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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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DALE M. WALLIS, D.V.M., JAMES
L. WALLIS, and HYGIEIA
BIOLOGICAL LABORATORIES, INC.,
a California Corporation,

NO. CIV. 08-02558 WBS GGH

Plaintiffs,

v.

ORDER RE: MOTION FOR
CERTIFICATION OF ORDER FOR
APPEAL AND FURTHER SCHEDULING
ORDER

CENTENNIAL INSURANCE COMPANY,
INC., a New York corporation,
ATLANTIC MUTUAL INSURANCE,
CO., INC., a New York
corporation,

Defendants,

_____ /

AND RELATED COUNTERCLAIMS AND
THIRD-PARTY COMPLAINT.

_____ /

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Plaintiffs Dale M. Wallis, James L. Wallis, and Hygieia
Biological Laboratories Inc. brought this action against
defendants Centennial Insurance Company, Inc. and Atlantic Mutual
Insurance Co., Inc. alleging breach of insurance contract, breach
of the implied covenant of good faith and fair dealing, and

1 breach of fiduciary duty relating to plaintiffs' professional
2 liability insurance policy. The court held a Status Conference
3 on April 30, 2012, in which counsel for both parties were in
4 attendance. Defendants now move for certification of the court's
5 January 30, 2012, Order, denying defendants' motion to stay, for
6 appeal pursuant to 28 U.S.C. § 1292(b). (Docket No. 139.)

7 On December 19, 2011, defendants filed a motion to
8 indefinitely stay the proceedings in this case pursuant to the
9 Orders of Liquidation issued by the Supreme Court of the State of
10 New York. (Docket No. 130.) In its January 30, 2012, Order, the
11 court denied defendants' motion to stay this action pending the
12 outcome of the liquidation proceedings in New York. (Docket No.
13 136.) In denying defendants' motion, the court relied upon the
14 Ninth Circuit's opinion in Hawthorne Savings F.S.B. v. Reliance
15 Insurance Co. of Illinois, 421 F.3d 835 (9th Cir. 2005), amended
16 by 433 F.3d 1089 (9th Cir. 2006), which held that neither the
17 Full Faith and Credit Clause of the Constitution nor the Uniform
18 Insurers Liquidation Act ("UILA"), Cal. Ins. Code § 1064.1-.12,
19 required that in personam proceedings against an insolvent
20 insurance company be stayed pursuant to orders issued by a state
21 court. Three months later, on April 26, 2012, defendants filed
22 their petition for a § 1292(b) certification of the court's
23 January 30, 2012, Order.

24 Orders denying motions to stay are not ordinarily final
25 decisions from which appeal may be taken under 28 U.S.C. § 1291.
26 See Mayacamas Corp. v. Gulfstream Aerospace Corp., 806 F.2d 928,
27 930 (9th Cir. 1986). However, under 28 U.S.C. § 1292(b), "[w]hen
28 a district judge, in making in a civil action an order not

1 otherwise appealable under [section 1292], shall be of the
2 opinion that such order involves a controlling question of law as
3 to which there is substantial ground for difference of opinion
4 and that an immediate appeal from the order may materially
5 advance the ultimate termination of the litigation, he shall so
6 state in writing in such order." When the district judge so
7 states, it is then up to the Court of Appeals, in its discretion,
8 to determine whether to permit an appeal to be taken from that
9 order. Id.

10 The court first considers the threshold issue of
11 whether the motion for certification of interlocutory appeal was
12 timely filed. Appeals brought under 28 U.S.C. § 1292(b) must be
13 filed within ten days of the court's certification of the order
14 for interlocutory appeal. "Though there is no specified time
15 limit for seeking certification, § 1292(b) provides for an
16 'immediate appeal,' and 'a district judge should not grant an
17 inexcusably dilatory request.'" Spears v. Wash. Mut. Bank FA,
18 No. C-08-868 RMW, 2010 WL 54755, at *1 (N.D. Cal. Jan. 8, 2010)
19 (quoting Richardson Elecs., Ltd. v. Panache Broad. of Pa., Inc.,
20 202 F.3d 957, 958 (7th Cir. 2000)).

21 "The ten-day limitation in section 1292(b) is not to be
22 nullified by promiscuous grants of motions to amend. An
23 amendment that will have the effect of extending the limitation
24 is proper only if there is a reason for the delay." Weir v.
25 Propst, 915 F.2d 283, 287 (7th Cir. 1990); see also Spears, 2010
26 WL 54755, a *2 (denying § 1292(b) certification where no reason
27 was provided for a two and a half month delay); A.H.D.C. v. City
28 of Fresno, No. CIV F 97-5498 OWW, 2003 WL 25948686, at *5 (E.D.

1 Cal. 2003) (dismissing certification requests as untimely because
2 they were not filed within 30 days after the initial order was
3 entered).

4 Defendants have provided no reason for their three
5 month delay in seeking certification of the court's January 30,
6 2012, Order denying their motion to stay the proceedings.¹ Given
7 the lack of justification for their delay in seeking
8 certification, the court denies the motion as untimely.

9 Furthermore, even if defendants had presented
10 sufficient justification for their delay in filing the motion
11 seeking certification, the court would have denied the motion on
12 its merits. A district court may certify an order for
13 interlocutory appeal when the order: (1) involves a controlling
14 question of law as to which (2) there is substantial ground for
15 difference of opinion and (3) an immediate appeal from the order
16 may materially advance the ultimate outcome of the litigation.
17 28 U.S.C. § 1292(b); see also In re Cement Antitrust Litig., 673
18 F.2d 1020, 1026 (9th Cir. 1982).

19 First, in the court's experience, most orders from
20 which a party may seek to take an interlocutory appeal involve a
21 controlling question of law in the sense that deciding the issue
22 in favor of the moving defendants would materially affect the
23 outcome of the litigation. In re Cement, 673 F.2d at 1026

24
25 ¹ Defendants' delay is especially notable due to the fact
26 that they notified the court in their April 16, 2012, Joint
27 Status Report that they intended to file the motion for
28 certification "well in advance of the status conference." (Joint
Status Report at 5:5-6 (Docket No. 138).) Instead of immediately
filing their motion, defendants further delayed and filed the
motion only two court days before the scheduled status
conference.

1 ("[A]ll that must be shown in order for a question to be
2 'controlling' is that resolution of the issue on appeal could
3 materially affect the outcome of litigation in the district
4 court." (citing U.S. Rubber Co. v. Wright, 359 F.2d 784, 785 (9th
5 Cir. 1966) (per curiam))). This case is no exception. The
6 question of law raised by plaintiffs is whether the court is
7 bound by a New York state court order staying all judicial
8 proceedings involving defendants. The appropriateness of a stay
9 in this action will materially affect the outcome because
10 defendants represent that a stay of several years would likely be
11 required, at which point defendants may no longer have any
12 remaining assets.

13 Second, in most seriously contested motions there is
14 also substantial ground for a difference of opinion. Filing a
15 motion involves the expenditure of attorney time and client
16 resources. Such motions are not generally pursued by competent
17 attorneys unless there is a substantial basis to believe they may
18 be granted. The complexity of such motions is precisely why
19 courts write lengthy opinions explaining their decisions. This
20 case, again, is no exception. Defendants argue that several out-
21 of-state authorities support their interpretation that a stay is
22 required pursuant to UILA. See, e.g., In re Ins. Affiliates,
23 Inc. v. O'Connor, 522 F. Supp. 703, 706 (D. Colo. 1981);
24 Integrity Ins. Co. v. Martin, 769 P.2d 69, 70 (Nev. 1989);
25 Vlasaty v. Avco Rent-A-Car Sys., Inc., 304 N.Y.S.2d 118, 120
26 (N.Y. S. Ct. 1969).

27 This is not a case, however, in which there is an
28 absence of controlling Ninth Circuit case law. The court has

1 already undertaken a substantially similar analysis of the
2 likelihood of defendants' success on appeal in its Order denying
3 defendants' motion to stay. The court's Order relies directly on
4 the Ninth Circuit's decision in Hawthorne Savings, in which the
5 Ninth Circuit decided a substantially similar motion. Thus,
6 while there are grounds for disagreement, this is not a matter of
7 first impression in this circuit.

8 Third, whether an immediate appeal would materially
9 advance the ultimate outcome of this litigation usually depends,
10 of course, on whether the appeal is successful. Defendants argue
11 that an immediate appeal from this court's Order "may" materially
12 advance the ultimate outcome of this litigation, but it is
13 unclear that would be the case.² To the contrary, in this case,
14 it is denial of defendant's petition for an interlocutory appeal
15 that will most likely materially advance the ultimate outcome of
16 this litigation. If the appeal is unsuccessful, there will be
17 further delay in litigating this matter. If on the other hand
18 the appeal is successful, the effect will be to indefinitely stay
19 this action pending the outcome of the defendants' liquidation
20 proceedings in New York. It is unclear at this time whether that
21 will terminate the matter or merely delay its resolution.³

22 But there is more to the analysis than that. The

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24 ² Defendants argue that a successful appeal "will
25 effectively bring to a close" this action. (Pet. to Dist. Ct.
26 for § 1292(b) Certification at 12:1.) Defendants motion to stay
subject to additional litigation if and when plaintiffs move to
lift the stay.

27 ³ It is similarly unclear whether appeal of the court's
28 Order would consume less litigation resources than proceeding
with this litigation.

1 Supreme Court has construed the 1958 amendments to § 1292(b) "to
2 confer on district courts first line discretion to allow
3 interlocutory appeals." Swint v. Chambers Cnty. Comm'n, 514 U.S.
4 35, 47 (1995). The Ninth Circuit further tells us that § 1292 is
5 to be used "only in exceptional situations in which allowing an
6 interlocutory appeal would avoid protracted and expensive
7 litigation." In re Cement, 673 F.2d at 1026 (citing U.S. Rubber
8 Co., 359 F.2d at 785). Such an exceptional situation does not
9 exist in this case because there is applicable Ninth Circuit
10 precedent and the appeal will fail to materially advance the
11 ultimate outcome of this matter.

12 Furthermore, the purpose of defendants' motion to stay
13 was to delay adjudication of this action. If the court were to
14 certify the motion for interlocutory appeal and the matter were
15 to be stayed pending the outcome of the appeal, then defendants
16 would achieve their desired delay regardless of their success on
17 appeal. The court is under an independent obligation to move its
18 calendar forward and will not permit defendants to circumvent
19 this duty. Accordingly, the court will deny defendants' motion
20 for certification of order for appeal.

21 At the Status Conference held on April 30, 2012,
22 plaintiffs requested that the court lift the stay over all claims
23 not subject to the court's April 16, 2009, Order compelling
24 arbitration, (Docket No. 41). This stay was originally ordered
25 by the court pursuant to plaintiffs' motion to stay and
26 defendants' non-opposition to the motion. (Docket No. 74.)
27 Because plaintiffs no longer wish the matter to be stayed pending
28 the outcome of the arbitration hearings, the court will lift the

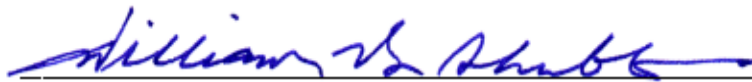
1 stay.

2 IT IS THEREFORE ORDERED that defendants' motion for
3 certification of the court's January 30, 2012, Order for appeal
4 pursuant to 28 U.S.C. § 1292(b) be, and the same hereby is,
5 DENIED.

6 IT IS FURTHER ORDERED that the stay imposed by the
7 court's December 10, 2009, Order, (Docket No. 74), is hereby
8 lifted as to all claims not subject to the court's April 16,
9 2009, Order compelling arbitration.

10 The court's July 2, 2009, Scheduling Order, (Docket No.
11 53), is amended as follows: All discovery shall be completed by
12 September 28, 2012. All pretrial motions shall be filed by
13 November 26, 2012. The Final Pretrial Conference is RESET for
14 January 22, 2013, at 2:00 p.m. in Courtroom No. 5. The trial is
15 RESET for February 20, 2013, at 9:00 a.m. in Courtroom No. 5.

16 DATED: May 1, 2012

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19 WILLIAM B. SHUBB
20 UNITED STATES DISTRICT JUDGE
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