UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA ex rel. ANTI-DISCRIMINATION CENTER OF METRO NEW YORK, INC., Plaintiff/Relator, – against – WESTCHESTER COUNTY, NEW YORK, Defendant.	:	**ECF CASE** 06 CV 2860 (DLC)

DEFENDANT WESTCHESTER COUNTY, NEW YORK'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO CERTIFY THE FEBRUARY 24, 2009 OPINION & ORDER FOR INTERLOCUTORY APPEAL AND TO POSTPONE TRIAL PENDING APPEAL

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Pursuant to 28 U.S.C. § 1292(b) and Fed. R. App. P. 5(a)(3), defendant County of Westchester, New York (the "County") respectfully submits this brief in support of its Motion to Certify the Court's February 24, 2009 Opinion & Order (the "February 24th Order") for Interlocutory Appeal and to Postpone Trial Pending Appeal.

SUMMARY OF REASONS FOR CERTIFYING APPEAL

As more completely explained below, the February 24th Order meets the statutory criteria for certification. That, of course, is not enough, standing alone, to justify granting this application. The County accordingly offers this brief summary of the reasons that justify this extraordinary relief, beyond the fact that the February 24th Order qualifies under the statute (28 U.S.C. § 1292) as a certifiable order.

If interlocutory appeal is not authorized, the County may not be able to obtain review of key aspects of the Court's ruling that will impose significant burdens on the County's future participation in the Community Development Block Grant ("CDBG") program. The trial presently scheduled, as circumscribed by the February 24th Order, will focus narrowly on but two issues: the County's intent when it certified compliance in 2000 through 2006 and the materiality of those certifications to the federal government at the time they were made. If a jury finds for the County – as the County expects will happen – that favorable verdict might insulate from appellate review the grant of partial summary judgment on several issues to ADC. The County could not appeal a verdict in its favor and any appeal by ADC would focus naturally on (with great deference to) the jury's determinations.

Unfortunately, that favorable verdict might not put to rest the broader controversy between ADC and the County. Unless the County adopts and implements this Court's view of its obligations resulting from the applicable certifications, ADC, or another relator, will likely seek to prosecute a follow-on suit, for the years after 2006. Any subsequent relator would

contend that the matter of intent would be removed as a defense as of February 24, 2009, when this Court held that the County's certifications were legally false.

Without an opportunity to take an immediate appeal, then, the County must decide either to conform its practices to the Court's ruling, with the expense involved and at the risk of mooting any future opportunity to challenge the Court's ruling, or to withdraw from the CDBG program, which produces the perverse result that ADC's suit ends up depriving Westchester County residents of the benefits of the community development initiatives that the County funds with the federal monies.[1] Indeed, the issues are sufficiently challenging that the County recently suspended its process of drawing on CDBG funds until it can determine how to proceed without increasing its exposure to FCA actions.

In light of these practical concerns, and to avoid the injustice that will occur if the County is denied any opportunity to obtain the Second Circuit's ruling on important questions that will guide the County's future participation in the CDBG program, the County respectfully asks the Court to amend its February 24th Order to certify it for interlocutory appeal.

ARGUMENT

I. THE FEBRUARY 24TH ORDER SHOULD BE CERTIFIED FOR INTERLOCUTORY APPEAL

"The standard for certification is well established." *United States ex rel. Anti-Discrimination Center of Metro New York, Inc. v. Westchester County, New York*, No. 06 Civ. 2860, 2007 WL 2402997, at *1 (S.D.N.Y. Aug. 22, 2007) ("*Anti-Discrimination Center II*").[2]

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[1] Notably, the recently enacted federal stimulus package steers substantial monies to local governments through the CDBG program. Loss of those monies to the County would be disastrous in the current economy.

[2] *Anti-Discrimination Center I* is the Court's July 13, 2007 Order denying the County's motion to dismiss, reported at 495 F. Supp. 2d 375. The February 24th Order should be considered *Anti-Discrimination Center III*. It has been posted on Westlaw at 2009 WL 455269 and is annexed to the Affirmation of Michael A. Kalish. Citations are to the slip opinion.

Under 28 U.S.C. § 1292(b), a district judge may certify an order to the court of appeals for interlocutory review where that judge (1) "shall be of the opinion that such order involves a controlling question of law [(2)] as to which there is substantial ground for difference of opinion and [(3)] that an immediate appeal from the order may materially advance the ultimate termination of the litigation . . . ." *See id.* Simply meeting these statutory criteria, however, does not entitle a litigant to an interlocutory appeal. The Court also should be persuaded that the case presents "exceptional circumstances" that warrant the act of certification and consequent immediate appeal. *See, e.g., Klinghoffer v. S.N.C. Achille Lauro*, 921 F.2d 21, 25 (2d Cir. 1990); *Anti-Discrimination Center II*, 2007 WL 2402997, at *1. As set forth herein, the February 24th Order meets the statutory criteria for certification and warrants certification due to the exceptional circumstances presented.

A. The February 24th Order Meets The Statutory Criteria for Certification

The County submits that the February 24th Order involves a controlling question of law, to wit, whether a claim under the FCA requires a showing of materiality and, if so, the standard to be applied to determine materiality.[3] This question of law, in fact, subsumes additional questions, such as whether an FCA claim requires a need to demonstrate injury to the Government. As explained below, divergent and substantial differences of opinion among the courts affect these controlling questions of law and immediate review will materially advance the termination of this litigation.

[3] The County's previous motion to certify concerned whether local administrative reports could contain public disclosures that would deprive the Court of its subject matter jurisdiction over this FCA lawsuit. Since the Court's decision on that earlier motion, *Anti-Discrimination Center II*, the Fourth Circuit Court of Appeals has weighed in on the issue and the matter is currently before the Supreme Court on a petition for certiorari. *United States ex. rel Wilson v. Graham County Soil & Water Conservation Dist.*, 528 F.3d 292 (4th Cir. 2008), *petition for cert. filed*, 77 U.S.L.W. (Sept. 5, 2008) (No. 08-304). On December 8, the Supreme Court invited the Solicitor General to provide the views of the United States. 129 S. Ct. 753 (U.S. Dec. 8, 2008). For the reasons stated in its previous motion to certify, the County believes that this issue, which the Court briefly addressed in its February 24 Order, also presents a controlling question of law that meets the criteria set forth in 28 U.S.C. § 1292(b).

1. Controlling Question of Law

The February 24th Order denies the County's motion for summary judgment in all respects and grants partial summary judgment to ADC on "the following elements of FCA liability: that the defendant made a claim, to the United States government, that was false or fraudulent, seeking payment from the Federal treasury." (Feb. 24th Order, p.54.) In reaching this conclusion, the Court considered and rejected the County's arguments for adopting the outcome materiality test for determining whether a claim could be considered fraudulent. Instead, the Court adopted the less restrictive "natural tendency test." While the Court nominally held that ADC still must bear the burden of proof on materiality at trial, the February 24th Order leaves little room for the County to avoid an adverse finding on this issue. The Court, for example, refused to give any significance to HUD's knowledge that the County limited its AI to an affordability analysis (except as an intent issue) and refused to require a showing of damages to the United States as a part of ADC's claim.

By granting partial summary judgment on several of the elements of ADC's claim, the Court inherently ruled on controlling questions of law. An order granting partial summary judgment may be entered only when the material facts are not genuinely in dispute and the law controls the outcome of the issue. *See, e.g., Borden, Inc. v. Spoor Behrins Campbell & Young, Inc.*, 828 F. Supp. 216, 218-19 (S.D.N.Y. 1993). Understandably, then, orders granting partial summary judgment in favor of plaintiffs frequently give rise to interlocutory appeal. *See, e.g., Campuzano-Burgos v. Midland Credit Mgmt., Inc.*, 550 F.3d 294, 296 (3d Cir. 2008); *Coury v. Moss*, 529 F.3d 579, 581 (5th Cir. 2008); *Am. Council of the Blind v. Paulson*, 525 F.3d 1256, 1265 (D.C. Cir. 2008); *Leonard v. McMorris*, 320 F.3d 1116, 1118 (10th Cir. 2003); *Bellas v. CBS, Inc.*, 221 F.3d 517, 521 (3d Cir. 2000); *Maertin v. Armstrong World Indus., Inc.*, No. Civ. 01-5321, 2006 WL 827881, at *1 (D.N.J. Mar. 29, 2006); *Amerisourcebergen Drug Corp. v.*

Meier, No. 03-cv-6769, 2005 WL 2645000, at *3 (E.D. Pa. Oct. 14, 2005) (*sua sponte* certification); *ABN Amro Verzekeringen BV v. Geologistics Americas, Inc.*, No. 02 Civ. 1238, 2003 WL 21543529, at *3 (S.D.N.Y. July 9, 2003) (Chin, J.).

The partial summary judgment in favor of ADC (and denial of summary judgment to the County) did not end this case, of course; if it did permission for interlocutory appeal would not be necessary. While the County submits that a favorable resolution of the materiality issue on appeal will terminate this case in its favor (as its motion argued), that potential outcome is not necessary to qualify the question of law for certification. Although a question of law is "controlling" if a reversal of the district court's order would terminate the action, "the resolution of an issue need not necessarily terminate an action in order to be 'controlling'[.]" *Klinghoffer*, 921 F.2d at 24 (citations omitted.); *In re WorldCom, Inc. Sec. Litig.*, No. 02 Civ. 3288, 2003 WL 22953644, at *5 (S.D.N.Y. Dec. 16, 2003) (Cote, J.) ("a question can be controlling without necessarily ending the litigation").

Rather, where the district court's ruling on the question of law, if erroneous, creates a reversible error on final appeal,[4] *see Amerisourcebergen Drug Co.*, 2005 WL 2645000, at *3, or raises questions serious to the conduct of the litigation, *see In re Duplan Corp.*, 591 F. 2d 139, 148 n.11 (2d Cir. 1978), it qualifies as a controlling question of law. This Court's ruling on materiality, if erroneous, raises the prospect of reversible error, particularly in light of the manner in which it will shape the proofs and questions that a jury will address. Since ADC need not meet the higher standard of proof demanded by the more restrictive standard, and the jury need not conclude that the higher standard is satisfied, a ruling by the Court of Appeals that this

[4] "A controlling question of law must encompass *at the very least* every order which, if erroneous, would be reversible error on final appeal. If the statute were interpreted to exclude any such order that interpretation would be inconsistent with the clear intention of the sponsors to avoid a wasted trial." *Katz v. Carte Blanche Corp.*, 496 F.2d 747, 755 (3d Cir. 1974) (en banc) (emphasis added).

Court erred in selecting the natural tendency test would invalidate any verdict in favor of ADC. *Cf. Maertin*, 2006 WL 827881, at *6, *7 n.7 (certifying choice of law question for immediate appeal); *Chin v. City of N.Y.*, 803 F. Supp. 710, 733 (S.D.N.Y. 1992), *aff'd*, 1 F.3d 96 (2d Cir. 1993). That potential outcome establishes that the question of law qualifies as controlling under Section 1292.

2. Substantial Ground for Difference of Opinion

The second criterion looks for the existence of a difference of opinion and at the substantiality of that difference. The materiality issue passes both hurdles.

A difference in opinion can be found in a split among the circuit courts. *See, e.g., In re Baker & Getty Fin. Servs., Inc.*, 954 F.2d 1169, 1172-73 (6th Cir. 1992) (circuit split satisfied second prong of § 1292(b)); *AD Global Fund, LLC ex rel. North Hills Holding, Inc. v. U.S.*, 68 Fed. Cl. 663, 665-66 (2005) (on decision to certify, the "'substantial ground for difference of opinion'" usually "manifests as splits among the circuit courts"), *aff'd*, 481 F.3d 1351 (Fed. Cir. 2006); Thomas E. Baker, *A Primer on the Jurisdiction of the U.S. Courts of Appeal* §4.03, at 59 (2d ed. 2009) ("A paradigm example of an appropriate occasion for a §1292(b) certificate might involve a legal issue of first impression in a circuit in which there is conflict between the other courts of appeal."). It also may arise from a healthy division and debate among the district courts. *See, e.g., In re WorldCom, Inc. Sec. Litig.*, 2003 WL 22953644, at *6 (finding substantial difference of opinion among "a handful of courts elsewhere" plus "at least one member of the Second Circuit"); *Keller v. Lee*, No. 96 Civ . 4168, 1997 WL 289853, at *1 (S.D.N.Y. May 29, 1997) (Cote, J.) (noting generally that "[t]he courts that have considered this issue have come to divergent results"). And, of course, the absence of controlling authority in the Second Circuit weighs heavily in the determination. *See In re*

Adelphia Communics. Corp. Sec. & Derivative. Litig., No. 03 MDL 1529, 2006 WL 708303, at *4 (S.D.N.Y. Mar. 20, 2006) (McKenna, J.).

As the February 24th Order acknowledges, the Second Circuit has not reached the issue of the proper standard to apply to the materiality element of an FCA action.[5] Other circuit courts have diverged on the test to be applied. The Seventh[6] and Eighth[7] Circuits apply the outcome materiality test; formulations set forth by the Fifth[8] and Tenth[9] Circuits resemble it as well. The Fourth, Sixth, and Ninth Circuits apply the natural tendency test.[10]

This Court selected the natural tendency test, concluding the reasoning underlying it was "more persuasive" than the outcome materiality test. Notably, by characterizing the reasoning as "more persuasive," this Court implicitly recognized that the outcome materiality test has some (albeit less) appeal. That conclusion provides a sufficient basis to conclude that a substantial ground for difference of opinion exists. Underscoring this point, the outcome materiality test and the natural tendency test have been part of an ongoing dialogue and debate between the circuits. There is no basis to conclude that either test reflects an outmoded or ill-

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5 (Feb. 24th Order, p. 48 (citing *Mikes v. Straus*, 274 F.3d 687, 697 (2d Cir. 2001).)

6 *See, e.g., Luckey v. Baxter Healthcare Corp.*, 183 F.3d 730, 732 (7th Cir. 1999); *United States ex rel. Bidani v. Lewis*, 264 F. Supp. 2d 612, 615 (N.D. Ill. 2003) (describing the *Luckey* standard as "lean[ing] toward an outcome materiality definition" and noting that district courts in the Seventh Circuit "have followed suit").

7 *Costner v. URS Consultants, Inc.*, 153 F.3d 667, 677 (8th Cir. 1998), *on subsequent appeal*, 317 F.3d 883 (8th Cir. 2003).

8 *See United States v. Southland Mgmt. Corp.*, 288 F.3d 665, 674-75 (5th Cir. 2002) (en banc) (holding "[i]t is only those claims for money or property to which a defendant is not entitled that are 'false' for purposes of the [FCA]," and citing *Costner*); *id.* at 675 ("unless [defendants] submitted claims for money to which they were not entitled no [FCA] liability arises"); *United States ex rel. Wilkins v. North Am. Constr. Corp.*, 173 F. Supp. 2d 601, 624-30 (S.D. Tex. 2001) (recounting the common law historical meanings of "false or fraudulent claim"); *id.* at 637 (boiling down materiality to "a reasonable agency would have acted differently in the absence of fraud").

9 *See United States ex rel. Conner v. Salina Reg. Health Ctr., Inc.*, 543 F.3d 1211, 1219-20 (10th Cir. 2008) ("If the government would have paid the claims despite knowing that the contractor has failed to comply with certain regulations, then there is no false claim for purposes of the FCA.").

10 *See, e.g., United States v. Bourseau*, 531 F.3d 1159, 1171 (9th Cir. 2008); *United States ex rel. A+ Homecare, Inc. v. Medshares Mgmt. Group, Inc.*, 400 F.3d 428, 446 (6th Cir. 2005); *Harrison v. Westinghouse Savannah River Co.*, 352 F.3d 908, 916-17 (4th Cir. 2003).

informed view of the statute. Rather, the circuits adhering to the outcome materiality test have concluded the less restrictive test did not, to their collective minds, fulfill the statutory purpose in the particular context presented.[11]

Against this background, the second criterion is met because "the conclusions reached by the Court were by no means the only reasonable conclusions an impartial arbitrator could reach." *Chin*, 803 F. Supp. at 733.

3. Materially Advance Termination of the Litigation

The last criterion looks to matters such as providing the parties with certainty on key issues that will be tried, the conservation of resources that would be wasted through multiple trials (that an erroneous unreviewed ruling might occasion), and the prospect that a trial could be eliminated if the appellate court ruled differently from this Court. *See, e.g., Maertin*, 2006 WL 827881, at *7; *Amerisourcebergen Drug Co.*, 2005 WL 2645000, at *4, *ABN Amro*, 2003 WL 21543529, at *3. All of these factors present themselves here. Indeed, with only the trial now left to take place, the Court must ask whether an immediate appeal would result in a more stable and sustainable trial result than plunging forward based on the Court's best estimation of how to resolve unsettled issues of law. The opportunity to settle those issues materially advances the termination of this litigation in an efficient and just manner.

B. Immediate Appeal Avoids Injustice and Permits The Development of Circuit Precedent on Important Issues of Law with Potentially Wide-Ranging Effect

As Judge Kaplan once aptly observed, "Section 1292(b) certification is reserved for cases of unusual significance, those in which a ruling is of practical importance going well

[11] Indeed, it may be the context of the individual claim plays an important role. *See United States ex rel. Conner*, 543 F.3d at 1219 n.6 ("adopt[ing] a materiality requirement in the context of false certification claims" but "not address[ing] whether materiality is an element of the criminal false claims provision or under other theories of FCA liability"); *Southland Management*, 336 F.3d at 680 (Edith H. Jones, J., specially concurring) ("the determination of materiality is context-specific").

beyond run-of-the-mill concerns of the parties before the Court." *In re Auction House Antitrust Litig.*, 164 F. Supp. 2d 345, 348 (S.D.N.Y. 2001). As the County outlined in the opening of this brief, a prompt appellate ruling is of enormous practical importance. It determines the course that the County may take in dealing with the CDBG program. If the County is correct in its view of the law and its impact on the facts, then the County may continue to operate as it has for the past nine years. That should be known sooner rather than later. Likewise, immediate interlocutory appeal should occur even if this Court strongly believes that the County will fail because even an unsuccessful appeal would "eliminate uncertainty" about the legal issues surrounding liability "before the [County] invests resources in determining how best to come into compliance with [CBDG certification requirements]." *See Am. Council of the Blind*, 525 F.3d at 1265.

In dealing with political entities such as the County, the value of a judicial resolution of such uncertainties should not be underestimated.[12] Moreover, the County believes that the impact of the Court's ruling may be felt well beyond the banks of the Hudson and the shoulders of I-287. Well over a thousand political entities participate in the CDBG program. If their respective AIs do not comport with the letter of the standards that the Court has set forth in the February 24th Order, the floodgates will open on communities struggling to cope with an affordable housing crisis brought on by the bursting of the real estate bubble. The practical stakes are extraordinary.

[12] *See, e.g., Barnes v. Gorman*, 536 U.S. 181, 185-86 (2002) (legitimacy of congressional power to legislate and impose conditions pursuant to the spending power rests on recipient's voluntary and knowing acceptance of terms unambiguously spelled out by Congress).

II. THE TRIAL SHOULD BE POSTPONED UNTIL AFTER THE DETERMINATION OF THE CERTIFIED APPEAL

It is our desire to gain appellate review, not delay the proceedings. As the foregoing analysis explains, however, going forward with a trial potentially moots the key issues and leaves the County without an avenue to obtain review of the Court's summary judgment rulings. Accordingly, the Court should postpone any trial – but not other proceedings – until after the determination of the certified appeal. If issues remain for trial at that point, they can be tried within the scope and under the principles set forth by the Court of Appeals. *See, e.g.*, *Public Interest Research Group of N.J., Inc. v. Hercules, Inc*., 830 F. Supp. 1549, 1559 (D.N.J. 1993) (granting stay after rulings on summary judgment while interlocutory appeal progressed), *aff'd in part, rev'd in part*, 50 F.3d 1239 (3d Cir. 1995), *after remand*, 970 F. Supp. 363 (D.N.J. 1997) (order clarifying issues for trial).

CONCLUSION

For the above reasons, the County respectfully requests that the Court amend its February 24th Order to certify it for interlocutory appeal, postpone trial pending determination of the certified appeal, and grant such other relief the Court deems just and proper.

Dated: New York, New York
March 10, 2009

Respectfully submitted,

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