IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA ex rel. TODD HEATH, *Plaintiff-Relator*, v. **WISCONSIN BELL, INC.**, *Defendant*.	Civil Case No. 2:08-CV-00876-LA (Lead Case No. 2:08-CV-00724-LA) Judge Lynn Adelman

DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO CERTIFY FOR IMMEDIATE APPEAL THE COURT'S ORDER DENYING DEFENDANT'S MOTION TO DISMISS, AND TO STAY PROCEEDINGS PENDING CERTIFICATION AND APPEAL

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INTRODUCTION

It is the "duty of the district court" to certify an order for immediate appeal "when the statutory criteria are met"—namely, when an order "involves a controlling question of law as to which there is substantial ground for difference of opinion," and "an immediate appeal from the order may materially advance the ultimate termination of the litigation." *Ahrenholz* v. *Bd. of Trustees of Univ. of Ill.*, 219 F.3d 674, 675-77 (7th Cir. 2000) (quoting 28 U.S.C. § 1292(b)). "If a case turn[s] on a pure question of law," the court of appeals "should be enabled" to decide that question "immediate[ly]"—"without having to wait till the end of the case." *Id.*; *see also Dekeyser* v. *Thyssenkrupp Waupaca, Inc.*, 2009 WL 750278, at *2 (E.D. Wis. Mar. 20, 2009) ("The Seventh Circuit has spoken of the 'duty' of the district court to allow an immediate appeal to be taken when all of the criteria are met.").

This Court's July 1 Order denying Defendant's motion to dismiss (ECF No. 126) fully satisfies the statutory standard. In fact, the July 1 Order decides not one but two "pure question[s] of law," both of which warrant immediate appeal: First, does the United States government "provide" funds for purposes of the False Claims Act, when the funds are paid by one private party to another private party due to government mandate? Second, should a private entity be regarded as an "agent" of the federal government for purposes of the False Claims Act, when the private entity has no power to bind the federal government?

Both of these questions satisfy the statutory standard for immediate appeal under 28 U.S.C. § 1292(b). Both present pure questions of law that different district

and circuit courts previously have decided differently. And appealing both issues now, rather than later, could dramatically hasten the end of this litigation, and thereby avoid wasting this Court's and the parties' time and resources in the event the appellate court decides the issues in Defendant's favor.

Other courts have already found the first question worthy of immediate appeal. In *United States ex rel. Shupe* v. *Cisco Systems, Inc.*, 759 F.3d 379 (5th Cir. 2014), the district court answered the question the same way as this Court did in its July 1 Order. The district court then dutifully certified the issue as worthy of immediate appeal. And the Fifth Circuit agreed.

The same process should apply here. If anything, the argument for immediate review in this case is even more compelling than in *Shupe*. To begin with, the first question was certified in *Shupe* based on a disagreement with an unpublished magistrate judge ruling. Here, by contrast, there is disagreement with published Fifth Circuit precedent. Moreover, the July 1 Order also expressly decides a second pure question of law, concerning the meaning of the statutory term "agent." And that question likewise warrants immediate review. As with the first question, different courts have answered the second question differently. *See Farmers Tel. Co.* v. *FCC*, 184 F.3d 1241, 1250 (10th Cir. 1999) (holding that the National Exchange Carrier Association is an "agent" of its members and not the government). And, like the first question, resolving the second question on appeal now could significantly expedite the end of this suit.

BACKGROUND

Wisconsin Bell, a telecommunications provider, serves various schools and school districts that receive special subsidies for telecommunications services from a nationwide, federally-mandated program known as Education Rate, or "E-Rate." Those subsidies are paid for by the Universal Service Fund ("USF"). The USF is funded entirely by private telecommunications carriers, and administered by the Universal Service Administrative Company ("USAC"), a private entity.

Relator Todd Heath filed suit claiming that Wisconsin Bell violated the False Claims Act by charging certain schools higher rates than those allegedly charged to other schools, in alleged violation of certain E-Rate regulations. The United States chose not to intervene in the suit.

On July 7, 2014, the Fifth Circuit held that USF funds are not "provided" by the government, and therefore are not subject to the False Claims Act. *See Shupe*, 759 F.3d 379.

Wisconsin Bell moved to dismiss the First Amended Complaint on November 25, 2014, and it opposed further amendments to Heath's complaint. *See* ECF Nos. 96, 119, 124. Consistent with the Fifth Circuit's ruling in *Shupe*, Wisconsin Bell argued that USF funds are not subject to the FCA because they are not "provided" by the government. Wisconsin Bell also argued that USAC is not an "agent" of the government for purposes of the post-2009 version of the FCA, consistent with the Tenth Circuit's decision in *Farmers Telephone*, 184 F.3d at 1250.

This Court denied the motion to dismiss on July 1, 2015. ECF No. 126. The Court held that USF funds are "provided" by the government, and that USAC is an "agent" of the government.

ARGUMENT

I. This Court Should Certify The July 1 Order For Immediate Appeal.

Under the governing statute, an immediate appeal of an interlocutory order is appropriate when the order "involves a controlling question of law as to which there is substantial ground for difference of opinion," and "an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). The Seventh Circuit has distilled four elements from that statutory standard: "[T]here must be a question of *law*, it must be *controlling*, it must be *contestable*, and its resolution must promise to *speed up* the litigation." *Ahrenholz*, 219 F.3d at 675 (emphases in original). If "the statutory criteria are met," it is "the duty of the district court . . . to allow an immediate appeal to be taken." *Id*. at 677.

The July 1 Order meets all four criteria. It presents not one but two pure questions of law that warrant immediate review: (1) whether funds are "provided" by the federal government for purposes of the False Claims Act, when the funds are paid by one private party to another due to government mandate; and (2) whether USAC is an "agent" of the federal government. Both questions control the outcome of this case. Both are plainly contestable. Indeed, the fact that multiple courts have decided the questions differently proves "substantial ground for difference of

opinion." And resolving the questions in Defendant's favor will not only speed up the litigation, it will end it immediately.

A. The Order Decided Pure Questions Of Law That Control The Outcome Of This Case.

Under § 1292(b), a "question of law" is a "question of the meaning of a statutory or constitutional provision, regulation, or common law doctrine." *Ahrenholz*, 219 F.3d at 676. Such a question of law is "controlling" when it is "serious to the conduct of the litigation, either practically or legally." *Johnson* v. *Burken*, 930 F.2d 1202, 1206 (7th Cir. 1991). This is a "flexible" standard. *Id.* That is, "[a] question of law may be deemed 'controlling' if its resolution is quite likely to affect the further course of the litigation, even if not certain to do so." *Sokaogon Gaming Enter. Corp.* v. *Tushie-Montgomery Assocs., Inc.*, 86 F.3d 656, 658-59 (7th Cir. 1996). These standards are easily met here: The July 1 Order presents pure questions of statutory interpretation that, if decided in Defendant's favor, are not merely "likely to affect the further course of the litigation"; they would bring this suit to an immediate end.

The Seventh Circuit has routinely approved interlocutory review under § 1292(b) of cases involving pure questions of law, such as issues of federal statutory interpretation. For example, in *United Airlines, Inc.* v. *Mesa Airlines, Inc.*, 219 F.3d 605 (7th Cir. 2000), the Seventh Circuit granted a § 1292(b) interlocutory appeal to resolve whether the Airline Deregulation Act of 1978 preempted the parties' tort claims against each other. *Id*. at 607-8. Likewise, in *Bester* v. *Chicago Transit Auth.*, 887 F.2d 118 (7th Cir. 1989), the Seventh Circuit granted a § 1292(b) appeal

to decide whether the defendant was statutorily exempt from the minimum wage and overtime provisions of the Federal Labor Standards Act. *Id*. at 119.[1]

As in *United Airlines* and *Bester*, this case presents a pure question of federal statutory interpretation that controls the outcome of this case. Heath claims that Wisconsin Bell violated the FCA by allegedly overcharging schools for telecommunications services under the E-Rate program. But everyone agrees that there can be no pre-2009 FCA claim if the government does not "provide" the funds at issue. *See* 31 U.S.C. § 3729(c); *Shupe*, 759 F.3d at 388. Likewise, no one disputes that Heath has no post-2009 claim unless USAC is a federal "agent" under the post-2009 version of the FCA. *See Farmers Tel.*, 184 F.3d at 1250.

These are indisputably pure questions of federal law and federal statutory interpretation. And they control the future course of this litigation. Neither Heath nor the United States denies that Wisconsin Bell's motion to dismiss would have been decided differently if this lawsuit had been filed in the Fifth or Tenth Circuit. To the contrary, Heath and the United States have simply argued that circuit precedents like *Shupe* are wrong *as a matter of law*. *See*, *e.g.*, Heath's Br. in Opp. to Motion to Dismiss, ECF No. 103, at 20-21 (arguing *Shupe* "misunderstood" whether

[1] *See also Johnson* v. *Graphic Commc'ns Int'l Union*, 930 F.2d 1178 (7th Cir.), *cert. denied*, 502 U.S. 86 (1991) (proper application of potentially dispositive statute of limitations question); *Wilson* v. *Humphreys (Cayman) Ltd.*, 916 F.2d 1239 (7th Cir. 1990), *cert. denied*, 499 U.S. 947 (1991) (availability of federal subject matter jurisdiction and *forum non conveniens*); *Alleghany Corp.* v. *Haase*, 896 F.2d 1046 (7th Cir. 1990), *vacated sub nom. Dillon* v. *Alleghany Corp.*, 499 U.S. 933 (1991) (whether the legal doctrine of *Younger* abstention precluded the federal courts from entertaining the lawsuit).

an FCA claim arose and suggesting its "reasoning and holding" are incorrect); United States' Statement of Interest in Response to Motion to Dismiss, ECF No. 106, at 1 (arguing *Shupe* "was wrongly decided and this Court should decline to follow the Fifth Circuit's misplaced reasoning").[2]

B. These Questions Of Law Have Already Been Answered Differently By Different Courts.

The questions of law this case presents are plainly "contestable," that is, there are "substantial ground[s] for difference of opinion." *Ahrenholz*, 219 F.3d at 675; 28 U.S.C. § 1292(b). The fact that multiple courts have already considered and disagreed on a particular question is strong evidence of substantial grounds for differences of opinion. *See*, *e.g.*, *Odle* v. *Wal-Mart Stores Inc.*, No. 3:11-cv-2954, 2013 WL 66035, at *3 (N.D. Tex. Jan. 7, 2013) (finding substantial ground for difference of opinion where courts do not agree on effect of recent Supreme Court precedent); *In re Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig.*, 212 F. Supp.

[2] When this Court has declined to certify immediate appeals under § 1292(b), it has done so for distinguishable reasons. For instance, *Merrill* v. *Briggs & Stratton Corp.*, No. 10-cv-700, 2012 WL 663819 (E.D. Wis. Feb. 29, 2012), presented no issue of statutory or constitutional interpretation, but only a question of contract interpretation. *Id*. at *2; *see also Ahrenholz*, 219 F.3d at 676 ("the question of the meaning of a contract, though technically a question of law when there is no other evidence but the written contract itself, is not what the framers of section 1292(b) had in mind"). Likewise, in *Shepherd Investments International, Ltd.* v. *Verizon Communications, Inc.*, No. 03-c-703, 2005 WL 1475323 (E.D. Wis. June 22, 2005), the Court denied a § 1292(b) certification of its order denying a motion to dismiss for lack of personal jurisdiction, because that inquiry turned not on a question of law, but on the fact-intensive issue of "whether [defendant] had sufficient contacts with Wisconsin to enable Wisconsin courts to exercise personal jurisdiction." *Id*. at *2. *See also Ahrenholz*, 219 F.3d at 677 (district courts should not certify record-intensive issues for immediate appeal).

2d 903, 909-10 (S.D. Ind. 2002) ("other courts have adopted conflicting positions regarding the issue of law proposed for certification"); *Klein* v. *Vision Lab Telecomms., Inc.*, 399 F. Supp. 2d 528, 537 (S.D.N.Y. 2005) (certification warranted where "two distinguished [district court] judges . . . have reached opposite conclusions on [an] issue"); *Pub. Interest Research Grp.* v. *Hercules, Inc.*, 830 F. Supp. 1549, 1556 (D. N.J. 1993) (same).

Here, the Fifth Circuit has already held that claims submitted to USAC for USF funds are not subject to the FCA. *Shupe*, 759 F.3d at 388. And the Tenth Circuit likewise has already held that USAC's parent company is not an "agent" of the federal government. *Farmers Tel.*, 184 F.3d at 1250; *see also United States ex rel. Lyttle* v. *AT&T Corp.*, No. 2:10-cv-1376, 2012 WL 6738149 (W.D. Pa. Dec. 28, 2012) (adopting in full the magistrate's report and recommendation found at 2012 WL 6738242, at *19-*24 (W.D. Pa. Nov. 15, 2012)) (concluding that the United States does not "provide" funds to the "telecommunications relay service," or to "other universal service programs"). This Court has now reached the opposite conclusion. Whatever the correct answer to these questions of statutory interpretation, no one can doubt the existence of substantial grounds for differences of opinion. 28 U.S.C. § 1292(b); *Ahrenholz*, 219 F.3d at 675.

C. Immediate Appeal May Materially Advance The Ultimate Termination Of This Litigation.

"[O]nce it is determined that the appeal presents a controlling question of law on which there is a substantial ground for a difference of opinion," interlocutory appeal is appropriate, so long as it "may materially advance the ultimate

termination of the litigation." *Sterk* v. *Redbox Automated Retail, LLC*, 672 F.3d 535, 536-37 (7th Cir. 2012) (emphasis deleted) (granting § 1292(b) appeal). Resolving a legal question that "may" dispose of a claim "is enough to satisfy the 'may materially advance' clause of section 1292(b)." *Id*. at 536. It is enough that resolution of the question "might save time for the district court, and time and expense for the litigants." *Johnson*, 930 F.2d at 1206 (quoting 16 Wright, Miller, Cooper & Gressman, § 3930, at pp. 159–60).

Here, there is no doubt that an interlocutory appeal "may materially advance the ultimate termination of the litigation." *Sterk*, 672 F.3d at 536. If the Seventh Circuit joins the Fifth Circuit and holds that the government does not "provide" USF funds, then Heath has no claim under the pre-2009 FCA. And if the Seventh Circuit follows the Tenth Circuit and holds that USAC is not a government "agent," then Heath has no claim under the post-2009 version of the FCA. Either ruling would materially narrow the scope of this litigation. Both rulings would eliminate this litigation in its entirety.

II. The Court Should Stay All Proceedings Pending § 1292(b) Certification And Appeal.

The Seventh Circuit has noted that "normally" district court proceedings are "halt[ed]" when an immediate appeal under § 1292(b) is granted. *Ahrenholz*, 219 F.3d at 676. Because the resolution of the issues for which Defendant Wisconsin Bell seeks an interlocutory appeal may result in a dismissal of this action, Defendant respectfully submits that the Court should stay all proceedings pending § 1292(b) certification and appeal. *See*, *e.g.*, *Bayer Healthcare, LLC* v. *Norbrook*

Labs, Ltd., 2010 WL 338089, at *5 (E.D. Wis. Jan. 20, 2010) (granting stay "until the resolution of" the § 1292(b) appeal); *see also Fisher* v. *Halliburton*, 703 F. Supp. 2d 639 (S.D. Tex. 2010) (certifying controlling questions for interlocutory appeal pursuant to § 1292(b) and staying the case on the court's own motion, pending the outcome of the appeal).

CONCLUSION

For all of the foregoing reasons, Defendant Wisconsin Bell respectfully submits that the Court should (1) certify its Order of July 1, 2015, for immediate appeal to the Seventh Circuit, pursuant to 28 U.S.C. § 1292(b), and (2) stay all proceedings pending resolution of the § 1292(b) certification and appeal.

Dated: July 27, 2015

Respectfully submitted,

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