

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

-----oo0oo-----

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

NO. CIV. 08-2558 WBS GGH

Plaintiffs,

MEMORANDUM AND ORDER RE:  
MOTION FOR STAY PENDING FINAL  
SETTLEMENT DOCUMENTATION AND  
SCBA FEE ARBITRATION AND  
DEMAND FOR BOND

v.

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

Defendants.

\_\_\_\_\_ /

AND RELATED COUNTER-CLAIMS AND  
THIRD-PARTY COMPLAINT.

\_\_\_\_\_ /

-----oo0oo-----

Plaintiffs Dale M. Wallis ("Dr. Wallis"), James L.  
Wallis ("Mr. Wallis"), and Hygieia Biological Laboratories, Inc.  
("Hygieia") brought this action against defendants Centennial  
Insurance Company Inc. and Atlantic Mutual Insurance Co. Inc.  
alleging breach of insurance contract, breach of the implied

1 covenant of good faith and fair dealing, and breach of fiduciary  
2 duty relating to plaintiffs' veterinarian professional liability  
3 policy ("Policy"). Plaintiffs now seek a stay of this action  
4 pending the completion of Cumis arbitration proceedings and also  
5 pending documentation and implementation of a partial settlement  
6 in the underlying state court action. Plaintiffs also move for  
7 an order requiring the defendants post a bond in the amount of  
8 \$1,200,000.00 to cover anticipated unpaid Cumis fees.

9 A. Request for Stay Pending Final Settlement and  
10 Arbitration

11 In its April 16, 2009 Order, this court granted  
12 the defendants' motion, in part, to compel binding arbitration  
13 regarding Cumis counsel fees pursuant to California Civil Code §  
14 2860(c). (April 16, 2009 Order.) Presently before the  
15 Sacramento County Bar Association ("SCBA") is the question of  
16 whether that arbitration forum has jurisdiction to hear the Cumis  
17 fee dispute. This court retained jurisdiction over other issues  
18 not squarely involving the calculation of Cumis counsel fees.  
19 (Id.) On July 20, 2009, an agreement for settlement of the  
20 underlying state court action was reached in a mediated partial  
21 settlement agreement. (Mot. Stay, Decl. Joanna R. Mendoza ¶ 2.)  
22 A formal settlement agreement has not yet been approved, and the  
23 state court has issued an extended stay to allow time to resolve  
24 several procedural issues in that case before the settlement is  
25 finalized. (Mot. Stay, Decl. Joanna R. Mendoza ¶ 4.)

26 The plaintiff moves for a stay of this action pending a  
27 final settlement and pending completion of the Cumis fee  
28 arbitration proceedings. Defendants do not oppose the motion.

1 Therefore, the motion for stay will be granted.

2 B. Request for Bond or Writ of Attachment Pending Attorney  
3 Fee Arbitration

4 Rule 64 of the Federal Rules of Civil Procedure  
5 provides, in pertinent part, that "all remedies providing for  
6 seizure of person or property for the purpose of securing  
7 satisfaction of the judgment ultimately to be entered in the  
8 action are available under the circumstances and in the manner  
9 provided by the law of the state in which the district court is  
10 held . . . ." Fed. R. Civ. P. 64. Thus, Rule 64 "permits state  
11 seizure provisions to be used in federal courts . . . ." Reebok  
12 Int'l v. Marnatech Enters., 970 F.2d 552, 558 (9th Cir. 1992);  
13 Pos-A-Traction, Inc. v. Kelly-Springfield Tire Co., 112 F. Supp.  
14 2d 1178, 1181 (C.D. Cal. 2000) (noting that Rule 64 incorporates  
15 state law for prejudgment seizures of property). Among the  
16 specific seizure remedies provided by Rule 64 are arrest,  
17 attachment, garnishment, replevin and sequestration.

18 Section 483.010(a) of the California Code of Civil  
19 Procedure states that an attachment may be issued on "a claim or  
20 claims for money, each of which is based on a contract, express  
21 or implied, where the total amount of the claim or claims is a  
22 fixed or readily ascertainable amount not less than five-hundred  
23 dollars (\$500) exclusive of costs, interest and attorney's fees."  
24 Cal. Civ. P. Code 483.010(a).

25 California Code of Civil Procedure § 484.090 provides  
26 that before an attachment order is issued, the court must find  
27 that: (1) the claim upon which the attachment is based is one  
28 upon which an attachment may be issued; (2) the applicant has

1 established "the probable validity" of the claim upon which the  
2 attachment is based; (3) the attachment is not sought for a  
3 purpose other than the recovery on the claim upon which the  
4 request for attachment is based; and (4) the amount to be secured  
5 by the attachment is greater than zero. In order to establish  
6 "the probable validity" of the claim, the applicant must show  
7 that it is more likely than not it will obtain a judgment against  
8 the defendant on its claim. Cal. Civ. P. Code § 481.190.

9 "Attachment is a prejudgment remedy which requires a  
10 court to make a preliminary determination of the merits of a  
11 dispute. It allows a creditor who has applied for an attachment  
12 following the statutory guidelines and established a prima facie  
13 claim to have a debtor's assets seized and held until final  
14 adjudication at trial." Lorber Indus. v. Turbulence, Inc., 175  
15 Cal. App. 3d 532, 535 (1985). The burden is on the moving party  
16 to establish grounds for an order of attachment. Loeb and Loeb  
17 v. Beverly Glen Music, Inc., 166 Cal. App. 3d 1110, 1116 (1985).  
18 Attachment is a purely statutory remedy, which is subject to  
19 strict construction. Jordan-Lyon Prods., Ltd. v. Cineplex Odeon  
20 Corp., 29 Cal. App. 4th 1459, 1466 (1994).

21 Plaintiffs request that this court order a bond or writ  
22 of attachment<sup>1</sup> in the amount of \$1,200,000.00 to ensure that the  
23 defendants can and will pay all Cumis fees determined to be owed  
24 through the arbitration compelled by this court. In support of  
25

---

26 <sup>1</sup>In their Reply, plaintiffs for the first time style their  
27 motion as a request for bond or writ of attachment. Until this  
28 time, plaintiffs have only requested a bond in the amount of  
\$1,200,000.00. The court will, however, address the issue of  
attachment.

1 this motion, plaintiffs allege that during mediation discussions,  
2 defendant's counsel advised the parties that Atlantic Mutual is  
3 operating in "run out" mode and that Atlantic Mutual may not have  
4 sufficient funds to pay out claims after early 2010. (Mot. Stay  
5 Decl. Joanna R. Mendoza ¶ 8.) Plaintiffs fear that if a bond is  
6 not issued, defendants may be unable to pay any judgment later  
7 issued by this court, and that plaintiffs will be left with a  
8 worthless insurance policy and liability for over \$1,000,000.00  
9 in attorneys fees. (Id.) Plaintiffs further allege that the  
10 delay in beginning arbitration after this court's April 16, 2009  
11 Order compelling arbitration, and subsequent motions before the  
12 SCBA challenging that organization's jurisdiction to arbitrate  
13 the Cumis fee dispute, are due to defendants' efforts to "run out  
14 the clock" on this litigation to avoid paying any potential award  
15 of Cumis fees that may be awarded by the arbitration forum.  
16 (Id.)

17 As of September 21, 2009, the amount of unpaid attorney  
18 fees for plaintiffs' Cumis counsel amounts to \$1,073,693.13, and  
19 plaintiffs estimate that they will total over \$1,200,000.00 by  
20 the time Cumis counsel's defense of plaintiffs in the underlying  
21 state court action is completed through the settlement process.  
22 (Mot. Stay Decl. Joanna R. Mendoza ¶ 6; Mot. Stay 4.) However,  
23 defendants assert that they do not owe this amount or any other  
24 amount because they have already paid more than the reasonable  
25 value of the services rendered by Cumis counsel in defense of the  
26 underlying state court action. (Opp. Mot. Stay 9); see Cal. Civil  
27 Code § 2860.

28 Plaintiffs have not made a sufficient showing that

1 would establish the "probable validity" of the claim upon which  
2 the attachment is based as required by section 484.090(a)(2).  
3 Specifically, plaintiff's request for a bond or attachment has  
4 focused almost exclusively on the alleged bad faith actions of  
5 the defendants. This is not the heart of the fee dispute between  
6 plaintiffs and defendants currently before the SCBA for  
7 arbitration. The dispute is whether defendants actually owe any  
8 of the unpaid fees billed. Although plaintiffs have provided the  
9 court with a redacted version of their most recent invoice from  
10 Cumis counsel, and had available a set of unredacted invoices  
11 during oral argument for the court's review, they have not  
12 presented any evidence that would allow the court to determine  
13 whether the additional fees claimed are in fact due to  
14 plaintiffs. Plaintiffs have not, therefore, established that it  
15 is more likely than not that they will prevail on the Cumis fee  
16 issue, and their request for attachment must be denied.

17           What remains is plaintiffs' loosely-pled motion for a  
18 bond. Defendants object to the motion to post bond on the ground  
19 that Local Rule 65.1-151 does not provide for courts to require  
20 security for damages, which in this case are the Cumis counsel  
21 fees. Besides attachment, Local Rule 65.1-151 allows for  
22 security for costs and for a supersedeas bond. (Eastern District  
23 Local Rule 65.1-151.) Plaintiffs provide no statutory authority  
24 for the proposition that this court has the power to issue a bond  
25 for damages. Rather, plaintiffs analogize to the power to  
26 require a bond to ensure that costs can be paid if that party is  
27 unsuccessful and is taxed costs. (Mot. Stay 5 (citing Anderson  
28 v. Steers, Sullivan, McNamar & Rogers, 998 F.2d 405 (7th Cir.

1 1993)).) In this case, plaintiffs request a bond to ensure that  
2 damages are paid should plaintiffs receive a favorable ruling in  
3 the Cumis fee arbitration. To do so would circumvent the  
4 pleading standards required to attach the defendants' assets  
5 pending the outcome of this litigation. Therefore, plaintiffs'  
6 motion for a bond will be denied.

7 IT IS THEREFORE ORDERED that plaintiffs' motion for  
8 stay pending final settlement and arbitration be, and the same  
9 hereby is, GRANTED.

10 IT IS FURTHER ORDERED that plaintiffs' motion for  
11 attachment and/or bond pending attorney fee arbitration is hereby  
12 DENIED.

13 DATED: December 9, 2009

14 

15 WILLIAM B. SHUBB  
16 UNITED STATES DISTRICT JUDGE  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28