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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

PHARMACEUTICAL RESEARCH AND
MANUFACTURERS OF AMERICA,

Plaintiff,

v.

ROBERT P. DAVID, in his official
capacity as Director of the California
Office of Statewide Health Planning
and Development,

Defendant.

No. 2:17-cv-02573-MCE-KJN

ORDER

Through the present action, Plaintiff Pharmaceutical Research and Manufacturers of America (“PhRMA” or “Plaintiff”) seeks a declaration that Section 4 of a California law, Senate Bill 17 (“SB 17”), which imposes various notice, reporting, and justification obligations on the manufacturer of a prescription drug sold to certain purchasers, is unconstitutional. PhRMA seeks injunctive relief preventing implementation of SB 17 by Defendant Robert P. David, Director of the Office of Statewide Health Planning and Development (“OSHPD” or “Defendant”).¹ This Court recently denied PhRMA’s motion for summary judgment. PhRMA now seeks leave to pursue an interlocutory appeal of

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¹ Elizabeth Landsberg has replaced Robert P. David as the Director of OSHPD.

1 that ruling pursuant to 28 U.S.C. § 1292(b). ECF No. 94 (“Motion”).² For the reasons
2 that follow, PhRMA’s Motion is GRANTED.³

3 Pursuant to 28 U.S.C. § 1292(b), a district court may certify an order for
4 interlocutory appeal if it (1) “involves a controlling question of law,” (2) there is
5 “substantial ground for difference of opinion,” and (3) “an immediate appeal from the
6 order may materially advance the ultimate termination of the litigation.” See Reese v. BP
7 Expl. (Ak.) Inc., 643 F.3d 681, 687-88 (9th Cir. 2011); Fed. R. App. P. 5(a)(3).⁴ PhRMA
8 has established each of these requirements here. First, the parties agree, as does the
9 Court, that its ruling on summary judgment involved a controlling question of law.
10 Second, resolution of the dormant Commerce Clause issue involved a “novel and difficult
11 question[] of first impression” in this circuit, which leaves room for substantial difference
12 of opinion as to its resolution. See Couch v. Telescope Inc., 611 F.3d 629, 633 (9th Cir.
13 2010). Indeed, as PhRMA highlights, there is potentially conflicting Fourth Circuit
14 authority on this issue, although this Court believes it to be distinguishable. Cf. Ass’n for
15 Accessible Meds. v. Frosh, 887 F.3d 664 (4th Cir. 2018), cert. denied, 139 S. Ct. 1168
16 (2019). Finally, the Court again agrees with the parties that resolution of an interlocutory
17 appeal will wholly advance this case, which is still in its infancy (e.g., no discovery has
18 been conducted and no trial is set), as well as a separate federal case pending in the
19 District of Oregon that has been stayed pending this Court’s resolution of PhRMA’s
20 dormant Commerce Clause challenge. See PhRMA v. Stolfi, No. 6:19-cv-01996-AA
21 (D. Ore. Mar. 9, 2020).

22 In consideration of the foregoing, PhRMA’s Motion for Certification of Interlocutory
23 Appeal (ECF No. 94) is GRANTED. Pursuant to Federal Appellate Rule 5(a)(3), the

24 ² Because oral argument would not have been of material assistance, the Court ordered this
25 matter submitted on the briefs. ECF No. 95; see E.D. Cal. Local Rule 230(g).


26 ³ The parties and the Court are intimately familiar with the factual and procedural background of
this case as well as the legal issues. Accordingly, they are not recounted here.

27 ⁴ PhRMA argues that their Motion was timely filed eighteen (18) days after denial of the Motion for
28 Summary Judgment. Motion, at 4 n.1. The Court concurs, and the matter will thus not be discussed
further.

1 Court hereby amends its January 4, 2021, Memorandum and Order to grant PhRMA
2 permission to appeal and state that the Order satisfies the necessary conditions for an
3 interlocutory appeal under 28 U.S.C. § 1292(b) as set forth above. This case is
4 STAYED pending resolution of a petition for permission to appeal to the Ninth Circuit
5 Court of Appeals and any subsequent appellate proceedings. Not later than ninety (90)
6 days following the date this Order is electronically filed, and every ninety (90) days
7 thereafter until the stay is lifted, the parties are directed to file a Joint Status Report
8 advising the Court as to the status of the proceedings before the Ninth Circuit.

9 IT IS SO ORDERED.

10 Dated: June 16, 2021

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13 MORRISON C. ENGLAND, JR.
14 SENIOR UNITED STATES DISTRICT JUDGE
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