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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

KETAB CORP.,

Plaintiff,

vs.

MESRIANI LAW GROUP, RODNEY
MESRIANI, SEYED ALI
LIMONADI, ALI LIMONADI,
STUDIO CINEGRAPHIC LOS
ANGELES dba IRTV, MELLI
YELLOW PAGES, INC., and
DOES 1 through 10,
inclusive,

Defendants.

2:14-cv-07241-RSWL (MRW)

**ORDER re: Plaintiff's
Application for a
Certificate of
Appealability Pursuant
to 28 U.S.C. § 1292(b)
and Request for Stay of
Proceedings Pending
Interlocutory Appeal**
[103]

Currently before the Court is Plaintiff Ketab Corp.'s ("Plaintiff") Application for a Certificate of Appealability Pursuant to 28 U.S.C. § 1292(b) and Request for Stay of Proceedings Pending Interlocutory Appeal [103] ("Application"). Plaintiff's Application

1 regards the Court's Order granting Mesriani Defendants'
2 Motion to Dismiss [42] and the Court's subsequent Order
3 denying Plaintiff's Motion for Reconsideration [98].
4 Pl.'s Appl. 1:1-5, ECF No. 103.

5 Upon review of all papers submitted and pertaining
6 to this Application [103], the Court **DENIES** Plaintiff's
7 Application [103].

8 I. BACKGROUND

9 A more thorough factual background of this Action
10 is provided in the Court's February 6, 2015, Order [42]
11 granting Mesriani Defendants' Motion to Dismiss.
12 Plaintiff brings this trademark-related Action [1, 53]
13 against five named defendants and alleges various
14 trademark-related claims against Rodney Mesriani and
15 Mesriani Law Group ("Mesriani Defendants").

16 On February 6, 2015, the Court granted Mesriani
17 Defendants' Motion to Dismiss, dismissing some claims
18 with prejudice and some claims with leave to amend.
19 Dckt. ## 42, 99. On March 13, 2015, Plaintiff moved
20 for reconsideration [63] of the Order. The Court
21 denied [98] Plaintiff's Motion for Reconsideration on
22 May 5, 2015.

23 On February 26, 2015, Plaintiff filed its First
24 Amended Complaint. See Dckt. ## 48, 49, 52, 53, 55,
25 57-59 (operative First Amended Complaint is Dckt. #
26 53). Mesriani Defendants moved to dismiss [64]
27 Plaintiff's First Amended Complaint on March 14, 2015,
28 and on March 18, 2015, Plaintiff filed a Motion for

1 Leave to Amend its First Amended Complaint [69]. On
2 May 5, 2015, the Court granted Mesriani Defendants'
3 Motion to Dismiss Plaintiff's First Amended Complaint
4 and denied Plaintiff's Motion for Leave to Amend its
5 First Amended Complaint. Dckt. # 100. On May 15,
6 2015, Plaintiff filed the instant Application for
7 Certificate of Appealability Pursuant to 28 U.S.C. §
8 1292(b) and Request for Stay of Proceedings Pending
9 Interlocutory Appeal [103].

10 **II. LEGAL STANDARD**

11 Section 1292(b) of Title 28 of the U.S. Code
12 "'provides for interlocutory appeals from otherwise not
13 immediately appealable orders, if conditions specified
14 in the section are met, the district court so
15 certifies, and the court of appeals exercises its
16 discretion to take up the request for review.'" Asis
17 Internet Serv. v. Active Response Grp., No. C07 6211
18 THE, 2008 WL 4279695, at *2 (N.D. Cal. Sept. 16, 2008)
19 (quoting City of L.A., Harbor Div. v. Santa Monica
20 Baykeeper, 254 F.3d 882, 885 (9th Cir. 2001)).

21 Section 1292(b) specifies that a certificate of
22 appealability may be issued if a district judge is "of
23 the opinion that [the order at issue] involves a
24 controlling question of law as to which there is
25 substantial ground for difference of opinion and that
26 an immediate appeal from the order may materially
27 advance the ultimate termination of the litigation."
28 28 U.S.C. § 1292(b).

1 As such, the certification requirements of Section
2 1292(b) are "(1) that there be a controlling question
3 of law, (2) that there be substantial grounds for
4 difference of opinion, and (3) that an immediate appeal
5 may materially advance the ultimate termination of the
6 litigation." In re Cement Antitrust Litig. (MDL No.
7 296), 673 F.2d 1020, 1026 (9th Cir. 1982).

8 Even if the Order meets the criteria for
9 certification under Section 1292(b), the district court
10 "has discretion to grant or deny certification, and its
11 decision is unreviewable." Asis Internet Serv., 2008
12 WL 4279695, at *2 (citing Executive Software N. Am.,
13 Inc. v. U.S. Dist. Ct. Cent. Dist. Cal., 24 F.3d 1545,
14 1550 (9th Cir. 1994)). "The party seeking review bears
15 the burden of showing that 'exceptional circumstances
16 justify a departure from the basic policy of postponing
17 appellate review until after the entry of a final
18 judgment.'" Id. (citing Coopers & Lyband v. Livesay,
19 437 U.S. 463, 474-75 (1978)).

20 III. DISCUSSION

21 Plaintiff's Application for a Certificate of
22 Appealability under 28 U.S.C. § 1292(b) requests that
23 the Court certify for interlocutory appeal three issues
24 related to two Orders: the Court's Order [42] granting
25 Mesriani Defendants Motion to Dismiss and the Court's
26 subsequent Order [98] denying Plaintiff's Motion for
27 Reconsideration. Pl.'s Appl. 1:1-5.

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1 The issues Plaintiff would assert on interlocutory
2 appeal are:

3 a. Whether a claim for trademark counterfeit can
4 be dismissed because the challenged mark is not
5 identical to the registered mark, or can a
6 claim survive challenged because it is based on
7 a challenged mark that is 'substantially
8 indistinguishable' from the registered mark
9 pursuant to 15 U.S.C. § 1127.

10 b. Whether a determination as a matter of law can
11 be made that there is no likelihood of
12 confusion based on a finding that the services
13 were unrelated in ruling on a motion to
14 dismiss, without conducting the eight factor
15 analysis in *Sleekcraft (AMF v. Sleekcraft*
16 *Boats*, 599 F.2d 341, 348 (9th Cir. 1979).

17 c. Whether the question of likelihood of confusion
18 is a mixed question of law and fact which is
19 not appropriate for resolving in a motion to
20 dismiss[.]

21 Pl.'s Appl. 1:25-2:9.

22 The "certification requirements" of 28 U.S.C. §
23 1292(b) are (1) that there be a controlling question of
24 law, (2) that there be substantial grounds for
25 difference of opinion, and (3) that an immediate appeal
26 may materially advance the ultimate termination of the
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1 litigation." In re Cement Antitrust Litig. (MDL No.
2 296), 673 F.2d at 1026.

3 **A. Controlling Question of Law**

4 Plaintiff's first issue is "[w]hether a claim for
5 trademark counterfeit can be dismissed because the
6 challenged mark is not identical to the registered
7 mark, or can a claim survive challenged because it is
8 based on a challenged mark that is 'substantially
9 indistinguishable' from the registered mark pursuant to
10 15 U.S.C. § 1127." Pl.'s Appl. 1:25-2:3.

11 Plaintiff's first issue is not a "controlling"
12 question of law because, as made clear in the Court's
13 May 5, 2015, Order [98], the Court's decision [42, 99]
14 to dismiss some of Plaintiff's claims with prejudice
15 was not based on the legal questions in Plaintiff's
16 first issue. See May 5, 2015, Order 7:8-9:9, ECF No.
17 98 (noting that the basis for the Court's dismissal
18 with prejudice of some of Plaintiff's claims was
19 because Plaintiff's and Mesriani Defendants' serves
20 were totally unrelated and thus confusion was unlikely
21 as a matter of law, per clear Ninth Circuit precedent).
22 In other words, regardless of the Ninth Circuit's
23 ruling on Plaintiff's first issue, the Court's Orders
24 [42, 98, 99] would remain the same. Plaintiff's first
25 issue is thus not a "controlling" question of law.

26 Plaintiff's second and third issues could be
27 controlling questions of law because they question the
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1 basis of the Court's decision to dismiss with prejudice
2 some of Plaintiff's claims: because Plaintiff's and
3 Mesriani Defendants' services are totally unrelated,
4 confusion is unlikely as a matter of law. Feb. 6,
5 2015, Amend. Order 7:25-8:13, ECF No. 99; see also May
6 5, 2015, Order 8:3-9; Feb. 6, 2015, Order 8:5-21, ECF
7 No. 42.

8 **B. Substantial Grounds for Difference of Opinion**

9 Plaintiff asserts that there are substantial
10 grounds for difference of opinion with regard to
11 Plaintiff's second and third issues. Pl.'s Appl. 3:7-
12 5:2. But Plaintiff fails to cite any relevant,
13 analogous, or controlling cases showing any such
14 difference of opinion. See id.

15 Plaintiff's second and third issues are borderline
16 frivolous in light of Murray, as those issues and their
17 arguments were clearly rejected by the Ninth Circuit in
18 Murray v. Cable Nat'l Broadcasting Co., 86
19 F.3d 858, 860 (9th Cir. 1996). The Ninth Circuit
20 clearly states that "[i]f the court determines as a
21 matter of law from the pleadings that the goods [or
22 services] are unrelated and confusion is unlikely, the
23 complaint should be dismissed." Id. The Ninth Circuit
24 does not require a Sleekcraft analysis to make such a
25 legal determination, and Plaintiff fails to cite any
26 cases imposing such a requirement. The Ninth Circuit
27 also clearly states in Murray that the district court
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1 is "not preclude[d] . . . from determining likelihood
2 of confusion as a matter of law, either through
3 dismissal or summary judgment." Id. at 860-61. This
4 explicitly resolves Plaintiff's third issue.

5 Plaintiff fails to show that there are substantial
6 grounds for difference of opinion on any controlling
7 questions of law. As such, Plaintiff's Application for
8 Certificate of Appealability [103] is **DENIED**, and
9 Plaintiff's Request for Stay of Proceedings Pending
10 Interlocutory Appeal is **DENIED AS MOOT**.¹

11 **IV. CONCLUSION**

12 For the foregoing reasons, Plaintiff's Application
13 for a Certificate of Appealability Pursuant to 28
14 U.S.C. § 1292(b) and Request for Stay of Proceedings
15 Pending Interlocutory Appeal [103] is **HEREBY DENIED**.

16 **IT IS SO ORDERED.**

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18 DATED: May 20, 2015

RONALD S.W. LEW

HONORABLE RONALD S.W. LEW
Senior U.S. District Judge

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24 ¹ Even if Plaintiff had established that there were
25 substantial grounds for a difference of opinion on Plaintiff's
26 controlling questions of law, granting Plaintiff's Application
27 would not advance the *termination* of this Action, but would serve
28 only to expand the scope of this Action, and thus would be
inappropriate under Section 1292(b). See CornerStone Staffing
Solutions, Inc. v. James, No. C 12-1527 RS, 2014 WL 1364993, at
*2 (N.D. Cal. Apr. 7, 2014).