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

DAVIS MORENO CONSTRUCTION,
INC.,

Plaintiff,

vs.

FRONTIER STEEL BUILDINGS
CORPORATION,

Defendant.

No. CV-F-08-854 OWW/SMS

MEMORANDUM DECISION AND
ORDER DENYING DEFENDANT'S
MOTION FOR CERTIFICATION OF
INTERLOCUTORY APPEAL (Docs.
71 & 71)

Before the Court is Defendant Frontier Steel Building Corporation's ("Frontier") motion for certification of interlocutory appeal pursuant to 28 U.S.C. § 1292(b) and Rule 5(a)(3), Federal Rules of Appellate Procedure.¹ Frontier seeks

¹Rule 5(a)(3), Federal Rules of Appellate Procedure, provides:

(a) Petition for Permission to Appeal.

...

1 certification of interlocutory appeal of the Memorandum Decision
2 and Order filed November 9, 2009, (November 9 Memorandum
3 Decision, Doc. 66), which denied Frontier's motion for
4 reconsideration of the Memorandum Decision and Order filed on May
5 26, 2009, (Doc. 37), denying Frontier's motion to dismiss for
6 lack of personal jurisdiction and for change of venue or to
7 transfer.

8 28 U.S.C. § 1292(b) provides:

9 When a district judge, in making in a civil
10 action an order not otherwise appealable
11 under this section, shall be of the opinion
12 that such order involves a controlling
13 question of law as to which there is
14 substantial ground for difference of opinion
15 and that an immediate appeal from the order
16 may materially advance the ultimate
17 termination of the litigation, he shall so
18 state in writing in such order. The Court of
19 Appeals which would have jurisdiction of an
20 appeal of such action may thereupon, in its
21 discretion, permit an appeal to be taken from
22 such order, if application is made to it
23 within ten days after the entry of the order;
24 Provided, however, That application for an
25 appeal hereunder shall not stay proceedings
26 in the district court unless the district
judge or the Court of Appeals or a judge
thereof shall so order.

The party seeking interlocutory review ``has the burden of
persuading the court of appeals that exceptional circumstances

(3) If a party cannot petition for appeal
unless the district court first enters an
order granting permission to do so or stating
that the necessary conditions are met, the
district court may amend its order, either on
its own or in response to a party's motion, to
include the required permission or statement.
In that event, the time to petition runs from
entry of the amended order.

1 justify a departure from the basis policy of postponing appellate
2 review until after the entry of a final judgment.'" *Coopers &*
3 *Lybrand v. Livesay*, 437 U.S. 463, 475 (1978). The standard to
4 certify a question of law is high and a district court generally
5 should not permit such an appeal where "it would prolong the
6 litigation rather than advance its resolution." *Syufy Enter. v.*
7 *Am. Multi-Cinema, Inc.*, 694 F.Supp. 725, 729 (N.D.Cal.1988).
8 Section 1292(b) is to be used only in exceptional situations in
9 which allowing an interlocutory appeal would avoid protracted and
10 expensive litigation. *United States Rubber Co. v. Wright*, 359
11 F.2d 784, 785 (9th Cir. 1966). Plaintiff must demonstrate that
12 (1) there is a controlling question of law, (2) that there are
13 substantial grounds for difference of opinion, and (3) that an
14 immediate appeal may materially advance the ultimate termination
15 of the litigation. *In re Cement Antitrust Litigation*, 673 F.2d
16 1020, 1026 (9th Cir. 1982). "In applying these standards, the
17 court must weigh the asserted need for the proposed interlocutory
18 appeal with the policy in the ordinary case of discouraging
19 "piecemeal appeals.'" *Association of Irrigated Residents v. Fred*
20 *Schakel Dairy*, 634 F.Supp.2d 1081, 1087 (E.D.Cal.2008).

21 Frontier seeks certification of the following issues for
22 interlocutory appeal:

- 23 1. Whether the Court abused its discretion
24 or erred as a matter of law in refusing to
25 enforce the parties' bargained for choice of
26 Colorado law contract provision;
2. Whether the Court erred as a matter of
law in its application of the California

1 Contractor's License statute to a Colorado
2 Defendant, a party who contract to design and
3 supply, but not erect, a pre-engineered steel
4 building for a California Project;

5 3. Whether the Court erred as a matter of
6 law or abused its discretion by failing to
7 apply the appropriate burden of proof
8 required to sustain Plaintiff's Complaint,
9 including the burden of proof for purposes of
10 determining whether Defendant may be subject
11 to the California Contractor's License
12 statute or the Court may refuse to enforce a
13 bargained for choice of Colorado law.

14 Frontier asserts that these issues should be certified
15 because they "may be controlling issues of law," "are too
16 important to deny review because, in a diversity action, they
17 void a bargained for choice of Colorado law clause and apply a
18 California statute which may include disgorgement remedies; both
19 on which materially control the scope of trial and both of which
20 materially alter the remedies available to the Court," and
21 because "[a]s a practical matter, a Colorado Defendant may be
22 unable to obtain a fair review of a judgment pursuant to the
23 California Contractor License Law because of the extraordinary
24 bankrupting character of the remedies of that law, and the
25 operation of the rules on appeal."²

26 ²Frontier contends that the Court "has previously evidenced
the significance of the issues presented by publishing its opinion
in this case." The May 26, 2009 Memorandum Decision denying
Frontier's motion to dismiss for lack of personal jurisdiction, for
change of venue to transfer action is reported by Westlaw as *Davis
Moreno Const., Inc. v. Frontier Steel Bldgs.*, 2009 WL 1476990
(E.D.Cal., May 26, 2009). The November 9, 2009 Memorandum Decision
denying Frontier's motion for reconsideration is reported by
Westlaw as *Davis Moreno Const., Inc. v. Frontier Steel Bldgs.*, 2009
WL 3763706 (E.D.Cal., Nov. 9, 2009). The Court played no part in
Westlaw's decision to report either of these Memorandum Decisions.

1 Frontier has not sustained its burden of proof that the
2 three specified issues are controlling issues of law with respect
3 to which there are substantial grounds for difference of opinion.
4 Frontier's contentions pertinent to enforcement of the
5 contractual choice of law provision and the applicability of
6 California's contractor licensing provisions posed a mixed
7 question of law and fact which could not be finally resolved in
8 the November 9 Memorandum. The issue there was reconsideration
9 of the Court's ruling that this Court possesses personal
10 jurisdiction over Frontier and that venue in this district is
11 appropriate.

12 Further, Frontier has not carried its burden of
13 demonstrating that immediate appeal of the three issues will
14 materially advance the ultimate termination of this litigation.
15 Frontier's primary concern is that the remedies that might be
16 applied should Davis Moreno prevail in this litigation will be
17 more onerous than those that might be applied under Colorado law.
18 These concerns have little or nothing to do with advancing the
19 ultimate termination of the litigation by an interlocutory
20 appeal. They turn rather on conflict of laws jurisprudence and
21 the mutual intent of the contracting parties, matters to be
22 resolved at trial based on mixed questions of law and fact.

23 CONCLUSION

24 There is a question of fact whether the parties modified

25 _____
26 The Court did not direct that either be reported or published and
neither has been reported in West's official reports.

1 Frontier's purchase order to authorize the complaining party to
2 establish jurisdiction. Nonetheless, Frontier's application for
3 certification of an interlocutory appeal will do nothing to
4 achieve termination of the case. Once jurisdiction and choice of
5 law are resolved, the case will have to be tried to resolve the
6 underlying contractual dispute over the California public works
7 project. Frontier has not carried its burden of demonstrating
8 exceptional circumstances pursuant to the Section 1292(b) factors
9 that justify certification of immediate appeal.

10 For the reasons stated, Frontier's motion for certification
11 of interlocutory appeal is DENIED.

12 IT IS SO ORDERED.

13 Dated: February 22, 2010

/s/ Oliver W. Wanger
UNITED STATES DISTRICT JUDGE