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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

TIFFANY FENTERS, DEBRA FENTERS,)
and VIRGIL FENTERS,)
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Plaintiffs,)
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v.)
)
YOSEMITE CHEVRON; ABBCO)
INVESTMENTS, LLC, et al.,)
)
Defendants.)
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)
)

1:05-cv-1630 OWW

ORDER DENYING DEFENDANTS'
EX PARTE APPLICATION TO
SHORTEN TIME FOR HEARING ON
AND DENIAL OF DEFENDANTS'
MOTION FOR CERTIFICATION OF
ORDER FOR APPEAL PURSUANT
TO 28 U.S.C. § 1292(b)

Defendants, Yosemite Chevron, Abbco Investments, LLC and Robert Abbate ("Defendants") seek an ex parte application for order shortening time to hear their motion to certify for immediate appeal the Court's December 30, 2010 Order Denying Summary Judgment pursuant to 28 U.S.C. § 1292(b). No oral argument is necessary and the matter is submitted for decision.

This case, brought by Tiffany Fenters, a former employee of the Abbate Defendants, alleges claims for violation of her civil rights and other damages arising from the alleged wrongful termination of her employment, abusive employment practices, and accusations of criminal wrongdoing against her made by the Abbate Defendants, leading to a criminal prosecution of Fenters, which

1 resulted in her acquittal.

2 Defendants have suggested that the denial of their summary
3 judgment motion was erroneous based on their contention that as
4 private parties they could not have conspired or acted in concert
5 with public officials and other state actors in the Merced County
6 District Attorney's Office and related law enforcement agencies.

7
8 A. Required Legal Standard.

9 Defendants seek certification of the Court's decision
10 granting in part and denying in part Defendants' Motion for
11 Summary Judgment, an interlocutory order from which no appeal is
12 available until the entry of final judgment following trial on
13 the merits. *Hopkins v. City of Sierra Vista, Ariz.*, 931 F.2d
14 524, 529 (9th Cir. 1991). The standard for a permissive
15 interlocutory appeal requires that a district court find and
16 certify that its order: 1) involves a controlling question of
17 law; 2) as to which there is substantial ground for difference of
18 opinion; and 3) an immediate appeal may materially advance
19 ultimate termination of the litigation.

20 In the Ninth Circuit, § 1292(b) is to be applied sparingly
21 and only in exceptional cases. The "controlling question of law"
22 requirement must be interpreted in such a way as to implement
23 this policy. *In re Cement Antitrust Litigation*, 673 F.2d 1020,
24 1027 (9th Cir. 1982); *Davis Moreno Construction, Inc. v. Frontier*
25 *Steel Buildings Corp.*, 2011 WL 347127 (E.D. Cal. Feb. 2, 2011).
26 A party seeking interlocutory review "has the burden of
27 persuading the Court of Appeals that exceptional circumstances
28 justify a departure from the basic policy of postponing appellate

1 review until after the entry of a final judgment." *Coopers &*
2 *Lybrand v. Livisay*, 437 U.S. 463, 475 (1978). The standard to
3 certify a question of law is high and a district court generally
4 should not permit such an appeal where "it would prolong
5 litigation rather than advance its resolution." *Syufy Enter. v.*
6 *Am. Multi Cinema, Inc.*, 694 F.Supp. 725, 729 (M.D. Cal. 1988).
7 In applying these standards, the trial court must weigh the
8 asserted need for the proposed interlocutory appeal with the
9 policy in the ordinary case of discouraging piecemeal appeals.
10 *Association of Irrigated Residents v. Fred Schakel Dairy*, 634
11 F.Supp.2d 1081, 1087 (E.D. Cal. 2008).

12 To establish a "substantial ground for difference of
13 opinion," a showing that there is a dearth of case law, or that
14 the issue is a question of first impression is insufficient.
15 *Davis Moreno*, 2011 WL 347127 at **2-3. The Court should also
16 consider: 1) if there are other claims (even ones of state law)
17 for which trial would nonetheless be required; 2) whether trial
18 is imminent; 3) whether the trial promises to be lengthy or
19 complex; and 4) how long the litigation has been pending. *Id.* at
20 **3-4.

21 This case has been pending since 2005. It is now
22 approximately six years old. The summary judgment ruling now
23 sought to be appealed was entered December 30, 2010. The present
24 motion filed 78 days later seeks to avoid an imminent June 14,
25 2011 trial date, previously scheduled with the agreement of the
26 parties in January 2011. This delay alone is sufficient to deny
27 certification. *Falise v. American Tobacco Co.*, 94 F.Supp.2d 316,
28 357 (E.D. N.Y. 2000) (denying certification motion two and one-

1 half months before the scheduled trial and holding, "[T]o delay
2 proceedings for appellate review on the eve of trial would not
3 advance the ends of justice, and would unnecessarily burden both
4 this Court and the Court of Appeals."). The party seeking
5 certification must act with "diligence." *Jiddes Richard*
6 *Electronics, Ltd. v. Panache Broadcasting of Pennsylvania, Inc.*,
7 202 F.3d 957, 958-59 (7th Cir. 2000) (two month delay in filing
8 for certification was untimely); *Weir v. Propst*, 915 F.2d 283,
9 285-87 (7th Cir. 1990) (sixty-three days between interlocutory
10 order and certification motion justified denial on the grounds of
11 lack of timeliness); see also *Jiddes v. Glenn Falls Ins. Co.*,
12 2003 WL 23486911, *1 (M.D. Fla. 2003).

13 There are other claims advanced by Plaintiff. The trial
14 will not be lengthy (approximately eight days). The trial will
15 not be complex as the issues turn almost entirely on the
16 credibility of witnesses. The motion lacks diligence, is
17 untimely, and simply seeks to avoid trial in this case. This
18 lack of diligence justifies denial of a motion.

19
20 B. Merits of the Motion.

21 *Arguendo*, the Defendants argue that a claim cannot be
22 maintained under the Civil Rights Act, 42 U.S.C. § 1983 solely
23 against a private actor. The Court has addressed the issue on
24 pages 57-75 of the underlying decision denying summary judgment.
25 Under the authority of *Arnold v. IBM Corp.*, 637 F.2d 1350, 1356-
26 57 (9th Cir. 1981), a civil rights plaintiff can establish the
27 requisite causation between the conduct of private persons and a
28 violation of § 1983 by proving that private individuals exercise

1 control over the decision-making state law enforcement in an
2 investigation. (Cited with approval and followed in *Franklin v.*
3 *Fox*, 312 F.3d 423, 445-446. Defendants' argument that the
4 dismissal of governmental co-defendants ends the ability to
5 maintain the claim against the private defendants is belied by
6 the *Arnold* case, 637 F.2d at 1352, where the plaintiff did not
7 sue any governmental defendants.

8 Defendant Abbate, an individual, actively participated in
9 the District Attorney's investigation working with the team
10 assigned to the Fenters' criminal investigation and prosecution.
11 District Attorney Investigator Hutton acknowledged that Defendant
12 Abbate assisted the District Attorney's investigation in the
13 Fenters' matter between May 14 and June 4, 2003. Defendant
14 Abbate acknowledged he assisted with the investigation and had
15 his most extensive contacts with Investigator Hutton during the
16 District Attorney's investigative phase of the criminal case.

17 Investigator Hutton testified about an interview protocol
18 set up between Defendant Abbate and Hutton to conduct the June 4,
19 2003 interview of a co-employee of Fenters. Abbate also set up
20 the June 4, 2003 interview with his employee, Acevas. Abbate
21 himself conducted the first part of the District Attorney's
22 interview, in conformity with guidelines provided by Investigator
23 Hutton. Abbate also provided an additional eight months of
24 financial analysis to assist the District Attorney. Investigator
25 Hutton spent approximately 20 hours working on the Fenters case.
26 Defendant Abbate worked 35 hours on the investigation, not
27 including time he spent assisting Hutton in interviews of
28 witnesses.

1 Mr. Bassarini, lead prosecutor at the preliminary hearing
2 and trial of the case against Fenters, had frequent contact with
3 Defendant Abbate as did Investigator Hutton, to prepare for the
4 preliminary hearing and present the trial. This extensive
5 involvement and participation coupled with the alleged motive of
6 Abbate as employer and owner of the service station, Yosemite
7 Chevron, where Plaintiff was employed, to avoid sexual harassment
8 charges and allegations of other deprivations of Plaintiffs'
9 employment interests present disputed issues of material fact
10 whether they were joint participants in a concerted action to
11 violate Plaintiffs' constitutional rights and had some control
12 over the state officials' decision, that cannot be resolved as a
13 matter of law. Abbate also benefitted from the criminal
14 prosecution which he aided by diverting Fenter's pursuit of her
15 claims and his efforts to discredit her.

16 The Abbate Defendants raise an argument not presented in
17 their Summary Judgment Motion and not addressed by the Court's
18 Memorandum Decision concerning a malicious prosecution claim
19 under § 1983. An issue not raised in the trial court has been
20 waived for failure to raise it in the District Court. *Alameida*
21 *Brooks, Inc. v. City of Los Angeles*, 631 F.3d 1031, 1044 (9th
22 Cir. 2011).

23 Plaintiff's First Amended Complaint alleged that the Abbate
24 Defendants initiated their actions to cause her to be falsely
25 prosecuted as a "preemptive strike" to defeat her from
26 successfully pursuing any remedies for violation of her rights in
27 the work place. ¶ 23, Doc. 66, p. 8-9. Plaintiff alleges there
28 was no probable cause for her prosecution, that it was meritless,

1 and Defendants pursued it for the improper motive of attempting
2 to defeat Plaintiff's claims. The Abbate Defendants' did not
3 challenge this claim by their prior motion to dismiss the First
4 Amended Complaint nor in Abbate Defendants' Summary Judgment
5 Motion. See Docs. No. 78, 131. Under applicable U.S. Supreme
6 Court precedent, a prosecution instituted without probable cause
7 and intended to discourage a plaintiff from seeking redress for
8 grievances violates the Fourth and First Amendments to the United
9 States Constitution. *Hartman v. Moore*, 547 U.S. 250, 256, 261-62
10 (2006); *Beck v. City of Upland*, 527 F.3d 853, 864-67, 871 (9th
11 Cir. 2008). The Abbates' citations of legal authority, to
12 support their argument that the law is unsettled, pre-date these
13 Supreme Court and Ninth Circuit more recent cases.

14 The last argument raised by the Abbate Defendants is that it
15 was error to find a genuine issue of material fact whether or not
16 the Abbate Defendants' conduct amounted to a "threat by means of
17 force, intimidation and coercion" under Federal and/or State law.
18 This is no more than a re-argument and disagreement with the
19 Court's prior review of applicable case law that the Defendants'
20 conduct is sufficient to meet the threats of force, intimidation
21 and coercion requirement of the law.

22 23 CONCLUSION

24 For all the reasons stated above, because the trial date is
25 imminent, there is no just cause for Defendants' lack of
26 diligence. Because Defendants seek an appeal from the entire
27 case to prevent a trial, there is no just reason to certify this
28 case for interlocutory appeal. There is nothing exceptional

1 about the circumstances of this case. Defendants' Motion for
2 Certification of Order for Appeal Pursuant to 28 U.S.C. § 1292(b)
3 is DENIED.

4
5 IT IS SO ORDERED.

6 April 5, 2011.

7 /s/ Oliver W. Wanger
8 Oliver W. Wanger
9 UNITED STATES DISTRICT JUDGE

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