

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

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STARR INTERNATIONAL COMPANY, INC., :  
Individually and on Behalf of All Others Similarly :  
Situated, and derivatively on behalf of AMERICAN :  
INTERNATIONAL GROUP, INC., :

Plaintiff, :

v. :

THE UNITED STATES OF AMERICA, :

Defendant, :

and :

AMERICAN INTERNATIONAL GROUP, INC., a :  
Delaware corporation, :

Nominal Defendant. :

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**NOMINAL DEFENDANT AMERICAN INTERNATIONAL GROUP, INC. (“AIG”)'S  
RESPONSE TO UNITED STATES OF AMERICA’S MOTION TO DISMISS**

This is a unique case in which the same claims are pleaded directly by Starr International Company, Inc. (“Starr”) and derivatively by Starr on behalf of American International Group, Inc. (“AIG”). A derivative claim, by its nature, is brought “to enforce a corporate cause of action,” belonging in this case to AIG. Kamen v. Kemper Fin. Servs., Inc., 500 U.S. 90, 95 (1991) (quoting Ross v. Bernhard, 396 U.S. 531, 534 (1970)). The claims involve the Government’s actions in connection with AIG’s near collapse in September 2008.

On January 31, 2012, the Court issued an order adding nominal defendant AIG as a party to this action and stated that AIG (i) “will be bound by the Court’s final judg-

ment in this case,” (ii) “may participate in this case to any extent it deems appropriate,” and (iii) “is not required to answer or respond” to the amended complaint, but “may answer or respond if it wishes.” Notice & Order (Jan. 31, 2012). On March 13, 2012, the Court issued an order stating that “[i]n the event that the Court denies the Government’s March 1, 2012 motion to dismiss, AIG may file an answer . . . or dispositive motion within twenty days after the Government’s filing of an answer.” Order (Mar. 13, 2012).

The Government’s March 1, 2012 motion to dismiss raises a variety of constitutional and other grounds for dismissal under RCFC 12(b)(1) and 12(b)(6), including lack of subject matter jurisdiction and failure to state a claim on numerous and diverse grounds. The Government argues that these grounds are case-dispositive.

On top of all those case-dispositive grounds for dismissal, the Government also seeks to dismiss plaintiff’s derivative claims under RCFC 23.1 and the governing Delaware law (because AIG is a Delaware corporation) on the ground that plaintiff has not made a pre-suit demand on AIG’s board of directors. Many cases hold that the demand requirement reflects the “basic principle of corporate governance that the decisions of a corporation – including the decision to initiate litigation – should be made by the board of directors or the majority of shareholders.” Kamen, 500 U.S. at 101 (citation omitted); see also Gaubert v. Fed. Home Loan Bank Bd., 863 F.2d 59, 65 (D.C. Cir. 1988) (“at its most fundamental, the demand requirement ‘furthers a principle basic to corporate organization, that the management of the corporation be entrusted to its board of directors’”) (citation omitted); Sagarra Inversiones, S.L. v. Cementos Portland Valderrivas, S.A., 34 A.3d 1074, 1082 (Del. 2011) (“the presuit demand requirement serves a core function of substantive corporation law, in that it allocates, as between directors and shareholders, the authority to

sue on behalf of the corporation”); Aronson v. Lewis, 473 A.2d 805, 811 (Del. 1984) (it is a “cardinal precept of the General Corporation Law of the State of Delaware . . . that directors, rather than shareholders, manage the business and affairs of the corporation”).

AIG appreciates the flexibility that this Court’s prior Orders have provided to AIG as a nominal defendant in whose name claims have been asserted by Starr on AIG’s behalf. Given the many grounds for dismissal advanced by the Government that do not in any way implicate the “demand” issues arising from the part-derivative nature of the action, AIG respectfully asks that the demand issues be deferred until after the Government’s motion to dismiss has been resolved. At that time, AIG will know what derivative claims, if any, survive. AIG – to whom the derivative claims belong – will then be best able to determine whether it will seek to enforce its right to a demand, or whether AIG, with the benefit of the Court’s rulings on the Government’s arguments under RCFC 12(b)(1) and 12(b)(6), will allow plaintiff to proceed in AIG’s name on any derivative claims remaining in the case at that time.

Indeed, even the Government concedes that deciding the Rule 23.1 issue now “could . . . result in the Court being required to decide the derivative issues twice.” Gov’t Brief at 5 (Mar. 2, 2012). AIG’s suggested approach conserves the Court’s resources and assures that Rule 23.1 derivative issues will only be addressed once – and only after the Court decides which claims are viable and the party whose right is at stake (AIG) determines whether it wants to enforce the right and briefs its entitlement to that right. This is also consistent with the relief requested by plaintiff and AIG in their February 23, 2012 Motion, Stipulation and Proposed Order, which the Court approved on March 13, 2011, which preserves

all arguments AIG could assert in its motion to dismiss until AIG files its answer or motion to dismiss.

For all of these reasons, the pre-suit demand issue is best left to be addressed, if necessary, after the Court decides whether to grant the Government's motion to dismiss under Rule 12(b)(1) and 12(b)(6). If the Government's potentially case-dispositive 12(b)(1) and 12(b)(6) arguments carry the day, there will be no need for AIG to brief, and the Court to decide, the Rule 23.1's pre-suit demand issue (and the extent to which plaintiff's claims are direct and the extent to which they are derivative – another issue plaintiff and the Government hotly dispute). And if derivative claims still remain after the Court's resolution of Rule 12(b)(1) and 12(b)(6) arguments, the Rule 23.1 demand issue is best decided based on full briefing by the party whose right is at stake, AIG, instead of the limited briefing on this point advanced to date by the Government.

Respectfully submitted,

Dated: New York, New York  
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