notes that “[t]he government may even have implicitly conceded that the regulations did impose a duty to investigate.” November 30, 2007 Order at 5. Instead, the Court bases its dismissal of Plaintiffs' failure-to-investigate claim on finding an “adequate alternative remedy” in Congress’ legislation which extended the statute of limitations for ECOA-based claims against USDA and provided for optional agency review process of certain “renewed complaints.” *Id.* at 6. In doing so, the Court disregarded evidence showing that there was no real “adequate” alternative remedy in effect for Plaintiffs, nor a remedy *in court*, as provided by § 704 of the APA. *See, e.g.*, Plaintiff’s Second Supplemental Memorandum at 7-10, 13 (Sept. 18, 2007).

In contrast to this Court’s decision, other decisions in the D.C. Circuit, in cases similar to this case and *Garcia*, have held that the failure to investigate claims of discrimination under comparable circumstances was an appropriate basis for an APA claim, and a proper basis for class certification. *See Pigford v. Glickman*, 185 F.R.D. 82, 86 & n.1, 94 (D.D.C. 1999) (Friedman J.); *Keepseagle v. Veneman*, 2001 WL 34676944, * 1, 15 (D.D.C. Dec. 12, 2001) (Sullivan, J.).

As Plaintiffs discussed in their presentations to this Court on remand, there is a solid legal basis for the rulings in *Pigford* and *Keepseagle* recognizing APA claims for the failure to investigate. *See, e.g.*, Plaintiff’s Brief in Support of Claims based on the Administrative Procedure Act, 4-14 (July 10, 2006); Plaintiff’s Supplemental Memorandum with regard to Their Claim Arising under the Administrative Procedure Act, at 2-14 (May 3, 2007). In *McKenna v. Weinberger*, 729 F.2d 783 (D.C. Cir. 1984), the D.C. Circuit recognized a separate cause of action under the APA arising from an agency’s failure to follow its own regulations relating to the termination of an employee.³ *Id.* at 781. The Supreme Court’s opinion in *Bowen v.*

³ The Court reasons that Plaintiffs’ failure to investigate claims are distinguishable from the claims raised in *McKenna*, however this is inconsistent with the Court’s acknowledgment that the government “may . . . have conceded . . . that the regulations did impose a duty to investigate.” November 30, 2007 Order at 5.

Massachusetts, 487 U.S. 879 (1988), also provides support for Plaintiffs’ claims. In *Bowen*, the Supreme Court noted that Congress intended the APA to provide a remedy in the form of district court review of agency action, not a “general grant of jurisdiction to duplicate the previously established special statutory procedures” of the agency, which qualify as “special and adequate review procedures.” *Id.* at 903. The teachings of *Bowen* and *McKenna*, which allow for APA claims even where an agency review process exists, are inconsistent with the Court’s finding that the voluntary limited agency review process established by Congress here provided the type of “adequate remedy in a court” which precludes Plaintiffs’ APA claims.

Now that Plaintiffs’ APA claims have been fully briefed and the Court has issued its ruling, the split in the Circuit is ripe for resolution by the Court of Appeals. Indeed, it would appear that in remanding the APA claims for further proceedings, the D.C. Circuit envisioned such further review, presumably at a time when consistent decisions could be made in all of the farmer discrimination cases.⁴ The presence of conflicting rulings within this Circuit provides an appropriate basis for this Court to certify the issue for interlocutory appeal. *APCC Servs.*, 297 F. Supp. 2d at 97. This result is particularly compelling in the current circumstances where a motion for judgment to dismiss a failure to investigate claim is now pending in the *Keepseagle* case, based upon this Court’s November 30, 2007 Order. *See supra*, n.2.

B. APA Claim for Discriminatory Denial of Non-Credit Benefits

Substantial conflicts of law also exist with regard to Plaintiffs’ APA claim arising out of USDA’s discriminatory denial of farm non-credit benefits. Plaintiffs’ failure to file an amended complaint, when the proceedings were stayed and the case was on remand for the limited purpose of briefing the substantive APA issues, should not form the basis for the Court’s determination on

⁴ If there was such a clear “unbroken line of circuit decisions,” *see* November 30, 2007 Order at 10, obviating Plaintiffs’ right to sue under the APA for USDA’s failure to investigate, the D.C. Circuit’s remand instructions would appear to serve no meaningful purpose.

the substantive issue of whether an APA claim may be asserted, and in turn may form the basis for class certification. Moreover, Plaintiffs made clear throughout the post-remand briefing – while all case proceedings were stayed pending further order of the Court – that they were prepared to amend their complaint, in the event that the Court lifted the stay and allowed them to move forward with their APA claims. *See* Plaintiffs’ Brief in Support of Claims Based on the Administrative Procedure Act at 16 n.9 (July 10, 2006); Plaintiff’s Reply Brief 9 (Sept. 8, 2006). The Court’s denial of this APA claim runs counter to existing opinions in this Circuit, and thus is appropriate for interlocutory review.

III. Certification Would Materially Advance the Disposition of the Litigation.

Interlocutory review constitutes material advancement of litigation where “[a]n immediate appeal would conserve judicial resources and spare the parties from possible needless expense.” *APCC Servs.*, 297 F. Supp. 2d at 100. An immediate appeal in this case would materially advance the disposition of this litigation by resolving the key question of whether Plaintiffs may maintain their APA claims, and in turn whether they may pursue their claims as a class action. In the event that the Court of Appeals agrees with this Court that there is no basis for asserting the APA claims, Plaintiffs would no longer be able to pursue all their claims as a class action. Essentially, that would end the litigation for the thousands of women farmers who are putative class members, because they lack the sufficient resources to pursue their claims individually against the USDA, although they could attempt to do so. For those putative class members who intend to pursue their claims individually against the USDA, interlocutory review of Plaintiffs’ APA claims now would be a more efficient use of judicial and litigants’ resources. An appellate determination of the viability of Plaintiffs’ APA claims at this juncture will enable Plaintiffs, and putative class members, to determine whether they can proceed with both ECOA and APA claims in a single proceeding. If Plaintiffs were compelled to wait until the end of the case, after their ECOA claims were individually tried, to appeal

this Court's dismissal of their APA claims and the D.C. Circuit then reversed the November 30, 2007 Order, Plaintiffs would be faced with a second new trial on their APA claims.

The *Keepseagle* case, in which the plaintiffs state an APA claim for failure to investigate which was the basis for class certification, would also benefit from appellate review of this Court's November 30, 2007 Order at this time. The *Keepseagle* Court stayed the plaintiffs' APA claim pending the outcome of the APA claims asserted in this case and *Garcia*. Following this Court's issuance of the November 30, 2007 Order, there is now pending in *Keepseagle* a motion for judgment to dismiss plaintiffs' APA claim, based on the November 30, 2007 Order. In the event that interlocutory review is not granted in this case, presumably *Keepseagle*'s APA claim would also not be resolved until the conclusion of this case, when an appeal could be taken. Ultimately, the various cases involving USDA's farm credit and non-credit benefit programs will need to be harmonized, and it would be a waste of judicial and litigants' resources to further delay that from occurring.

Certifying an interlocutory appeal on the APA claims will conserve both Plaintiffs' and the Court's resources, and obviate the possibility of expensive and time-consuming duplicative proceedings. *See Phillip Morris*, 2004 WL 1514215 at *3 (citing *APCC Servs.*, 297 F. Supp. 2d 90, 100).

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court certify its Memorandum and Order of November 30, 2007 for interlocutory review pursuant to 28 U.S.C. § 1292(b) on the question of whether Plaintiffs' allegations of USDA's failure to investigate discrimination complaints and discriminatory denial of farm non-credit benefits state causes of action under the APA, and to amend its November 30, 2007 Order to state that the conditions for necessary conditions for interlocutory review under 28 U.S.C. § 1292(b) have been met.

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