IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

UNITED STATES OF AMERICA ex rel.
CORI RIGSBY and KERRI RIGSBY — RELATORS/COUNTER-DEFENDANTS

v. — CASE NO. 1:06cv433-LTS-RHW

STATE FARM FIRE & CASUALTY COMPANY — DEFENDANT/COUNTER-PLAINTIFF

and

HAAG ENGINEERING CO. — DEFENDANT

STATE FARM'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO CERTIFY THE COURT'S [872] ORDER AND [871] MEMORANDUM OPINION FOR INTERLOCUTORY APPEAL PURSUANT TO 28 U.S.C. § 1292(b)

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PRELIMINARY STATEMENT

During the course of its work on Hurricane Katrina litigation, this Court has grappled with a number of important issues of first impression in the Fifth Circuit. After deciding these issues, the Court has appropriately certified for interlocutory review critical dispositive legal issues even where the Court "believes in the correctness of its decisions and their analysis." *Tuepker v. State Farm Fire & Cas. Co.*, 2006 WL 2794773, at *2 (S.D. Miss. Sept. 27, 2006) (Senter, J.). State Farm respectfully submits that the Court's January 24, 2011, [871] Memorandum Opinion and [872] Order (collectively "Order") involve the same type of significant legal issues that also merit interlocutory review.[1]

As demonstrated below, all of the statutory and policy reasons that support interlocutory review compel the conclusion that certification of the Order is appropriate:

Court Uncertain of Fifth Circuit Standard. First, this Court was uncertain as to the Fifth Circuit's position on the standard to be applied in determining whether a False Claims Act ("FCA") case should be dismissed for violations of the statutory seal order, having found "no case decided by the Fifth Circuit Court of Appeals directly dealing with that issue." ([871] at 8.).

Identified Circuit Split. Second, this Court's Order correctly identified an irreconcilable split in the circuits – most notably between the Sixth and Ninth Circuits – on that issue. *Id.*

Purely a Question of Law. Third, the seal violation issues presented in this case are conceded by all to be pure questions of law and potentially dispositive of the litigation. As in *Tuepker,* the Court and the parties deserve to know the appellate answer to these important issues before proceeding through a long and expensive trial.

[1]At the time of the filing of this memorandum and accompanying motion, the Court had not ruled on State Farm's motion for summary judgment [734], which, of course, if granted, would make this motion to certify moot.

STANDARD FOR CERTIFICATION

28 U.S.C. § 1292(b) provides that a district court should certify an order for interlocutory appeal where it determines "that such 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); *see also Rico v. Flores*, 481 F.3d 234, 238 (5th Cir. 2007). When all of these elements are clearly present, the Fifth Circuit has admonished that a trial court must certify an order for interlocutory appeal. *In re McClelland Eng'rs, Inc.*, 742 F.2d 837, 837-38 (5th Cir. 1984) (vacating trial court's refusal to certify order for interlocutory appeal as abuse of discretion), *overruled on other grounds by In re Air Crash Disaster Near New Orleans, La. on July 9, 1982*, 821 F.2d 1147 (5th Cir. 1987).

ARGUMENT

I. THE COURT'S RULING ON THE RIGSBYS' VIOLATIONS OF THE SEAL PRESENTS A CONTROLLING QUESTION OF LAW

The Court's Order presents a "question of law" because it involves "a question regarding the meaning of a statutory . . . provision." *Boim v. Quranic Literacy Inst. & Holy Land Found. for Relief & Dev.*, 291 F.3d 1000, 1007 (7th Cir. 2002). *See also, Dresser v. Meba Medical & Benefits Plan,* __ F. 3d __, 2010 WL 5175509 at *2 (5th Cir. Dec. 22, 2010) ("[a] district court's interpretation of a statute or regulation is a question of law . . . ."); *Kemp v. G. D. Searle & Co*., 103 F. 3d 405, 407 (5th Cir. 1997) ("[q]uestions of statutory interpretation are questions of law . . . "). Specifically, that question is whether a relator's violation of the FCA's sealing requirement requires dismissal of the relator's *qui tam* complaint. *See* 31 U.S.C. § 3730(b)(2). The question here is *purely* one of law because the Rigsbys admit that they participated in at least six seal violations and that their former counsel orchestrated dozens more, but claim that they should not be held legally accountable for these multiple violations.[2]

[2] The Rigsbys further submitted no argument, let alone evidence, challenging any of State Farm's factual contentions and evidence of seal violations.

The Court itself recognized at least "three instances" where the Rigsbys committed a violation of the seal order. ([871] at 11-12.) Here, the Court was not required to resolve disputed factual assertions – as there are no such disputes – but rather, only to apply the law to undisputed facts.

This question of law is "controlling" because a reversal by the Fifth Circuit would result in dismissal of this Action with prejudice as to the Rigsbys. Where, as here, "an incorrect disposition would require reversal of a final judgment," there is "no doubt" that a question of law is "controlling" under section 1292(b). 16 Charles Alan Wright, et al., *Federal Practice & Procedure* § 3930 (2d ed. 2008). A question of law is deemed "controlling" merely "if interlocutory reversal might save time for the district court and time and expense for the litigants," making it even more certain that this question of law, which may result in final resolution of the Rigsbys' action, is controlling. *Johnson v. Burken*, 930 F.2d 1202, 1206 (7th Cir. 1991); *accord State of N. Carolina ex rel. Howes v. W.R. Peele, Sr. Trust*, 889 F. Supp. 849, 853 (E.D.N.C. 1995). This question of law is particularly suited to interlocutory review because it was "considered at the summary judgment stage on a record fully developed through discovery." *Kuzinski v. Schering Corp.*, 614 F. Supp. 2d 247, 249-50 (D. Conn. 2009).

II. INTERLOCUTORY REVIEW OF THE COURT'S ORDER DENYING STATE FARM'S MOTION TO DISMISS WILL MATERIALLY ADVANCE THE TERMINATION OF THIS LITIGATION

Certification of the Order for interlocutory appeal is warranted in light of the further proceedings that may occur in this Court. If this Action proceeds at this juncture, the parties will have to prepare for and conduct a potentially lengthy trial on the McIntosh claim, which will require an enormous expenditure of resources by the parties and the Court.

Further, the Rigsbys' pending motion for reconsideration of the scope of discovery seeks to jettison the carefully crafted pretrial order which has guided the parties and the Court for over a year and requests discovery into properties the Rigsbys speculate may have been the subject of their alleged scheme. That motion, if granted, could lead to a protracted discovery period with colossal expense, not

to mention further subsequent dispositive motion practice and an exponentially larger trial that would follow.

If this Action is ultimately tried to judgment and appealed, the Fifth Circuit may determine that this Action should have been dismissed at the outset due to the Rigsbys' numerous seal violations. Thus, as this Court has previously recognized, interlocutory appeal is advisable because it would "clarify the scope of, or even render unnecessary," these "difficult and time-consuming" proceedings, which will involve complex issues and "extensive documentary evidence." *Williamson v. Elf Aquitine, Inc.*, 1996 WL 671660, at *2 (N.D. Miss. 1996) (Senter, J.); *see also Tuepker*, 2006 WL 2794773, at *2 (where interlocutory appeal would affect numerous other proceedings, "it is most obvious and should be stressed that an appeal will materially advance the ultimate termination of the litigation").

III. THERE ARE SUBSTANTIAL GROUNDS FOR A DIFFERENCE OF OPINION AS TO THE COURT'S ORDER REGARDING THE RIGSBYS' NUMEROUS SEAL VIOLATIONS

This Court's identification of a circuit split on the central issue supporting the Court's ruling demonstrates conclusively that there are substantial grounds for a difference of opinion as to whether the Rigsbys' multiple seal violations – (both directly and through the actions of more than one of their former counsel, including Richard Scruggs) – require dismissal of their complaint. This Court ultimately concluded that dismissal was not required by balancing the three factors set forth by the Ninth Circuit in *Lujan*, which include the harm to the government, the nature and extent of the violations, and the presence of bad faith or willfulness. *See* ([871] at 8-9) (citing *Lujan*, 67 F.3d 242).

However, the Court also recognized that "[t]he Sixth Circuit has established a *per se* rule that failure to follow the sealing requirements of the FCA requires dismissal of the complaint." ([871] at 8 (citing *Summers*, 623 F.3d 287).) Indeed, the Sixth Circuit has expressly rejected the *Lujan* balancing test, holding that a relator's failure to comply with the FCA's seal requirement is "'a fatal deficiency that requires dismissal of this action with prejudice as to the relator.'" *Summers*, 623 F.3d at 290 (quotation

omitted). The presence of a circuit split alone satisfies this element for certification of interlocutory review. *See In re Baker & Getty Fin. Servs.*, 954 F.2d at 1172 & *Drake v. Lab. Corp. of Am. Holdings*, 323 F. Supp. 2d 449, 456 (E.D.N.Y. 2004). Where, as here, the parties' differing positions reflect a circuit split involving statutory construction which the Fifth Circuit has yet to address, the Court of Appeals has found interlocutory appeal to be appropriate, has resolved the issue, and then has remanded the case to district court for further proceedings consistent with the Court's ruling. *See, e.g.*, *Nuovo Pignone, SpA v. STORMAN ASIA M/V*, 310 F. 3d 374 (5th Cir. 2002).

Crucially, the conflicting standards utilized by the Ninth and Sixth Circuits on this issue implicate fundamental constitutional principles – namely, the separation of powers and judicial restraint – each of which should be addressed by the Fifth Circuit before this case proceeds any further. As the Sixth Circuit explained in *Summers*, superimposing a *Lujan*-like balancing test on the unambiguous language of the FCA's sealing provision "represent[s] a form of judicial overreach," 623 F. 3d at 296, which improperly invites the courts to "second-guess" the balance that Congress had already struck when it enacted the FCA's seal requirement. *Id.* at 299.

Lujan and *Summers* must also be viewed in light of the Fifth Circuit and Supreme Court decisions in *McCord*, which State Farm respectfully submits require dismissal of the Rigsbys' *qui tam* complaint, due to their numerous violations of the statutory seal provision. *See* 233 U.S. at 162 & *United States ex rel. Texas Portland Cement Co. v. McCord*, 218 F. 991 (5th Cir. 1914). *McCord* involved a different *qui tam* statute, but an analogous issue, namely, whether the relator's failure to strictly comply with the statute's filing requirements divested the relator of a right to sue on behalf of the government. The Supreme Court answered the question in the affirmative, explaining that when Congress "creates a new liability and gives a special remedy for it, . . . the limitations upon such liability become a part of the right conferred, and ***compliance with them is made essential*** to the assertion and benefit of the liability itself." *McCord*, 233 U.S. at 162 (emphasis added). The Supreme Court did not

limit this unambiguous holding to Heard Act cases, but rather applied it to any case in which Congress "creates a new liability and gives a special remedy for it…." *Id.*

As the Sixth Circuit did in *Summers*, the Supreme Court explained that it is not the province of the courts to second-guess these procedural limitations:

> The purpose of Congress [in setting procedural limitations on *qui tam* suits] is stated in terms too plain to be mistaken or to require construction, because of any possible uncertainty in their meaning. When this is so it becomes unnecessary to inquire into the reasons which induced the legislation. . . . Whatever the motive, the language used clearly expresses the legislative intention and admits of no doubt as to its meaning. ***This being so, it is only the province of the courts to enforce the statute in accordance with its terms.***

McCord, 233 U.S. at 163 (emphasis added); *see also United States ex rel. Bain v. Ga. Gulf Corp.*, 208 F. App'x 280, 281-82 (5th Cir. 2006) (relator's appeal from a dismissal of a *qui tam* complaint due to seal violation, *inter alia*, was "frivolous"). Indeed, other courts have cited *McCord* as authority for dismissing *qui tam* claims where the relators violated the seal provision. *See, e.g., U.S. ex rel. Pilon v. Martin Marietta Corp.* 60 F. 3d 995, 999 (2nd Cir. 1995); *Erickson ex rel. U.S. v. American Institute of Biological Sciences,* 716 F. Supp. 908, 912 (E.D. Va. 1989). Thus, both the decisions of the Supreme Court and the Fifth Circuit, and the circuit split on this controlling issue (acknowledged by the Court and the Rigsbys) show that there are substantial grounds for a difference of opinion. Indeed, the Fifth Circuit has held that refusal to certify an order under similar circumstances is a reversible abuse of discretion. *See In re McClelland Eng'rs*, 742 F.2d at 837.

Finally, State Farm notes that the Fifth Circuit has shown a keen interest in considering the important and cutting-edge legal issues arising from Hurricane Katrina cases. In addition to *Tuepker,* the Fifth Circuit very recently agreed to review important FCA issues that had been decided by the district court in the *Branch* litigation. *In re Am. Nat'l Prop. & Cas. Co*., No. 10-30928 (5th Cir.); *In re Allstate Ins. Co*., No. 10-31207 (5th Cir.). Although that review is likely now moot in light of the even

more recent entry of judgment against the *Branch* relators, the point remains that the Fifth Circuit has been willing to preemptively engage these important issues and thereby allow the district courts saddled with the responsibility of handling Hurricane Katrina litigation to proceed to conclusions with even greater confidence. *See, e.g., In re Katrina Canal Breaches Litig*., 613 F. 3d 504 (5th Cir. 2010); *Penthouse Owners Ass'n, Inc. v. Certain Underwriters at Lloyd's, London*, 612 F. 3d 383 (5th Cir. 2010); *Catlin Syndicate Ltd. v. Imperial Palace of Miss.*, 600 F. 3d 511 (5th Cir. 2010); *Turk v. La. Citizens Prop. Ins. Corp.*, 281 F. App'x 262 (5th Cir. 2008).

CONCLUSION

For all the foregoing reasons, State Farm respectfully requests that the Court grant this motion to certify its [871] Memorandum Opinion and [872] Order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b), by amending each of them to include a statement by the Court that its denial of State Farm's [739] motion to dismiss due to the Rigsbys' violations of the seal order presents a controlling question of law, that an immediate appeal would materially advance the ultimate termination of the litigation, and that there are substantial grounds for a difference of opinion as to this question.

This the 7th day of February, 2011.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, E. Barney Robinson III, one of the attorneys for State Farm Fire and Casualty Company, do hereby certify that I have this day caused a true and correct copy of the foregoing instrument to be delivered to the following, via the means directed by the CM/ECF system:

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