UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

SUHAIL NAJIM ABDULLAH AL SHIMARI, et al.,	
Plaintiffs,	Case No. 1:08-CV-00827-GBL-JFA
v.	
CACI INTERNATIONAL INC, et al.,	
Defendants.	

DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION FOR 28 U.S.C. § 1292(B) CERTIFICATION OF THE COURT'S ORDER ON DEFENDANTS' MOTION TO DISMISS[1]

1. Plaintiffs' opposition makes no attempt to argue that CACI fails to satisfy the criteria for 28 U.S.C. § 1292(b) certification. Plaintiffs neither cite the applicable test nor address any of the statutory considerations. This is because, as CACI argued in its motion, there is no question that the March 18, 2011 Memorandum Order (the "Memorandum Order") involves controlling questions of law for which there are substantial grounds for difference of opinion, and that an interlocutory appeal will materially advance the disposition of this litigation. Defs. Mem. in Support of their Mot. for 28 U.S.C. § 1292(b) Certification of the Court's Order on Defs. Mot. to Dismiss ("CACI Mem.") at 7-17.

[1] Given that Plaintiffs' opposition was due at 5 pm on the day before the hearing on Defendants' motion, Defendants' opportunity to brief issues in a reply memorandum for the Court's consideration before the hearing is exceedingly limited. Accordingly, Defendants (collectively, "CACI") neither waive nor concede issues addressed in Plaintiffs' opposition that are not addressed in this reply.

2. While Plaintiffs contend that this Court lacks jurisdiction to certify its Memorandum Order, they cannot credibly distinguish the authorities cited by CACI nor do Plaintiffs' own authorities support their position. Plaintiffs cite *Marrese v. Am. Academy of Orthopaedic Surgeons*, 470 U.S. 373, 379 (1985), for the proposition that this Court lacks jurisdiction "over all aspects of the case" (Pl. Opp. at 5), but one paragraph later acknowledge that a district court always retains jurisdiction in aid of an appeal (*id.*). Contrary to Plaintiffs' characterization of *Marrese*, however, the Supreme Court *in that very case* held that the pendency of an appeal as of right does not prevent a district court from certifying the denial of a motion to dismiss for interlocutory appeal under 28 U.S.C. § 1292(b). *Marrese*, 470 U.S. at 379. Indeed, the Fourth Circuit, citing *Marrese*, held that a district court has jurisdiction to issue a post-appeal Rule 54(b) certification because post-appeal certifications were permitted "in an analogous context—interlocutory appeals under 28 U.S.C. § 1292(b)." *Harrison v. Edison Bros. Apparel Stores, Inc.*, 924 F.2d 530, 532 (4th Cir. 1991). Thus, the Fourth Circuit has squarely rejected Plaintiffs' reading of *Marrese*, and instead recognized that *Marrese* <u>*allows*</u> a post-appeal § 1292(b) certification.

3. Plaintiffs' attempt to distinguish the other court of appeals cases directly on point is similarly unavailing. In *Pelt v. Utah*, 539 F.3d 1271, 1273-74 (10th Cir. 2008), the district court certified its order for § 1292(b) appeal <u>*months*</u> after the defendant had filed a notice of appeal, and <u>*after*</u> the plaintiff had moved in the court of appeals to dismiss the appeal for lack of appellate jurisdiction. *Id.* at 1273. The Tenth Circuit endorsed the district court's post-appeal certification, a result incompatible with Plaintiffs' argument that district courts lack jurisdiction to issue post-appeal certifications. Similarly, in *In re Jartran*, 886 F.2d 859, 861-64 (7th Cir. 1989), the Seventh Circuit approved of a district court's post-appeal § 1292(b) certification, even

after the Seventh Circuit panel had expressed doubts about the existence of appellate jurisdiction as of right. These cases are directly on point with the present action. In the present case, one judge on the initial panel expressed doubt about the existence of appellate jurisdiction, and CACI has returned to the district court (as did the appellants in *Pelt* and *Jartran*) in an effort to remove any dispute over appellate jurisdiction. The other cases cited by Plaintiffs involve the general proposition that a district court may not substantively change an order that is being reviewed on appeal. Pl. Opp. at 5. By contrast, every single court to consider whether a district court retains jurisdiction to issue a § 1292(b) certification of an order on appeal has held that district courts do retain such jurisdiction.

4. Plaintiffs devote much of their opposition to arguing that CACI should have sought § 1292(b) certification at the time this Court entered the Memorandum Order. They do so while devoting no portion of their brief arguing that CACI fails to satisfy the relevant statutory criteria for certification. Indeed, Plaintiffs cite no law to support their contention that timing of a § 1292(b) request is a relevant criteria, or any cases denying certification on that basis. Indeed, the statute itself identifies the appropriate considerations and timing is not one of them. *See* 28 U.S.C. § 1292(b).

5. Plaintiffs' opposition fails to address in any meaningful way the significant developments since the Court issued its Memorandum Order that highlight the substantial grounds for difference of opinion with the analysis of the Memorandum Order, including the initial panel decision in this case that would have reversed this Court's preemption decision.[2]

[2] Other important developments since the Court issued its Memorandum Order include the D.C. Circuit's holding that nearly identical claims were preempted in *Saleh v. Titan Corp.*, 580 F.3d 1, 11 (D.C. Cir. 2009); the Fourth Circuit's holding in *Taylor v. Kellogg, Brown & Root Svcs., Inc.*, 658 F.3d 402, 403 (4th Cir. 2011), that the political question doctrine barred battle-zone tort claims against a government contractor; and the preemption portion of Judge Doumar's

Indeed, Judge King, though dissenting on jurisdictional grounds, endorsed § 1292(b) certification as a useful tool in ensuring that battlefield tort claims are resolved expeditiously. *Al Quraishi v. L-3 Svcs., Inc.*, 657 F.3d 201, 213 (4th Cir. 2011) (King, J., dissenting). These developments, if anything, have strengthened the case for § 1292(b) certification. There also is no conceivable prejudice to Plaintiffs as a result of CACI seeking § 1292(b) now, in light of significant developments in the Fourth Circuit and elsewhere, rather than in 2009. Plaintiffs' timeliness argument appears to rest on the dubious notion that certification should be denied as a punitive measure, when timeliness is irrelevant to the statutory criteria for certification and there is no credible claim of prejudice to Plaintiffs.

6. Because they have no argument respecting the actual statutory criteria for certification, Plaintiffs argue that CACI is "playing fast and loose" with the Court and changing positions on its right to appeal. Pl. Opp. at 11. This is not the case. CACI continues to maintain that it has an appeal as of right under the collateral order doctrine. In seeking § 1292(b) certification, CACI is merely seeking to alleviate the concerns expressed by Judge King on appellate jurisdiction, and following his guidance that 28 U.S.C. § 1292(b) certification is an appropriate tool to address rulings denying immunity for battle-zone conduct. *Al Quraishi*, 657 F.3d at 213 (King, J., dissenting). Plaintiffs suggest that CACI should have followed the procedure it followed in *Saleh*, where CACI sought 28 U.S.C. § 1292(b) certification while simultaneously filing a notice of appeal as of right. However, in *Saleh*, the order appealed from did not include immunity defenses, but was limited solely to CACI's preemption defense. Because the law concerning appealability of a denial of a battlefield preemption defense is far

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opinion in *Taylor* (now vacated because the Court affirmed Judge Doumar's finding of a political question), in which he disagreed with this Court's preemption analysis, *Taylor v. Kellogg, Brown & Root Svcs., Inc.*, No. 2:09-cv-341, 2010 WL 1707530, at *10 (E.D. Va. Apr. 19, 2010).

less settled than the appealability of a denial of immunity, seeking § 1292(b) certification in *Saleh* made sense as a protective matter. Here, the Memorandum Order contains denial of immunity defenses, where CACI believed (and believes) the right of immediate appeal is settled. Thus, seeking § 1292(b) appeared far less necessary in this case until such time that Judge King expressed doubts as to appellate jurisdiction and the Fourth Circuit decided to hear the appeal *en banc*.

7. Plaintiffs argue that CACI cannot assert an appeal as of right while also seeking § 1292(b) certification. Plaintiffs' position is defeated by *Pelt*, 539 F.3d at 1274, and *Jartran*, 886 F.2d at 861-64, and by the numerous cases in which district courts have issued § 1292(b) certifications as "insurance" in case there is no appeal as of right. *See* CACI Mem. at 17 n.10.

8. On November 15, 2011, the Fourth Circuit issued an order inviting the United States to submit a brief as *amicus curiae* in *Al Shimari* and to participate in the *en banc* oral argument now scheduled for January 27, 2012. By inviting the United States' participation, it appears that the Fourth Circuit is seeking all relevant perspectives on the merits of CACI's battle-zone defenses (such as law of war immunity, battlefield preemption, and the political question doctrine) so that the Court can issue a fully-informed decision on the merits. By issuing the requested § 1292(b) certification, this Court would give the Fourth Circuit the flexibility, but not the obligation, to reach the merits issues it appears poised to clarify, without the Court of Appeals having to address the scope of its collateral order jurisdiction (and even if some segment of the Court of Appeals concludes that some of CACI's defenses fall outside the collateral order doctrine). Denying § 1292(b) certification would result in this Court restricting the Fourth Circuit's options in resolving an appeal it apparently finds sufficiently important to warrant *en banc* review.

Respectfully submitted,

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November 16, 2011

CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of November, 2011, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

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