UNITED STATES DISTRICT COURT

DISTRICT OF RHODE ISLAND

JUDITH A. SISTI, Plaintiff, v. FEDERAL HOUSING FINANCE AGENCY, FEDERAL HOME LOAN MORTGAGE CORPORATION, AND NATIONSTAR MORTGAGE, LLC Defendants.	Case No.: 1:17-cv-00005-JJM-LDA
CYNTHIA BOSS, Plaintiff, v. FEDERAL HOUSING FINANCE AGENCY, FEDERAL NATIONAL MORTGAGE ASSOCIATION, AND SANTANDER BANK, N.A. Defendants.	Case No.: 1:17-cv-00042-JJM-LDA

REPLY IN SUPPORT OF
MOTION TO CERTIFY THE AUGUST 2, 2018 ORDER FOR INTERLOCUTORY APPELLATE REVIEW UNDER 28 U.S.C. § 1292(b)

INTRODUCTION

This Court's August 2, 2018 Order addressed whether Fannie Mae and Freddie Mac (together, the "Enterprises"), as well as the Federal Housing Finance Agency ("FHFA"), in its capacity as their Conservator, are government entities for purposes of constitutional claims under *Lebron*.[1] Interlocutory review is appropriate because the issue presents a controlling question of law, a substantial ground for difference of opinion exists regarding the correctness of the Court's Order, and an immediate appeal may materially advance the ultimate termination of the cases.

Plaintiffs offer no compelling argument to the contrary in their opposition. Plaintiffs largely ignore the requisite certification factors, raising tangential issues that are irrelevant to the Section 1292(b) analysis. Plaintiffs do not dispute that an interlocutory appeal resolved in Defendants' favor will materially advance termination of the cases. Nothing in Plaintiffs' opposition undercuts Defendants' arguments for certification under Section 1292(b). Accordingly, certification for interlocutory review is appropriate.

ARGUMENT

I. AN INTERLOCUTORY APPEAL IS PROPER BECAUSE THE COURT'S ORDER INVOLVES A CONTROLLING QUESTION OF LAW

Plaintiffs argue that an interlocutory appeal is inappropriate because the Court's order "did not simply hinge on statutory interpretation" and appellate review will require review of "detailed factual allegations, and other filings (such as pleadings and briefs)." Opp. at 3; *see also id.* at 10. Plaintiffs are wrong.

Defendants seek to raise a purely legal issue for interlocutory review. The question at issue is whether, as a matter of law, the Enterprises and Conservator are government actors for purposes of constitutional claims. Defendants argued that the answer to this question is no because FHFA's organic statute (HERA) creates substantive structural limits that make FHFA conservatorships inherently temporary under *Lebron*. This Court disagreed as a matter of law, not based on any factual issue. (Order at 10-14). The First Circuit will have to evaluate HERA, analogous statutes,

[1] Terms not defined herein shall take on the definition in Defendants' Motion to Certify ("Mot.").

and relevant case law, just as this Court did as part of its analysis. Nothing more.

To be sure, the Court accepted the Plaintiffs' factual allegations as true (as required when deciding a motion for judgment on the pleading). Order at 10, 14. But the Court's ruling did not make any factual findings requiring appellate review. Rather, the Court held that "Plaintiffs *can prove* that the [Enterprises] and FHFA as conservator are government actors, and thus, *can prove* that the Defendants denied Plaintiffs due process by conducting non-judicial foreclosures." Order at 6 (emphases added). The Court's ruling was necessarily based on its holding that the Defendants are not excluded from Fifth Amendment requirements *as a matter of law*. The Court did not—because it could not at this stage of the litigation—rule that as a factual matter, the Defendants *are* government actors for purposes of constitutional claims. As a result, certifying the Court's Order will not lead to an inquiry into competing versions of the facts.[2]

In sum, the Court's Order involved a controlling issue of law appropriate for interlocutory review, and thus the first Section 1292(b) certification requirement is satisfied.

II. DEFENDANTS HAVE DEMONSTRATED THAT SUBSTANTIAL GROUNDS FOR DIFFERENCE OF OPINION EXIST

There are substantial grounds for difference of opinion from this Court's determination that FHFA and the Enterprises can be deemed government actors for constitutional purposes: the more than 40 decisions holding otherwise. Plaintiffs' arguments to the contrary are wholly without merit.

Plaintiffs acknowledge that the Court's Order is at odds with more than 40 district court and appellate decisions. Opp. at 3. However, Plaintiffs contend that because the Court's Order relied on a U.S. Supreme Court decision—*Lebron*—Defendants' motion "should be denied because controlling authority exists." Opp. at 7-8. But Defendants rely on this same controlling authority as well. Thus, at bottom, Plaintiffs argue that the differing decisions are not substantial because the Court's interpretation of *Lebron* is correct and the other decisions are wrong. Opp. at 7-9. Such an

[2] Plaintiffs also claim that interlocutory appeals are not proper from orders denying motions to dismiss. Opp. at 6. The First Circuit accepts certification in these circumstances. *See, e.g., S.E.C. v. Rocklage*, 470 F.3d 1, 3 (1st Cir. 2006); *Barnard v. Zapata Haynie Corp.*, 975 F.2d 919 (1st Cir. 1992); *Driver v. Helms*, 577 F.2d 147, 149 (1st Cir. 1978).

argument has no relevance to the Court's analysis in deciding Defendants' motion. Neither section 1292(b)'s text nor the First Circuit decisions applying it require this Court to blind itself to the irreconcilable conflicts in the parties' competing interpretations of what all acknowledge is the governing precedent.

However, Plaintiffs are correct that courts consider the strength of the arguments in opposition to the challenged ruling when analyzing this element. Opp. at 6-7, 10; *see also, e.g., In re Flor*, 79 F.3d 281, 284 (2d Cir. 1996). That more than 40 decisions have adopted Defendants' position demonstrates the strength of Defendants' arguments. *In re Bridgestone/Firestone, Inc. Tires Prod. Liab. Litig.*, 212 F. Supp. 2d 903, 909–10 (S.D. Ind. 2002) ("[W]e examine the strength of the arguments in opposition to the challenged ruling [and t]his analysis includes examining whether other courts have adopted conflicting positions regarding the issue of law proposed for certification."). Further, the Court's thorough analysis of the issue and leading cases supporting Defendants' position suggests that the Court "also recognizes the arguments in support of contrary conclusions are not insubstantial." *APCC Servs., Inc. v. AT & T Corp.*, 297 F. Supp. 2d 101, 107 (D.D.C. 2003) (certifying question for appeal).

Recognizing that there are substantial grounds for difference of opinion does not require the Court to agree with the decisions supporting Defendants' position to grant certification, as Plaintiffs suggest. Opp. at 3 (arguing that the "Court [already] conducted that substantive review ["required to examine the rationale of different opinions"] and was 'not persuaded by the reasoning of prior cases'" (quoting Order at 6-7)). Indeed, the entire purpose of an interlocutory appeal is for an appellate court to weigh the merits of conflicting-but-reasonable competing legal positions and to resolve the conflict.

Accordingly, by this Court acknowledging that reasonable jurists can differ on a legal issue, the Court is not causing "a substantive revision that is at odds with" its Order, Opp. at 3. *See, e.g., Reese v. BP Expl. (Alaska) Inc.*, 643 F.3d 681, 688 (9th Cir. 2011) ("[T]his appeal involves an issue over which reasonable judges might differ and such uncertainty provides a credible basis for a difference of opinion on the issue." (citation omitted)); *Cmty. Tr. Bancorp., Inc. v. Cmty. Tr. Fin. Corp.*, No. 7:10-CV-062-KKC, 2011 WL 2020246, at *4 (E.D. Ky. May 24, 2011) (granting

defendants' motion to certify order for interlocutory appeal although the court was "confident in [its] determination"); *Schwendimann v. Arkwright Advanced Coating, Inc.*, No. CIV. 11-820 ADM/JSM, 2012 WL 5389674, at *4 (D. Minn. Nov. 2, 2012) ("Although believing its March and August decisions were correctly decided, the Court recognizes there is substantial ground for difference of opinion on [the issue]."); *APCC Servs., Inc.*, 297 F. Supp. 2d at 107 (granting certification "[a]lthough this Court believes that its prior decisions . . . are correct"); *Max Daetwyler Corp. v. Meyer*, 575 F. Supp. 280, 283 (E.D. Pa. 1983) (certifying question although the court found one judge's "analysis more persuasive" than the other); *Driver v. Helms*, 74 F.R.D. 382, 402 (D.R.I. 1977) ("[I]f the Court's resolution of these questions is mistaken, in all likelihood this action would be terminated in this Court. The Court therefore makes the certification.").

Plaintiffs also erroneously contend that the substantial ground for disagreement needs to exist among cases in the First Circuit. Opp. at 6 ("[T]he existence of different conclusions from outside courts…does not establish a substantial ground for a difference of opinion within the First Circuit."). Again, nothing in Section 1292(b)'s text or the relevant case law requires that there be substantial ground for difference of opinion only within the applicable circuit. "A substantial ground for difference of opinion is often established by a dearth of precedent within the controlling jurisdiction and conflicting decisions in other circuits." *APCC Servs., Inc.*, 297 F. Supp. 2d at 97; *see also, e.g.*, *Bd. of Trustees of Leland Stanford Junior Univ. v. Roche Molecular Sys., Inc.*, No. C 05-04158 MHP, 2007 WL 1119193, at *2 (N.D. Cal. Apr. 16, 2007) ("In order to secure an interlocutory appeal, [the moving party] must demonstrate a legitimate and 'substantial ground for difference of opinion' between and among judicial bodies."). Plaintiffs' citation to *Ryan, Beck & Co.* for support is inapposite. Opp. at 6 (citing *Ryan, Beck & Co., LLC v. Fakih*, 275 F. Supp. 2d 393, 398 (E.D.N.Y. 2003)). In that case, the court did not "not[e] that differing opinions from outside courts do not establish substantial grounds for difference of opinion." *See* Opp. at 6. Rather, the court concluded that it was not necessary to consider the out-of-circuit opinions because a recent Second Circuit decision had "clearly settled [the] law" on the issue. 275 F. Supp. 2d at 397-98. Here, the First Circuit has not issued a decision on whether the Defendants are government

actors for purposes of constitutional claims. Thus, Defendants' reliance on out-of-circuit decisions to demonstrate a substantial difference of opinion is appropriate.[3]

III. THIS IS AN EXCEPTIONAL CASE WARRANTING INTERLOCUTORY REVIEW

Plaintiffs' argument that this case does not present an exceptional circumstance because the case is simple and there is no "imminent or unusual prejudice or hardship that [Defendants] will suffer," Opp. at 10, is unavailing.

Whether the case is simple or whether Defendants will experience hardship or prejudice is irrelevant. Plaintiffs do not cite to, and Defendants are not aware of any, First Circuit authority mandating that the Court consider complexity, hardship, or prejudice in determining whether a case is exceptional for certification for interlocutory review. Nevertheless, to the extent it is relevant, as explained in Defendants' motion, the case presents a pivotal issue, and Defendants are greatly prejudiced by the unsettled law. Mot. at 5-7.

According to the First Circuit, "an exceptional case might be one where the district court . . . is reluctant to embark upon an extended and costly trial." *In re Heddendorf*, 263 F.2d 887, 888 (1st Cir. 1959); *Cummins v. EG & G Sealol, Inc.*, 697 F. Supp. 64, 68 (D.R.I. 1988) ("An extensive body of case law indicates that § 1292(b) review should only be granted in rare cases where the saving of costs to the litigants and increase in judicial efficiency is great."). Thus, expense is not a "flimsy argument," Opp. at 11 n.8. Indeed, if the First Circuit rules in Defendants' favor the ruling would end the *Boss* litigation, and it would allow for more efficient resolution of Plaintiff's remaining state claims in the *Sisti* litigation. All the costs to be incurred by the parties associated with litigation would be avoided or substantially lowered along with the associated judicial resources that would be saved. Plaintiffs would thus also avoid "expensive and burdensome," Opp. at 11, litigation.[4]

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[3] Further, Plaintiffs' argument that the more than 40 decisions at issue are not binding on this Court, Opp. at 3, is totally irrelevant. If there were binding precedent, there would be no good-faith basis for an appeal.

[4] Given that Defendants meet the requirements for § 1292(b) certification, the usual concern with piecemeal appeals, Opp. at 11, has no bearing on this case. *Cummins*, 697 F. Supp. at 68 (explaining that § 1292(b) is a statutory exception to the final judgment rule).

CONCLUSION

Defendants respectfully request this Court amend its Order to include the certification necessary to permit a petition to the First Circuit for interlocutory review of the Order.

Dated: October 11, 2018

FEDERALHOUSING FINANCE AGENCY, FEDERAL NATIONAL MORTGAGE ASSOCIATION, AND FEDERAL HOME LOAN MORTGAGE CORPORATION,

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CERTIFICATE OF SERVICE

I, Ethan Z. Tieger, hereby certify that the documents filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as nonregistered participants on October 11, 2018.

/s/ Ethan Z. Tieger
Ethan Z. Tieger