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

JACOB WINDING,

Plaintiff,  
vs.

No. CIV S-09-03526 KJM-KJN

ALLSTATE INSURANCE CO. and DOES  
1-25, inclusive,

Defendants.

MEMORANDUM AND ORDER

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This matter is before the court on the “notice of interlocutory appeal”<sup>1</sup> filed by plaintiff Jacob Winding (“plaintiff”). Through the notice, plaintiff challenges the court’s March 8, 2012 order<sup>2</sup> granting defendants summary judgment on plaintiff’s fourth claim for insurance bad faith. (ECF 129.) Defendant has not responded to this filing. For the reasons set forth

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<sup>1</sup> Plaintiff did not notice a motion for certification of the court’s order for interlocutory appeal. However, as plaintiff is proceeding pro se, the court construes plaintiff’s “notice of interlocutory appeal” as a motion for a certificate of interlocutory appeal under 28 U.S.C § 1292(b).

<sup>2</sup> The court, on March 7, 2012, issued an order adopting the magistrate judge’s findings and recommendation that defendants should be granted partial summary judgment solely as to plaintiff’s claim for insurance bad faith and the corresponding request for punitive damages, but that the motion for summary judgment should be denied in all other respects. (ECF 124.)

1 below, and construing plaintiff's "notice" as a request for leave to file an interlocutory appeal,  
2 the court finds plaintiff has not met his burden of demonstrating that the court's order granting  
3 partial summary judgment involved a controlling question of law as to which there is substantial  
4 ground for difference of opinion and that an immediate appeal may materially advance the  
5 ultimate termination of this litigation. Thus, in accordance with 28 U.S.C § 1292(b), plaintiff's  
6 request is DENIED.<sup>3</sup>

7 I. BACKGROUND

8 Defendant moved for partial summary judgment as to plaintiff's claims for breach of  
9 contract, insurance bad faith, fraud and plaintiff's request for punitive damages. (ECF 60.) On  
10 November 1, 2011, the magistrate judge issued detailed and well-reasoned findings and  
11 recommendations, recommending that defendant's motion for summary judgment be denied in  
12 part and granted in part. (ECF 105 at 34:2-7). Specifically, the magistrate judge recommended  
13 defendant "be granted summary judgment as to plaintiff's claim for insurance bad faith and the  
14 corresponding request for punitive damages, but that the motion for summary judgment be  
15 denied in all other respects." (*Id.*) On March 8, 2012, the court issued an order adopting the  
16 findings and recommendations. (ECF 124.)

17 In recommending defendant be granted summary judgment as to plaintiff's  
18 insurance bad faith claim, the magistrate judge found that plaintiff, under the insurance policy,  
19 "sought reimbursement for appliances and materials . . . but was unable or unwilling to produce  
20 receipts, invoices, or other documents substantiating the cost" of the materials. (ECF 105 at  
21 22:15-23:2.) The court therefore found that, "[a]t bottom, plaintiff may ultimately succeed on  
22 his breach of contract claim, but he has not produced enough evidence of unreasonableness to  
23 withstand summary judgment on his insurance bad faith claim." (*Id.* at 23:11-13.)

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26 <sup>3</sup> Because oral argument will not be of material assistance, the court orders this matter submitted on the briefs. E.D. Cal. Local Rule 230(g).

1 II. STANDARD

2 The general rule is that an appellate court should not review a district court ruling  
3 until after entry of a final judgment. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 474 (1978); *In*  
4 *re Cement Antitrust Litig.*, 673 F.2d 1020, 1026 (9th Cir. 1982), *aff'd sub nom. Arizona v. Ash*  
5 *Grove Cement Co.*, 459 U.S. 1190 (1983); *see* 28 U.S.C. § 1291. Generally speaking, where, as  
6 here, the district court grants partial summary judgment, that decision is not appealable precisely  
7 because it is not a final judgment disposing of all claims. *American States Ins. Co. v. Dastar*  
8 *Corp.*, 318 F.3d 881, 884 (9th Cir. 2003) (citing *Cheng v. Comm'r*, 878 F.2d 306, 310 (9th  
9 Cir.1989)). There is, however, an exception to this general rule:

10 When a district judge, in making in a civil action an order not  
11 otherwise appealable under this section, shall be of the opinion that  
12 such order involves a controlling question of law as to which there  
13 is substantial ground for difference of opinion and that an  
14 immediate appeal for the order may materially advance the  
15 ultimate termination of the litigation, [she] shall so state in writing  
16 in such order. The Court of Appeals . . . may thereupon . . . permit  
17 an appeal . . . if application is made to it within ten days . . . .

18 28 U.S.C. § 1292(b). The party seeking certification of an interlocutory appeal has the burden to  
19 show the presence of the exceptional circumstances required to prevail. *Coopers & Lybrand*,  
20 437 U.S. at 474-75.

21 Section 1292 identifies three factors that must be present in order for the court to  
22 certify an appeal. First, the issue to be certified must involve a controlling issue of law. 28  
23 U.S.C. § 1291. An issue is "controlling" if "resolution of the issue on appeal could materially  
24 affect the outcome of litigation in the district court." *In re Cement Antitrust Litig.*, 673 F.2d at  
25 1026 (citing *U.S. Rubber Co. v. Wright*, 359 F.2d 784, 785 (9th Cir. 1966)). Second, there must  
26 be substantial ground for difference of opinion on that issue. A party's strong disagreement with  
the court's ruling is not sufficient for there to be a "substantial ground for difference"; the  
proponent of an appeal must make some greater showing. *Kern-Tulare Water Dist. v.*  
*Bakersfield*, 634 F. Supp. 656, 667 (E.D. Cal. 1986), *aff'd in part and rev'd in part on other*

1 grounds, 828 F.2d 514 (9th Cir. 1987). Third, an interlocutory appeal must be likely to  
2 materially speed the termination of the litigation. This factor is linked to whether an issue of law  
3 is "controlling," in that the court should consider the effect of a reversal by the court of appeals  
4 on the management of the case. See *In re Cement Antitrust Litig.*, 673 F.2d at 1026.<sup>4</sup>

### 5 III. ANALYSIS

6 In this case, plaintiff's attempt to seek an interlocutory appeal is unwarranted, as  
7 plaintiff cannot meet his burden of demonstrating that the issue to be certified — whether  
8 plaintiff's claim for insurance bad faith should be allowed to proceed — is a controlling question  
9 of law. *In re Cement Antitrust Litig.*, 673 F.2d at 1026. Where the issue decided by the court is  
10 "fact-dependent," it is generally not a "controlling question of law." See *Eaton v. Siemens*, 2007  
11 WL 2318538, at \*2 (E.D. Cal., Aug. 10, 2007) (citing *Keystone Tobacco Co., Inc. v. Nat'l*  
12 *Tobacco Co.*, 217 F.R.D. 235, 238 (D.D.C. 2003) (holding that controlling issues of law are not  
13 those issues resolved based on the underlying facts)). In this case, the court did not grant  
14 defendant's motion for summary judgment as to plaintiff's insurance bad faith claim based on  
15 interpretation of an ambiguous statute or common-law doctrine; rather, the court granted  
16 defendant's motion because plaintiff failed to proffer sufficient evidence to raise a genuine  
17 dispute as to any material fact. Specifically, the court adopted the magistrate judge's finding that  
18 summary judgment should be granted as to the insurance bad faith claim because plaintiff did  
19 "not cite[] to evidence of an inadequate investigation, bias in Allstate's investigation, or bad  
20 faith in interpreting the policy."<sup>5</sup> (ECF 105 at 23:9-10.) Because the court resolved plaintiff's  
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23 <sup>4</sup> Plaintiff has not sought to stay these proceedings pending interlocutory appeal.

24 <sup>5</sup> Even plaintiff had shown that the issue resolved on summary judgment was a  
25 "controlling question of law," plaintiff has also failed to meet his burden of establishing that  
26 there is substantial grounds for disagreement over the legitimacy of plaintiff's bad faith  
claim—as Judge Newman found, plaintiff simply failed to meet his burden of proffering any  
evidence to support his insurance bad faith claim.

1 faith claim based on the factual record, and not as a question of law, plaintiff is precluded from  
2 appealing the court's grant of partial summary judgment.

3 IV. CONCLUSION

4 Based on the foregoing, plaintiff's request for leave to file an interlocutory appeal  
5 is DENIED.

6 IT IS SO ORDERED.

7 DATED: May 1, 2012.

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11 UNITED STATES DISTRICT JUDGE  
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