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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

ORACLE USA, INC., et al.,

Plaintiffs,

v.

SAP AG, et al.,

Defendants.

Case No. 07-CV-1658 PJH (EDL)

APPENDIX OF UNPUBLISHED AUTHORITIES CITED IN DEFENDANTS' OPPOSITION TO ORACLE'S MOTION FOR 1292(b) CERTIFICATION FOR INTERLOCUTORY REVIEW

Date: N/A
Time: N/A
Courtroom: 3, 3rd Floor
Judge: Hon. Phyllis J. Hamilton

TABLE OF CONTENTS

Dated: October 7, 2011

Respectfully submitted,

JONES DAY

By: /s/ Tharan Gregory Lanier
Tharan Gregory Lanier

Counsel for Defendants
SAP AG, SAP AMERICA, INC., and
TOMORROWNOW, INC.

TAB 1

Not Reported in F.Supp.2d, 2006 WL 149006 (N.D.Cal.)
(Cite as: 2006 WL 149006 (N.D.Cal.))

United States District Court,
N.D. California.
Valenti AGGIO, et al., Plaintiffs,
v.
ESTATE OF Joseph AGGIO, Defendant.

No. C 04-4357 PJH.
Jan. 18, 2006.

ORDER GRANTING MOTION FOR CERTIFICATION PURSUANT TO 28 U.S.C. § 1292(b), AND ORDER STAYING CASE PENDING APPEAL

PHYLLIS J. HAMILTON, J.

***1** Sequoia Insurance Company, in its capacity as insurer for defendant Estate of Joseph Aggio, seeks an order pursuant to 28 U.S.C. § 1292(b) for certification of a question for interlocutory appeal, and an order staying the action pending a ruling by the United States Court of Appeals. The court hereby GRANTS the motion, for the following reasons.

Plaintiffs in this action seek recovery of response costs for clean-up of environmental contamination, under § 107 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. § 9607(a); and contribution under the California Hazardous Substances Act ("HSAA"), Cal. Health & Safety Code § 25300, et seq. Plaintiffs also assert state law claims for nuisance, equitable indemnity, and unjust enrichment, and seek a judicial declaration of the parties' respective rights and obligations under CERCLA, HSAA, and other federal and state laws.

On September 19, 2005, the court issued a written order denying defendant's motion to dismiss the CERCLA § 107(a) claim. Defendant had argued that under the United States Supreme Court's ruling in *Cooper Indus., v. Aviall Servs., Inc.*, 543 U.S. 157, 125 S.Ct. 577, 583-84 (2004), a private party who has not been sued under either § 106 or § 107 of CERCLA may not sue other potentially responsible parties (PRPs) for contribution. The court denied the motion based on the Ninth Circuit's pre-*Aviall* ruling in *Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298 (9th Cir.1997), in which the court held that there is an implied right of contribution under § 107(a). Sequoia now requests the court to certify the order for appeal.

The general rule is that an appellate court should not review a ruling from a district court until after entry of final judgment. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 474 (1978). An exception to this general rule appears in 28 U.S.C. § 1292, which provides that certification of an interlocutory order for appeal is appropriate when the order involves a controlling question of law, as to which there is substantial ground for difference of opinion, and where a resolution thereof will materially advance the termination of the litigation. 28 U.S.C. § 1292(b). The party seeking certification of an interlocutory appeal has the burden to show the presence of those exceptional circumstances. *Coopers & Lybrand*, 437 U.S. at 474-75.

The court finds that this case meets all three criteria stated above. First, the question whether a PRP must meet the CERCLA § 113 standing requirement to bring a contribution claim under CERCLA § 107(a) is a controlling question of law. A question of law is "controlling" if the resolution of the issue on appeal could materially affect the outcome of the litigation in the district court. *In re Cement Antitrust Litigation*, 673 F.2d 1020, 1026 (9th Cir.1982). A decision that the Aggio plaintiffs must meet CERCLA § 113 requirements when asserting an implied CERCLA § 107(a) contribution claim will materially affect the course of this litigation, as it will determine that the Aggios' federal CERCLA claims are not viable and must be dismissed.

***2** Second, a substantial basis exists for a difference of opinion regarding the issue. Five decisions have been issued by district courts in California ruling on this question. In four of those-two decisions from the Eastern District of California, and two (including the decision in the present case) from this district-the courts ruled that a PRP has an implied right to seek contribution under § 107(a). In the fifth-a decision from the Central District of California-the court ruled

that there is no implied right of contribution under § 107(a). At least one of those district courts-the Eastern District of California in *Kotrous v. Goss-Jewett Co. of Northern Calif.*, 2005 WL 1417152 (E.D. Cal., June 16, 2005)-has granted the motion of the defendant in that case for certification pursuant to 28 U.S.C. § 1292(b).

Third, resolution of the question whether a PRP must satisfy CERCLA § 113 requirements when bringing a § 107(a) contribution claim will materially advance the underlying litigation. Although it is true, as plaintiffs assert in opposition to the motion, that discovery has closed, there remains nonetheless a significant amount of work necessary to litigate the case to its conclusion, including trial preparation and work on Sequoia's motion for summary judgment. Should the Ninth Circuit decide contrary to its pre-*Aviall* position, the CERCLA claim will be dismissed from the case, leaving only state law claims.

Accordingly, the motion is GRANTED. In addition, the action is hereby STAYED, pending a ruling by the Ninth Circuit.

IT IS SO ORDERED.

N.D.Cal.,2006.
Aggio v. Estate of Aggio
Not Reported in F.Supp.2d, 2006 WL 149006 (N.D.Cal.)

END OF DOCUMENT

TAB 2

FRANK BARBARO, Plaintiff, -v- UNITED STATES OF AMERICA ON BEHALF OF THE FEDERAL BUREAU OF PRISONS FCI OTISVILLE, WITH THE FOLLOWING NAMED PRISON OFFICIALS WHO ARE BIVENS DEFENDANTS: M.E. RAY; HARRELL WATTS; DR. SUNDARIN; DR. GENOVESE; DR. WILLIAMS; P.A. HUGO SANCHEZ; and JANE VANDER HEYWRIGHT, Defendants.

05 Civ. 6998 (DLC)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

2008 U.S. Dist. LEXIS 12837

February 21, 2008, Decided
February 21, 2008, Filed

PRIOR HISTORY: *Barbaro v. United States ex rel. Fed. Bureau of Prisons FCI Otisville, 521 F. Supp. 2d 276, 2007 U.S. Dist. LEXIS 80148 (S.D.N.Y., 2007)*

COUNSEL: **[*1]** For Plaintiff: Joshua Dick, White & Case LLP, New York, New York.

For Defendants: Peter M. Skinner, Assistant United States Attorney, United States Attorney's Office, New York, New York.

JUDGES: DENISE COTE, United States District Judge.

OPINION BY: DENISE COTE

OPINION

MEMORANDUM OPINION & ORDER

DENISE COTE, District Judge:

Plaintiff Frank Barbaro ("Barbaro") filed this Federal Tort Claims Act ("FTCA") and *Bivens* action to recover for the defendants' failure to treat certain pre-existing injuries while he was incarcerated at the Federal Correctional Institution in Otisville, New York between January 1998 and December 2003. An Opinion of October 30, 2007 ("2007 Opinion") dismissed as time-barred any FTCA claims based on events occurring before March 1, 2002, as well as any *Bivens* claims based on events occurring before August 5, 2002. [1] *Barbaro v. United States, 521 F. Supp. 2d 276 (S.D.N.Y. 2007).* Pursuant to *28 U.S.C. § 1292(b)*, Barbaro has now moved to certify an immediate appeal from the 2007 Opinion. The motion for certification is denied.

Section 1292(b) provides in relevant part:

> When a district judge, in making in a civil action an order not otherwise appealable under this section., shall be of the opinion that **[*2]** such order involves a *controlling question of law* as to which there is *substantial ground for difference of opinion* and that *an immediate appeal from the order may materially advance the ultimate termination of the litigation,* he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order.

28 U.S.C. § 1292(b) (emphasis supplied); *Casey v. Long Island R.R. Co., 406 F.3d 142, 146 (2d Cir. 2005).* This statute is to be narrowly construed, as "the power to grant an interlocutory appeal must be strictly limited to

the precise conditions stated in the law." *Klinghoffer v. S.N.C. Achille Lauro, 921 F.2d.21, 25 (2d Cir. 1990)* (citation omitted). It, therefore, "continues to be true that only 'exceptional circumstances'" warrant certification. *Id.* (quoting *Coopers & Lybrand v. Livesay, 437 U.S. 463, 475, 98 S. Ct. 2454, 57 L. Ed. 2d 351 (1978))*.

> 1 The 2007 Opinion revisited the statutes of limitations rulings made in an Opinion of October 10, 2006 ("2006 Opinion"), which had similarly granted in part the defendants' motion **[*3]** to dismiss the Complaint. Upon newly appointed counsel's request, Barbaro, who began this action *pro se*, was granted a second opportunity to oppose the defendants' motion to dismiss and to seek to restore the years that had been excluded from the action by the 2006 Opinion. The 2007 Opinion addressed Barbaro's subsequent renewed opposition to the defendants' motion to dismiss.

Specifically, Barbaro identifies for certification two issues which the 2007 Opinion decided in the affirmative: (1) whether a plaintiff who asserts an FTCA claim for the aggravation of existing injuries must point to a distinct act of negligence to extend the claim's accrual, even where a defendant's inaction forms the basis of the claim; and (2) whether the continuing violation doctrine is inapplicable to a *Bivens* claim alleging deliberate indifference to the plaintiff's medical needs, in violation of the *Eighth Amendment*. Neither question presents the exceptional circumstances needed to satisfy all three conditions set forth in *§ 1292(b)*.

The extent to which either issue constitutes "a controlling question of law" in this case is arguable. But, Barbaro has not shown that an immediate appeal of either question **[*4]** would materially advance the ultimate termination of this litigation. Moreover, he has not shown that there is substantial ground for a difference of opinion with respect to either question.

An immediate appeal will not bring this case materially closer to its conclusion, and will very likely delay the termination of this already lengthy litigation. If the holdings in the 2007 Opinion are adopted by the Second Circuit, then the plaintiff will only have achieved a delay in his trial. If the holdings are rejected, then further discovery must take place before trial. Barbaro argues that: an immediate appeal and his success on appeal will obviate the need for a second trial. But, that is true with respect to virtually every case in which a trial court has made a legal ruling either before or during trial that is reversed on appeal. The customary appellate process following entry of a final judgment is sufficient to protect Barbaro's rights regarding these legal issues. Finally, as the Government correctly observes, there may even be outcome s during the litigation of the remaining claims that render Barbaro's time-barred claims moot.

There is also no sufficient showing of a substantial ground **[*5]** for a difference of opinion on either legal question. As the 2007 Opinion explained, although the Second Circuit has not addressed the need for a distinct act of negligence in the context of the FTCA, it has addressed it in the context of the Federal Employers' Liability Act (FELA) in *Mix v. Delaware & Hudson Ry. Co., 345 F.3d 82, 91 (2d Cir. 2003)*. *See Barbaro, 521 F. Supp. 2d at 278*. The Second Circuit in *Mix* also noted the overlap in the development of the accrual rules under the FTCA and FELA. *Mix, 345 F.3d at 86*. Barbaro's efforts to undermine the strength of this precedent are unavailing.

As for the *Bivens* claim, the Second Circuit held in *Mix* that the continuing violation doctrine is inconsistent with the discovery rule and, therefore, inapplicable to FELA claims. *See Mix, 345 F.3d at 88*. As the 2007 Opinion explained, that same reasoning applies to *Bivens* claims, which are also governed by the discovery rule. *See Barbaro, 521 F. Supp. 2d at 281*. Moreover, the 2007 Opinion relied on recent Supreme Court authority to confirm its analysis: *Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 122 S. Ct. 2061, 153 L. Ed. 2d 106 (2002)*, and *Ledbetter v. Goodyear Tire & Rubber Co., U.S. , 127 S. Ct. 2162, 167 L. Ed. 2d 982 (2007)*. **[*6]** Barbaro's efforts to cast doubt on this reasoning rely on cases which either predate or do not confront this precedent.

CONCLUSION

The plaintiff's November 28, 2007 motion for certification of an immediate appeal pursuant to *28 U.S.C. § 1292(b)* is denied.

SO ORDERED:

Dated: New York, New York

February 21, 2008

/s/ Denise Cote

DENISE COTE

United Stites District Judge

TAB 3

PATRICIA BRIZZEE, Plaintiff, v. FRED MEYER STORES, INC., a foreign corporation, Defendant.

CV-04-1566-ST

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

2007 U.S. Dist. LEXIS 99155

December 10, 2007, Decided
December 10, 2007, Filed

SUBSEQUENT HISTORY: Adopted by, Certificate of appealability denied, As moot *Brizzee v. Fred Meyer Stores, Inc., 2008 U.S. Dist. LEXIS 11393 (D. Or., Feb. 13, 2008)*

PRIOR HISTORY: *Brizzee v. Fred Meyer Stores, 2006 U.S. Dist. LEXIS 54058 (D. Or., July 17, 2006)*

COUNSEL: **[*1]** For Patricia Brizzee, Plaintiff: Kerry M. L. Smith, LEAD ATTORNEY, Smith & Fjelstad, Gresham, OR.

For Fred Meyer Stores Incorporated, a foreign corporation, Defendant: Alan M. Lee, Francis T. Barnwell, Jennifer Lyn Bouman, LEAD ATTORNEYS, Bullard Smith Jernstedt Wilson, Portland, OR.

For Fred Meyer Stores Incorporated, a foreign corporation, Counter Claimant, Counter Defendant: Francis T. Barnwell, Bullard Smith Jernstedt Wilson, Portland, OR.

JUDGES: Janice M. Stewart, United States Magistrate Judge.

OPINION BY: Janice M. Stewart

OPINION

FINDINGS AND RECOMMENDATIONS

STEWART, Magistrate Judge:

INTRODUCTION

Plaintiff, Patricia Brizzee ("Brizzee"), filed this action on October 28, 2004, alleging four claims against her former employer, Fred Meyer Stores, Inc. ("Fred Meyer"): (1) violation of the Family Medical Leave Act ("FMLA"), *29 USC §§ 2901, et seq* ("First Claim"); (2) violation of the Oregon Family Leave Act, *ORS 659A.150-186* ("Second Claim"); (3) common law wrongful discharge ("Third Claim"); and (4) intentional infliction of emotional distress ("Fourth Claim"). Each of these claims stems from Fred Meyer's action of terminating Brizzee's employment on March 28, 2003.

On October 12, 2005, Fred Meyer filed a Motion **[*2]** for Summary Judgment on all of Brizzee's claims, arguing that Brizzee was precluded from bringing any claims by virtue of a Separation Agreement and Release of Claims that she signed the day she was terminated. This court issued Findings and Recommendations ("F&R") to grant summary judgement as to all claims except the First Claim alleging a violation of the FMLA (docket # 56). Judge Michael Mosman adopted that F&R (docket # 74). According to the court's ruling, the Separation Agreement was enforceable, but could not waive or release the FMLA claim without approval by either the United States Department of Labor ("DOL") or the court. That ruling is premised on *29 CFR § 825.220(d)* which provides in relevant part that "[employees cannot waive, nor may employers induce employees to waive, their rights under [the] FMLA." No Ninth Circuit authority discusses the issue of a person's ability to waive or release a FMLA claim. Recognizing a divergence of opinions on this issue in the Fourth and Fifth Circuits, this court found the Fourth Circuit's interpretation of *29 CFR § 825.220(d)* to be more thorough and persuasive. Compare *Taylor v. Progress Energy, Inc., 415 F3d 364, 368 (4th Cir 2005)* **[*3]** (*"Taylor I"), opinion reinstated after rehearing, 493 F3d 454 (2007)* ("*Taylor II*"), *petition for certorari filed,* 76 U.S.L.W. 3226 (Oct 22, 2007)

(NO. 07-539) [cert. denied, *128 S. Ct. 2931, 171 L. Ed. 2d 876 (2008)*] with *Faris v. Williams WPC-I, Inc., 332 F.3d 316, 321 (5th Cir 2003)* (holding that the regulation applies "only to waiver of substantive rights under the FMLA, rather than to claims for money damages.").

Fred Meyer contends that the Fifth Circuit correctly analyzed the existing state of the law when it found that an employee could waive an FMLA claim under the appropriate circumstances. Accordingly, it filed a direct appeal (docket # 78) which the Ninth Circuit dismissed (docket # 88). Fred Meyer also filed in this court a Motion for Certification Order for Appeal Pursuant to *28 USC § 1292(b)* (docket # 76), which it later amended (docket # 82), requesting that this court amend its previous order regarding summary judgment to certify the issue for immediate appeal. On September 13, 2006, at the request of Fred Meyer, this court stayed that motion pending a rehearing by the Fourth Circuit in *Taylor I* (docket # 87). In July 2007, in an *amicus* brief filed in the Fourth Circuit, the DOL expressed its opinion that *29 CFR § 825.220(d)* should **[*4]** be interpreted to bar only the prospective waiver of future FMLA rights and not the retrospective settlement of claims. In *Taylor II*, the Fourth Circuit rejected that interpretation and reinstated its prior opinion.

This court then lifted the stay and allowed supplemental briefing on the pending motions. Given the DOL's recent interpretation of its regulation, Fred Meyer not only seeks to certify the issue for immediate appeal, but, in the alternative, requests that this court reconsider its prior opinion and find that the FMLA claim is barred by the existing Separation Agreement.

FINDINGS

I. Motion for Reconsideration

If, upon reconsideration, this court concluded that Brizzee could waive or release her FMLA claim without approval by either the DOL or the court, then the FMLA claim should be dismissed as barred by the Separation Agreement and Release of Claims. In that event, a final and appealable judgment would be entered, rendering moot Fred Meyer's motion to certify an order for appeal. Therefore, this court will first address that issue.

After this court denied summary judgment to Fred Meyer on the FMLA claim, the defendant in *Taylor I* filed a petition for rehearing. The DOL filed **[*5]** an *amicus* brief in support of that petition disagreeing with the Fourth Circuit's interpretation of *29 CFR § 825.220(d)* and contending that its regulation bars only the prospective waiver of FMLA rights. The Fourth Circuit granted a rehearing to consider the DOL's interpretation.

Based on the DOL's *amicus* brief in *Taylor II*, but before the Fourth Circuit issued its decision in *Taylor II*, one district court reconsidered its earlier position following *Taylor I* and held that an employee may waive or settle claims for past violations of the FMLA. *Dougherty v. TEVA Pharms. USA, Inc., 2007 U.S. Dist. LEXIS 27200, 2007 WL 1165068 (ED Pa April 9, 2007)*. The court rejected the DOL's argument "that the applicability of *Section 825.220(d)* turns solely on the general distinction between rights and claims." *2007 U.S. Dist. LEXIS 27200, [WL] at *6*. However, it reasoned that the right to bring a claim "is not a right under the FMLA." *Id*. Instead, the right "arises only when an employer has violated the FMLA. So by settling a past FMLA claim, the employee still retains all of her substantive rights and remedies (proscriptive rights) under the FMLA." *Id*. Finding that the DOL reasonably interpreted the FMLA in the regulation, the court gave that interpretation **[*6]** deference under *Chevron, USA, Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984)*.

In *Taylor II*, the Fourth Circuit considered and rejected both the DOL's position and the reasoning in *Dougherty*. Based on the text of the FMLA, the Fourth Circuit first concluded that rights under the FMLA includes "the right to bring an action or claim for a violation of the Act." *Taylor II, 493 F.3d at 457*. It also found that the DOL had offered differing assertions as to the scope of the regulation by urging the adoption of the holding of *Faris* which it had rejected in its *amicus* brief in *Dougherty*. *Id at 458*. The court was not persuaded by the reasoning in *Dougherty* which ignored the FMLA's text by finding that the right to bring an FMLA claim is not a right under the FMLA and which also confused the decision to exercise rights with waiver of rights. *Id at 459*. It further concluded that "[a]s with the FLSA, private settlements of FMLA claims undermine Congress's objective of imposing uniform minimum standards" and the FMLA is not analogous with either Title VII or the ADEA which "are not standard labor laws like the FMLA" and which have no implementing regulation akin to *29 CFR § 825.220(d)*. **[*7]** *Id at 460*. Finally, it pointed out that the DOL's interpretation is "inconsistent with what the DOL said it intended the regulation to mean at the time it was promulgated, noting that the DOL "specifically considered and rejected proposed amendments that would have permitted the interpretation now advanced by the DOL." *Id at 461*. Acknowledging that the requirement of DOL or court approval of waivers or releases of FMLA claims will create added burdens, it nonetheless expressed confidence "that both the DOL and the courts will work diligently to deal with these cases in a prompt and efficient manner." *Id at 462*. Accordingly, it remained "convinced that the plain language of *section 220(d)* precludes both the prospective and re-

trospective waiver of all FMLA rights, including the right of action (or claim) for a past violation of the Act" and reinstated its opinion in *Taylor I*, with one of the three judges filing a dissent. *Id at 456*. In late October, the defendant in *Taylor II* filed a petition for *certiorari* with the Supreme Court.

This court has carefully reviewed the arguments for the opposing positions and remains persuaded by the Fourth Circuit's analysis. Therefore, it declines to **[*8]** reconsider its prior recommendation.

II. Motion to Certify Appeal

A. Legal Standard

Pursuant to *28 USC § 1291*, the federal courts of appeals postpone appellate review until after a final judgment has been entered by a district court. The Interlocutory Appeals Act, *28 USC § 1292(b)* ("*§ 1292(b)*"), [1] provides a limited exception to this final judgment rule. It authorizes district courts to certify an order for interlocutory appeal if: (1) the "order involves a controlling question of law;" (2) there is "substantial ground for difference of opinion;" and (3) "an immediate appeal from the order may materially advance the ultimate termination of the litigation." *Id; In re Cement Antitrust Litig., 673 F2d 1020, 1026 (9th Cir 1982), aff'd sub nom Arizona v. Ash Grove Cement Co., 459 US 1190, 103 S. Ct. 1172, 103 S. Ct. 1173, 75 L. Ed. 2d 425 (1983)*. Even when all three statutory criteria are satisfied, district court judges have "unfettered discretion" to deny certification. *Ryan, Beck & Co., LLC v. Fakih, 275 F Supp2d 393, 396 (EDNY 2003)*; *see also Executive Software N. Am., Inc. v. United States Dist. Ct. for the Cent. Dist. of Cal., 24 F3d 1545, 1550 (9th Cir 1994)* (stating that a district court's certification decision is "unreviewable").

1 *28 USC § 1292(b)* **[*9]** provides in full:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however*, that application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

The Ninth Circuit has cautioned that *§ 1292(b)* "is to be applied sparingly and only in exceptional circumstances." *United States v. Woodbury, 263 F.2d 784, 788 n11 (9th Cir 1959)*. The legislative history makes clear that *§ 1292(b)* is reserved for "extraordinary cases where decision of an interlocutory appeal might avoid protracted and expensive litigation," **[*10]** such as "antitrust and similar protracted cases." *United States Rubber Co. v. Wright, 359 F2d 784, 785 (9th Cir 1966)*, quoting S Rep No 2434 (1958), reprinted in 1958 USCCAN 5255, 5260. As the Ninth Circuit has explained, the statute "was not intended merely to provide review of difficult rulings in hard cases." *Id*. "Routine resort to *§ 1292(b)* requests would hardly comport with Congress' design to reserve interlocutory review for 'exceptional' cases while generally retaining for the federal courts a firm final judgment rule." *Caterpillar, Inc. v. Lewis, 519 US 61, 74, 117 S. Ct. 467, 136 L. Ed. 2d 437 (1996)* (citations omitted). Interlocutory appeals are limited to "rare circumstances" because it is a "departure from the normal rule that only final judgments are appealable." *James v. Price Stern Sloan, Inc., 283 F3d 1064, 1067 n6 (9th Cir 2002)*.

B. Controlling Questions of Law

1. Legal Standard

A "question of law" is "controlling" under *§ 1292(b)* if resolving it on appeal could materially affect the outcome of litigation in the district court. *In re Cement Antitrust Litig ., 673 F2d at 1026*. A "question of law" means a "pure question of law," not a mixed question of law and fact or an application of law to a particular **[*11]** set of facts. *See Ahrenholz v. Bd. of Trs. of the Univ. of Illinois, 219 F.3d 674, 675-77 (7th Cir 2000)*. As explained by the Seventh Circuit, in the context of *§ 1292(b)*, the term "'question of law' means *an abstract legal issue* rather than an issue of whether summary judgment should be granted." *Id at 677* (emphasis added).

2. Application

For purposes of this motion, Brizzee agrees that whether she may release her FMLA claims without DOL or court approval is a controlling question of law as to a very narrow portion of this case because it could mate-

rially affect the outcome of the FMLA claim. She also agrees, for purposes of this motion, that this is a pure question of law. However, as discussed below, she disagrees that the question of law controls the entire case.

C. Substantial Ground for Difference of Opinion

1. Legal Standard

To demonstrate "a substantial ground for difference of opinion" on a question for *§ 1292(b)* certification, a party must show more than its own disagreement with a court's ruling. *See, e.g., First Am. Corp. v. Al-Nahyan, 948 F Supp 1107, 1116 (DDC 1996)* ("Mere disagreement, even if vehement, with a court's ruling on a motion to dismiss does not establish a 'substantial **[*12]** ground for difference of opinion' sufficient to satisfy the statutory requirements for an interlocutory appeal"). However, "in determining whether a substantial ground for difference of opinion truly exists, a district court must analyze the strength of the arguments in opposition to the challenged ruling." *Ryan, Beck & Co., LLC, 275 F Supp2d at 398* (internal quotation omitted). Indeed, an issue can be a controlling question of law for which there is a substantial ground for difference of opinion when it is "difficult and of first impression." *Klinghoffer v. S.N.C. Achille Lauro Ed Altri-Gestione Motonave Achille Lauro in Amministrazione Straordinaria, 921 F2d 21, 25 (2nd Cir 1990)*; *but see In re Flor, 79 F3d 281, 284 (2nd Cir 1996)*.

2. Application

The Fourth Circuit's opinion in *Taylor II* conflicts with the DOL's interpretation of its regulation, the district court's opinion in *Dougherty* and the Fifth Circuit's opinion in *Faris*. For purposes of this motion, Brizzee concedes that there is a substantial ground for a difference of opinion, but contends that this disagreement is not, of itself, enough to justify a permissive appeal.

D. Immediate Appeal from the Order May Materially Advance [*13] the Ultimate Termination of the Litigation

It is the third requirement for an immediate appeal on which Fred Meyer's position falters. Fred Meyer argues that an interlocutory appeal on the FMLA issue would materially advance the ultimate termination of this litigation by deciding the only remaining claim. Of course, resolution of that appeal could be delayed significantly if the Supreme Court accepts the petition for *certiorari* filed in *Taylor II*. If the Ninth Circuit (or Supreme Court) disagrees with this court on its interpretation of the FMLA, then on remand all of Brizzee's claims will be dismissed, resulting in a final judgment in Fred Meyer's favor. Brizzee will then appeal that judgment on the binding nature of the release in the Separation Agreement, resulting in a second appeal. At that point, if Brizzee wins the second appeal, the case then will be remanded for trial on all claims. That scenario will result in two appeals, with the possibility of one trial after the second appeal.

On the other hand, if the Ninth Circuit (or Supreme Court) agrees with this court on the FMLA issue, then the parties will return to this court for trial only on the FMLA claim. Regardless of the **[*14]** outcome, a second appeal will follow. If Fred Meyer wins that trial on the facts, then Brizzee will appeal the loss of her other claims on summary judgment. If Brizzee wins at trial, then Fred Meyer will appeal. That scenario will result in two appeals and one trial, with the possibility of a second trial after the second appeal.

Brizzee contends, however, that an immediate appeal simply further delays the already protracted litigation which is not economical or fair to the litigants. Instead, she prefers to proceed to trial now on the FMLA claim. Unfortunately, such a trial will likely neither be simple nor short since Brizzee acknowledges that, even though proof of damages will be limited, the witnesses as to liability on just the FMLA claim will be the same as for a trial on all claims. A jury verdict in Fred Meyer's favor would eliminate the need to appeal the FMLA issue, although Brizzee would likely appeal the loss of her other claims on summary judgment. A jury verdict in Brizzee's favor would preserve Fred Meyer's FMLA argument and allow the Ninth Circuit to resolve all issues (the FMLA issues, trial issues and all other summary judgment issues) in one appeal. That scenario **[*15]** will result in one trial, followed by one appeal, with the possibility of a second trial after the appeal.

Granting Fred Meyer's motion will result in an appeal of a limited issue with the virtual assurance of a second appeal to the Ninth Circuit, followed by the possibility of one or two trials. Appeals are very time-consuming and expensive and may or may not avoid a trial. Two appeals to the Ninth Circuit could easily consume a period of three to four years. On the other hand, denying Fred Meyer's motion would put all issues before the Ninth Circuit at the same time after one trial. However, trials are very expensive. Neither option is particularly attractive to parties who want their dispute resolved quickly and efficiently.

It is tempting to grant Fred Meyer's motion because doing so would force all issues remaining after remand into one trial. However, as the above discussion demonstrates, granting Fred Meyer's motion would not necessarily avoid further appeals and trials. Instead, it would simply change the order and number of issues in ensuing appeals and trials. This case has been pending before this court for over three years, and this court has already once

stayed its hand **[*16]** in the hope that rulings elsewhere would resolve the one remaining issue. That did not happen and Fred Meyer's proposed appeal would further delay this already lengthy litigation without providing the assurance of untangling the procedural quagmire it has created. A trial now on the FMLA claim may ultimately end up one step forward, followed by two steps backward in the form of additional appeals or trials. However, this court concludes that it is a step which must be taken because Fred Meyer's proposed alternative would not materially advance termination of the litigation, but would simply reshuffle the procedural deck.

Certification under *§ 1292(b)* should be granted only sparingly and in exceptional circumstances. This case does not present any exceptional circumstances. Because this court concludes that certification of this case for appeal under *§ 1292(b)* will not materially advance the ultimate termination of this litigation, Fred Meyer's request for such certification should be denied. As a result, the remaining FMLA claim should be set for trial.

RECOMMENDATIONS

For the reasons discussed above, defendant's Motion for Certification Order for Appeal Pursuant to *28 USC § 1292(b)* (docket **[*17]** # 78) should be DENIED AS MOOT and Amended Motion for Certification Order for Appeal Pursuant to *28 USC § 1292(b)* (docket # 82) should be DENIED.

SCHEDULING ORDER

Objections to the Findings and Recommendation, if any, are due January 2, 2008. If no objections are filed, then the Findings and Recommendation will be referred to a district judge and go under advisement on that date.

If objections are filed, then a response is due within 10 days after being served with a copy of the objections. When the response is due or filed, whichever date is earlier, the Findings and Recommendation will be referred to a district judge and go under advisement.

DATED this 10th day of December, 2007.

/s/ Janice M. Stewart

Janice M. Stewart

United States Magistrate Judge

TAB 4

FEDERAL TRADE COMMISSION, Plaintiff, v. SWISH MARKETING, et al., Defendants.

No. C 09-03814 RS

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION

2010 U.S. Dist. LEXIS 47948*; *2010-1 Trade Cas. (CCH) P76,985

April 14, 2010, Decided
April 14, 2010, Filed

SUBSEQUENT HISTORY: Motion denied by, Motion to strike denied by *FTC v. Benning, 2010 U.S. Dist. LEXIS 64030 (N.D. Cal., June 28, 2010)*

PRIOR HISTORY: *FTC v. Swish Mktg., 2010 U.S. Dist. LEXIS 15016 (N.D. Cal., Feb. 22, 2010)*

COUNSEL: **[*1]** For Federal Trade Commission, Plaintiff: Lisa Diane Rosenthal, LEAD ATTORNEY, Eric David Edmondson, Evan Rose, Kerry O'Brien, Federal Trade Commission, San Francisco, CA.

For Swish Marketing, Inc, a corporation, Matthew Patterson, individually and as an officer of Swish Marketing, Inc., Defendants: Brian Matthew Grossman, LEAD ATTORNEY, Tesser & Ruttenberg, Los Angeles, CA; Michael Aubrey Thurman, LEAD ATTORNEY, Michael Lawrence Mallow, Loeb & Loeb LLP, Los Angeles, CA.

For Mark Benning, individually and as an officer of Swish Marketing, Inc., Defendant: Donald P. Gagliardi, Bergeson, LLP, San Jose, CA.

For Jason Strober, individually and as an officer of Swish Marketing, Inc., Defendant: Brian Matthew Grossman, LEAD ATTORNEY, Tesser & Ruttenberg, Los Angeles, CA.

JUDGES: RICHARD SEEBORG, UNITED STATES DISTRICT JUDGE.

OPINION BY: RICHARD SEEBORG

OPINION

ORDER DENYING MOTION TO CERTIFY ORDER FOR INTERLOCUTORY REVIEW

I. INTRODUCTION

Pursuant to *28 U.S.C. § 1292(b)*, the corporate and individual defendants (collectively, "Swish") request certification for interlocutory review of this Court's Order of February 22, 2010 denying their motion to strike. Specifically, Swish seeks to appeal the Order's determination that, as stated **[*2]** in *FTC v. H.N. Singer, Inc., 668 F.2d 1107 (9th Cir. 1982)*, ancillary monetary relief is a remedy available under section 13(b) of the Federal Trade Commission Act, *15 U.S.C. § 53(b) (1994)*. This matter is appropriate for resolution without oral argument, pursuant to *Civil Local Rule 7-1(b)*. Because defendants have not demonstrated "exceptional circumstances" warrant immediate, interlocutory appeal, their motion will be denied.

II. LEGAL STANDARD

As a general rule, a party may seek review of a district court's rulings only after the entry of final judgment. *In re Cement Litig., 673 F.2d 1020, 1027 (9th Cir. 1982)*. The district court may under "exceptional" circumstances, however, certify an order for interlocutory review pursuant to *28 U.S.C. § 1292(b)*. *Id. at 1026* (*citing Coopers & Lybrand v. Livesay, 437 U.S. 463, 475, 98 S. Ct. 2454, 57 L. Ed. 2d 351 (1978)* (holding that "exceptional circumstances [must] justify a departure from the basic policy of postponing appellate review until after the entry of a final judgment")). Certification may be appropriate where: (1) the order involves a controlling question of law; (2) as to which there is substantial ground for difference of opinion; and (3) an immediate appeal from

[*3] the order may materially advance the ultimate termination of the litigation. *28 U.S.C. § 1292(b).*

II. DISCUSSION

A. Controlling Question of Law

The Ninth Circuit has explained that a question of law is "controlling" if "resolution of the issue on appeal could materially affect the outcome of the litigation in the district court." *Cement Litig., 673 F.2d at 1026*. It has also observed that *section 1292(b)* "was intended primarily as a means of expediting litigation by permitting appellate consideration during the early stages of litigation of legal questions which, if decided in favor of the appellant, would end the lawsuit." *United States v. Woodbury, 263 F.2d 784, 787 (9th Cir. 1959)* ("Examples of such questions are those relating to jurisdiction or a statute of limitations which the district court has decided in a manner which keeps the litigation alive but which, if answered differently on appeal, would terminate the case."). That said, the issue need not be dispositive of the lawsuit to be controlling. *Id.* The Ninth Circuit has reasoned that even issues collateral to the merits may be the subject of interlocutory appeal if immediate resolution would avoid "needless expense and delay." **[*4]** *Kuehner v. Dickinson & Co., 84 F.3d 316, 319 (9th Cir. 1996)* (finding resolution of admittedly "collateral" issue of whether arbitration was required involved "controlling" legal issue where district court's construction risked "litigating an entire case in a forum that has no power to decide the matter") (*citing Cement Litig., 673 F.2d at 1027 n.5*).

Defendants somewhat boldly contend that the Circuit's reexamination of its *Singer* analysis would end the litigation. This seems at best a hopeful forecast. Before this Court may even reach the question of an appropriate remedy, the FTC must first establish defendants' liability. And, even were the Circuit to chart a new course with regard to the availability of equitable remedies under *Section 13(b)*, left for decision would remain the Commission's request for non-monetary injunctive relief expressly contemplated in that section. Despite corporate defendants' assurances that they have voluntarily discontinued the allegedly wrongful acts, their promises alone do not bar the possibility for injunctive relief. As the Supreme Court has insisted, without the clear resolution of the legality of a practice or clear proof of abandonment, "the defendant **[*5]** is free to return to his ways." *United States v. W.T. Grant Co., 345 U.S. 629, 632, 73 S. Ct. 894, 97 L. Ed. 1303 (1953)*. The possibility for purely injunctive relief still presents a live controversy, even assuming defendants correctly predict that the Circuit would reverse its own precedent and deny the availability of restitution under *section 13(b)*.

On the other hand, assuming the arguments advanced by defendants were sufficiently compelling to persuade the Circuit to abandon *Singer* and its progeny, common sense dictates that the time and expense spent litigating a fitting amount of restitution would be needless. Defendants correctly reason that an immediate appeal would, if successful, preclude this possibility. The problem with defendants' rationale, however, is that--in the name of avoiding costly litigation--it ignores the chance that this Court might resolve the matter at the liability phase. And, should the Circuit uphold *Singer*, interlocutory appeal threatens to impose--not avoid--delay. As one of the central aims of *section 1292(b)* is to avoid unnecessary proceedings before a district court, the controlling issue of law criterion should, at a minimum, require that reversal have some immediate effect on **[*6]** the course of litigation and result in some savings of resources. *See* Note, *Interlocutory Appeals in the Federal Courts Under 28 U.S.C. § 1292(b)*, 88 Harv. L. Rev. 607, 619 (1975). Defendants have not persuasively demonstrated either immediate effect or a sufficient likelihood of resource conservation.

B. Substantial Grounds for Difference of Opinion

A party's disagreement--no matter how strongly held--with a court's ruling is not sufficient by itself to establish a substantial ground for difference of opinion as contemplated by *Section 1292(b). See, e.g., Wilton-Miwok Rancheria, 2010 U.S. Dist. LEXIS 23317, 2010 WL 693420 at *12 (N.D. Cal. Feb. 23, 2010)*; *Mateo v. The M/S Kiso, 805 F. Supp. 792, 800 (N.D. Cal. 1992)*. Substantial grounds for disagreement may exist, for example, where there is "a dearth of precedent within the controlling jurisdiction and conflicting decisions in other circuits." *Wilton-Miwok, 2010 U.S. Dist. LEXIS 23317, 2010 WL at * 12* (*quoting APCC Servs., Inc. v. AT&T Corp., 297 F. Supp. 2d 101, 107 (D.D.C. 2003)).*

Defendants do not dispute that ample controlling precedent in this Circuit favors the award of restitutionary relief under *section 13(b)*. They introduce no contrary, on-point authority (appellate or otherwise) **[*7]** from outside the Circuit. Swish argues solely that the Supreme Court's approach to the availability of statutory equitable relief under an environmental regulatory scheme in *Meghrig v. K.F.C. Western, Inc., 516 U.S. 479, 116 S. Ct. 1251, 134 L. Ed. 2d 121 (1996)*, undermines two earlier opinions: *Porter v. Warner Holding Co., 328 U.S. 395, 66 S. Ct. 1086, 90 L. Ed. 1332 (1946)* and *Mitchell v. Robert De Mario Jewelry, Inc., 361 U.S. 288, 80 S. Ct. 332, 4 L. Ed. 2d 323 (1960)*. Because the Circuit in *Singer* relied on *Porter* and *Mitchell* for the proposition that a district court may award monetary relief ancillary to a permanent injunction under *section 13(b) of the FTC Act*, Swish reasons that *Meghrig* undermines *Singer*, as well.

Taken together, *Porter* and *Mitchell* authorize a district court sitting in equity to grant broad equitable relief, including restitution. When Congress invokes the district court's equitable jurisdiction in a statute, *Porter* held, "all the inherent equitable powers of the district court are available for the proper and complete exercise of that jurisdiction." *328 U.S. at 398*. *Meghrig* did not overrule *Porter* and *Mitchell*, but did find that a citizen-suit provision that expressly contemplated only the "restraint" of violations of the Resource Conservation and Recovery **[*8]** Act ("RCRA") did not authorize restitution for past toxic cleanup costs. *Meghrig, 516 U.S. at 481*. *Meghrig* compared RCRA's citizen-suit provision to its analogue in the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"). Unlike RCRA, CERCLA's provisions expressly allowed "any person [to] seek contribution from any other person who is liable." *42 U.S.C. § 9613(f)(1)*. The Court explained: "[w]here Congress has provided 'elaborate enforcement provisions' for remedying the violation of a federal statute, it cannot be assumed that Congress intended to authorize by implication additional judicial remedies for private citizens suing under the statute." *516 U.S. at 487-88*. Following *Meghrig*, the D.C. Circuit in *Phillip Morris, 396 F.3d 1190, 364 U.S. App. D.C. 454 (D.C. Cir. 2005)*, refused to award disgorgement under a civil RICO provision that also only contemplated "restraint" and where a monetary remedy was expressly available elsewhere in the statutory scheme. The Tenth Circuit, by contrast, examined a statutory provision with similar language in light of both *Meghrig* and *Porter / Mitchell*, but applied the latter. *United States v. Rx Depot, 438 F.3d 1052 (10th Cir. 2006)*.

Against this **[*9]** backdrop, defendants suggest "substantial grounds for disagreement" arise with regard to the continuing vitality of *Singer*. While the ultimate effect of *Meghrig* is certainly an academically intriguing issue, it is not obvious that *Meghrig*'s analysis must be deployed against *section 13(b)* nor does there appear to be virtually *any* inkling or hint in this Circuit or in others that it should. The Ninth Circuit (and, as plaintiffs point out, every circuit to consider the question) has consistently applied the *Singer* rationale to grants of restitutionary relief under *section 13(b)*. *See, e.g., FTC v. Pantron I Corp., 33 F.3d 1088, 1102 (9th Cir. 1994)* (citing *Singer* for the proposition that a district court may award monetary relief under *section 13(b)*); *FTC v. Silueta Distribs., Inc., No. 93-4141, 1995 U.S. Dist. LEXIS 22254, 1995 WL 215313, at *7-8 (N.D. Cal. Feb. 24, 1995)* (citing both *Singer* and *Pantron I* and ordering disgorgement under *section 13(b)*). This Circuit has even done so as recently as 2009, where a *Meghrig* argument was at least arguably available. *FTC v. Stefanchik, 559 F.3d 924, 931-32 (9th Cir. 2009)*.

C. Immediate Appeal May Not Materially Advance the Ultimate Termination of Litigation

As the Commission **[*10]** points out, it must first prove a violation of *section 5 of the FTC Act* before the court may address an appropriate remedy. An immediate appeal at this stage would obviously delay resolution of the liability phase. Without commenting on the merits, it is still theoretically possible to resolve the matter at the liability phase without ever reaching the remedy. Given the timing of the suit, then, granting Swish's plea for immediate, interlocutory review would seem to carry with it a greater risk for delay than its promise for ultimate savings of both time and resources. Moreover, defendants advance no argument that appellate review of this Court's final judgment, should it favor the plaintiffs, would impose a harm more exquisite than that "suffered by any litigant forced to wait until the termination of the trial before challenging . . . orders [they] consider[] erroneous." *Firestone Tire & Rubber Co. v. Rijsford, 449 U.S. 368, 378 n.13, 101 S. Ct. 669, 66 L. Ed. 2d 571 (1981)*.

III. CONCLUSION

"Exceptional circumstances" must "justify a departure from the basic policy of postponing appellate review until after the entry of a final judgment." *Coopers & Lybrand v. Livestay, 437 U.S. 463, 475, 98 S. Ct. 2454, 57 L. Ed. 2d 351 (1978)*. Defendants have shown **[*11]** no such "exceptional circumstances" here nor have they demonstrated that immediate, interlocutory review pursuant to *section 1292(b)* is necessary or appropriate. Defendants' motion for certification is therefore denied.

IT IS SO ORDERED.

Dated: 04/14/2010

/s/ Richard Seeborg

RICHARD SEEBORG

UNITED STATES DISTRICT JUDGE

TAB 5

MATSUNOKI GROUP, INC., doing business as HAIKU HOUSES, Plaintiff, v. TIMBERWORK OREGON, INC.; TIMBERWORK, INC.; JOAN L. SHUELL; EARL MAURY BLONDHEIM; DON PAUL; ILENE ENGLISH-PAUL; and DOES 1 through 10, inclusive, Defendants.

No. C 08-04078 CW

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

2011 U.S. Dist. LEXIS 33178

February 18, 2011, Decided
February 18, 2011, Filed

PRIOR HISTORY: *Matsunoki Group, Inc. v. Timberwork Or., Inc., 2010 U.S. Dist. LEXIS 97827 (N.D. Cal., Sept. 3, 2010)*

COUNSEL: **[*1]** For Matsunoki Group Inc, doing business as, Haiku Houses, Plaintiff: Richard Paul Sybert, LEAD ATTORNEY, Gordon & Rees LLP, San Francisco, CA; Rowena Ching-Wen Seto, Lewis, Brisbois, Bisgaard & Smith LLP, San Francisco, CA.

For Timberwork Oregon Inc, Timberwork Inc, Joan L. Shuell, Earl Maury Blondheim, Defendants: Julian John Pardini, LEAD ATTORNEY, Alan J. Haus, Rowena Ching-Wen Seto, Lewis Brisbois Bisgaard & Smith LLP, San Francisco, CA.

Don Paul, Defendant, Pro se, Jenner, CA.

Ilene English-Paul, Defendant, Pro se, Jenner, CA.

For Matsunoki Group Inc, Counter-defendant: Richard Paul Sybert, LEAD ATTORNEY, Gordon & Rees LLP, San Francisco, CA.

JUDGES: CLAUDIA WILKEN, United States District Judge.

OPINION BY: CLAUDIA WILKEN

OPINION

ORDER DENYING PLAINTIFF'S MOTION FOR LEAVE TO FILE MOTION FOR RECONSIDERATION (Docket No. 177); DEFENDANTS' MOTION FOR CERTIFICATION FOR INTERLOCUTORY APPEAL (Docket No. 183); AND PLAINTIFF'S MOTION TO EXCLUDE EXPERT TESTIMONY (Docket No. 227)

This order addresses three pending motions in the above captioned case. Plaintiff Matsunoki Group, Inc. seeks leave from the Court to file a motion for reconsideration. Docket No. 177. Defendants Timberwork, Inc. [1] and Earl Blondheim (collectively **[*2]** Timberwork) seek certification for an interlocutory appeal of the Court's order granting Matsunoki's motion for relief from judgment. Docket No. 183. Matsunoki has also moved to exclude certain expert testimony. Docket No. 227. Having considered all of the papers submitted by the parties, the Court DENIES all three motions.

1 Plaintiff erroneously sued Timberwork Oregon, Inc.

BACKGROUND

This is a copyright and trademark infringement case about custom-built Japanese pole-style houses. Matsunoki brings claims against Timberwork, Don Paul and Ilene English-Paul for copyright, trademark and trade dress infringement, false designation of origin and unfair competition. [2]

2 The Court previously dismissed claims against Joan Schuell for lack of personal jurisdiction. Docket No. 59. Defendants Don Paul and Ilene English-Paul are unrepresented by counsel

> and have not joined Timberwork's motion for certification.

On April 16, 2010, the Court granted Timberwork's motion for summary judgment against Matsunoki on all of its claims, including Matsunoki's copyright claims. [3] The parties disputed whether Matsunoki could prove ownership of the copyrights for seven publications at the center of the dispute. **[*3]** Matsunoki presented evidence that its predecessor Landmark Architecture and Design owned the copyrights, but failed to present evidence that those copyrights had been transferred to Matsunoki. Landmark was administratively dissolved as a corporation on November 6, 2006. The Court stated, "Because Matsunoki presents no evidence that it currently owns the copyrights at issue, and it is not clear when and if it will obtain those copyrights by assignment, the Court concludes that Matsunoki cannot bring any claims for copyright infringement. Therefore, Matsunoki's copyright claims fail." Order Granting Mot. Summ. J. at 12.

> 3 In this order the Court also summarily adjudicated the claims against Don Paul and Ilene English-Paul in their favor.

Subsequently, Matsunoki moved the Court for relief from judgment under *Federal Rule of Civil Procedure 60(b)*, presenting evidence of the following two developments: (1) on January 7, 2010, the Tennessee Secretary of State reinstated Landmark as a corporation in good standing, and (2) on February 26, 2010, Landmark assigned in writing all of its intellectual property to Matsunoki. On September 3, 2010, the Court granted Matsunoki's motion for relief from **[*4]** judgment on the basis of the two new developments.

I. Timberwork's Motion for Certification under *28 U.S.C. § 1292(b)*

Timberwork requests that the Court certify for interlocutory appeal its order relieving Matsunoki from judgment. Timberwork identifies two questions of law that it seeks to appeal:

> (1) Whether the reinstatement of Landmark and assignment of the assets to Matsunoki constitutes "newly discovered evidence" within the meaning of *Rule 60(b)(2)*; and
>
> (2) Whether Matsunoki exercised due diligence to discover this evidence.

Pl.'s Mot. at 4.

A. Legal Standard

Pursuant to *28 U.S.C. § 1292(b)*, a district court may certify an appeal of an interlocutory order only if three factors are present. First, the issue to be certified must involve a "controlling question of law." *28 U.S.C. § 1292(b)*. Establishing that a question of law is controlling requires a showing that the "resolution of the issue on appeal could materially affect the outcome of litigation in the district court." *In re Cement Antitrust Litig., 673 F.2d 1020, 1026 (9th Cir. 1982)* (citing *U.S. Rubber Co. v. Wright, 359 F.2d 784, 785 (9th Cir. 1966)*). The Seventh Circuit has explained:

> We think [Congress] used "question of law" **[*5]** in much the same way a lay person might, as referring to a "pure" question of law rather than merely to an issue that might be free from a factual contest. The idea was that if a case turned on a pure question of law, something the court of appeals could decide quickly and cleanly without having to study the record, the court should be enabled to do so without having to wait until the end of the case.

Ahrenholz v. Bd. Trustees of Univ. of Ill., 219 F.3d 674, 676-77 (7th Cir. 2000).

Second, there must be "substantial ground for difference of opinion" on the issue. *28 U.S.C. § 1292(b)*. A substantial ground for difference of opinion is not established by a party's strong disagreement with the court's ruling; the party seeking an appeal must make some greater showing. *Mateo v. M/S Kiso, 805 F. Supp. 792, 800 (N.D. Cal. 1992)*, abrogated on other grounds by *Brockmeyer v. May, 361 F.3d 1222, 1226-27 (9th Cir. 2004)*.

Third, it must be likely that an interlocutory appeal will "materially advance the ultimate termination of the litigation." *28 U.S.C. § 1292(b)*; *Mateo, 805 F. Supp. at 800*. Whether an appeal will materially advance termination of the litigation is linked to whether an issue of law **[*6]** is "controlling" in that the court should consider the effect of a reversal on the management of the case. Id. In light of the legislative policy underlying *§ 1292*, an interlocutory appeal should be certified only when doing so "would avoid protracted and expensive litigation." *In re Cement, 673 F.2d at 1026*; *Mateo, 805 F. Supp. at 800*. If, in contrast, an interlocutory appeal would delay resolution of the litigation, it should not be certified. See *Shurance v. Planning Control Int'l, Inc., 839 F.2d 1347, 1348 (9th Cir. 1988)* (refusing to hear a certified appeal

in part because the Ninth Circuit's decision might come after the scheduled trial date).

All three requirements under *28 U.S.C. § 1292(b)* must be met for certification to issue. *Best Western Int'l, Inc. v. Govan, 2007 U.S. Dist. LEXIS 39172, *9 (D. Ariz.).* "*Section 1292(b)* is a departure from the normal rule that only final judgments are appealable, and therefore must be construed narrowly." *James v. Price Stern Sloan, Inc., 283 F.3d 1064, 1068 n.6 (9th Cir. 2002).* Thus, the court should apply the statute's requirements strictly, and should grant a motion for certification only when exceptional circumstances warrant it. *Coopers & Lybrand v. Livesay, 437 U.S. 463, 475, 98 S. Ct. 2454, 57 L. Ed. 2d 351 (1978).* **[*7]** The party seeking certification of an interlocutory order has the burden of establishing the existence of such exceptional circumstances. Id. A court has substantial discretion in deciding whether to grant a party's motion for certification. *Brown v. Oneonta, 916 F. Supp. 176, 180 (N.D.N.Y. 1996)* rev'd in part on other grounds, *106 F.3d 1125 (2nd Cir. 1997).*

B. Discussion

Timberwork has identified controlling issues for appeal; if the Court's order relieving Matsunoki from judgment were reversed, the judgment would be reinstated and the case closed.

However, Timberwork has failed to identify a substantial ground for difference opinion as to the controlling question of law. Timberwork extensively cites facts, and asserts that a substantial difference of opinion exists as to whether Matsunoki's assignment constitutes "newly discovered evidence," and whether Matsunoki acted with "due diligence." However, disagreement with the way the Court applied settled law to the particular facts in this case does not satisfy the requirements under *28 U.S.C. § 1292(b),* even if the moving party's disagreement with the court's order is "vehement." *Best Western Int'l, 2007 U.S. Dist. LEXIS 39172 at *27.*

Timberwork **[*8]** has not identified any lack of precedent within the Ninth Circuit, or conflicting decisions in other circuits, in support of its motion for certification. *APCC Services, Inc. v. AT&T Corp., 297 F. Supp. 2d 101, 107 (D.D.C. 2003)* ("A substantial ground for difference of opinion is often established by a dearth of precedent within the controlling jurisdiction and conflicting decisions in other circuits."). Timberwork cites one Ninth Circuit decision on the question of what constitutes "newly discovered evidence." In Feature Realty Inc. v. City of Spokane, the Ninth Circuit denied the plaintiff's *Rule 60(b)* motion, rejecting the argument that the evidence was "newly discovered" when plaintiff learned of it eight days before judgment was rendered. *331 F.3d 1082, 1093 (9th Cir. 2003). Riverbend Ranch Golf Course v. County of Madera, 2005 U.S. Dist. LEXIS 29497 (E.D. Cal.),* is a lower court decision that does not give rise to a circuit split. Furthermore, Riverbend Ranch is consistent with Feature Realty, because it also holds, "Evidence is not newly discovered under the Federal Rules if it was in the moving party's possession at the time of trial or could have been discovered with reasonable **[*9]** diligence." *Id. at *5.* Although Timberwork bears the burden of persuading the Court to certify an interlocutory appeal, it identifies no lack of authority and presents no substantial disagreement among courts as to what constitutes due diligence.

Timberwork's motion also falters because it will likely delay the resolution of this case. Trial in this matter is currently scheduled for July, 2011. The issues that Timberwork seeks to appeal are not weighty matters that are likely to be expedited on appeal. Fact discovery on this case closed on December 20, 2010, and expert discovery will end on February 19, 2011. All case dispositive motions are to be heard on or before April 8, 2010. Consequently, Timberwork has not established that an immediate appeal may materially advance the ultimate termination of the case.

Because a district court's certification is reserved for exceptional circumstances, and Timberwork has failed to satisfy all requirements under *28 U.S.C. § 1292(b),* the Court denies the motion for certification. II. Matsunoki's Motion for Leave to Move for Reconsideration

A. Legal Standard

This Court's *Local Rule 7-9(b)(3)* permits the reconsideration of an interlocutory order if there **[*10]** was a manifest failure by the Court to consider material facts or dispositive legal arguments which were presented to the Court before such order was issued. A party moving for leave to file a motion for reconsideration, however, may not repeat any argument made earlier in support of or opposition to the interlocutory order. *L.R. 7-9(c)*

B. Discussion

Matsunoki's request for reconsideration reiterates arguments made in response to Timberwork's motion for summary judgment, already rejected by the Court, and attempts to raise new arguments. Matsunoki attacks the Court's ruling that it unduly delayed in filing suit, by arguing that the cease and desist letter was narrowly written. The Court, however, has already ruled on the letter's broad wording. Order, 13-14. Matsunoki further asserts that the laches defense does not apply to the Pauls, and that Steen's death did not prejudice Defendants, and points to a legal test for the applicability of the laches defense, which no party briefed, and the Court did not apply in its summary judgment order. *E-Systems, Inc. v.*

Monitek, 720 F.2d 604, 607 (9th Cir. 1983). Although Matsunoki did not raise these arguments in prior briefing, they do not present **[*11]** newly established evidence or law. Because *Civil Local Rule 7-9* is not intended to allow parties to repeat prior argument or present new arguments that could have been raised earlier, the Court need not entertain Matsunoki's request to reconsider.

Even if the Court were to consider Matsunoki's new arguments, the outcome on summary judgement would remain the same. Matsunoki raises, for the first time, a six factor test used to determine whether laches will bar relief from trademark infringement. Notably, Matsunoki's motion for reconsideration neglects to apply the standard to the particular facts of this case. The Court's application, however, demonstrates that the test does not change its finding that laches provides a valid defense for Timberwork.

The six E-Systems factors are: "1) the strength and value of trademark rights asserted; 2) plaintiff's diligence in enforcing the mark; 3) harm to senior user if relief denied; 4) good faith ignorance by junior users; 5) competition between senior and junior users; and 6) extent of harm suffered by junior user because of senior user's delay." *720 F.2d at 607*; see also *Tillamook Country Smoker, Inc. v. Tillamook County Creamery Ass'n, 465 F.3d 1102, 1108 (9th Cir. 2006)*(applying **[*12]** two of the six E-Systems factors, the plaintiff's diligence in enforcement and the defendant's good faith use).

These factors weigh in Timberwork's favor. The Haiku Houses marks have value and have provided for a measure of Timberwork's business success. Matsunoki has been less than diligent in enforcing its rights. Considering its knowledge about Timberwork and Timberwork's direct assertion in 2001 that it owned the marks, Matsunoki could have acted sooner than 2008, when it finally filed suit. Nearly a decade after the cease and desist letter from Matsunoki, and after seven years of silence from Matsunoki, Timberwork risks losing the marks and its business. Matsunoki was not ignorant of Timberwork's ongoing existence or activities during this time. The companies formerly worked together. Competition exists, although Matsunoki is based in Tennesee, and Timberwork is based in California. In light of Matsunoki's silence, Timberwork proceeded with its business, taking on more clients and involving the Pauls to increase its marketing and sales activities. Overall, these facts make clear that Matsunoki was less than diligent in enforcing its rights, and Timberwork acted in good faith.

Matsunoki **[*13]** asserts another new argument, distinguishing between Defendants Timberwork and the Pauls. Nevertheless, Matsunoki's claims against the Pauls are barred by laches, just as the defense applies to Timberwork. "This defense embodies the principle that a plaintiff cannot sit on the knowledge that another company is using its trademark, and then later come forward and seek to enforce its rights." *Internet Specialties West, Inc. v. Milon-Digiorgio Enterprises, Inc., 559 F.3d 985, 989-90 (9th Cir. 2009)*. The test of laches is two-fold: "first, was the plaintiff's delay in bringing suit unreasonable? Second, was the defendant prejudiced by the delay?" *Id. at 990*.

If a plaintiff filed suit within the limitations period for the analogous action at law, there is a presumption that laches in inapplicable. *Jarrow Formulas, Inc. v. Nutrition Now, Inc., 304 F.3d 829, 835*. The parties agree that the four-year limitations period from California trademark infringement law is the most analogous. Matsunoki points out that the Pauls did not become involved in the business until 2004, at the earliest. As a result, Matsunoki argues that the lawsuit against the Pauls is within the four-year statute of limitations **[*14]** period, and no presumption in favor of laches applies. Nevertheless, the Pauls are protected under a theory of agency. The Pauls acted on behalf of Timberwork, marketing its products and services with Timberwork's authorization. The Pauls did not act independently of Timberwork. The Pauls acquired and used the marks through Timberworks, and should be treated as identically situated.

Even if no presumption of laches applies, the equitable principles are not entirely barred from consideration in the claims against the Pauls. "The limitations period for laches starts when the plaintiff 'knew or should have known about its potential cause of action.'" *Tillamook Country Smoker, 465 F.3d at 1108*. As of 2001, Matsunoki was aware of Timberwork's use of the marks. Matsunoki sent a cease and desist letter that same year. Timberwork responded to the letter, insisting that Timberwork had ownership of the trademarks. Timberwork carried on with its business. Matsunoki knew that it had potential causes of action with respect to Timberwork, and should have known that Timberwork might involve other parties to conduct their business. Timberwork's insistence that it was the mark owner, and its continued **[*15]** use of the marks, increased the likelihood that it would involve third parties, like the Pauls, and thus increased the risk that the marks were being used widely without authorization. Matsunoki either knew or should have known about the Pauls' role, and therefore the limitations period for laches includes them.

The two-prong test for laches, weighing the reasonablness of Matsunoki's delay and the prejudice suffered by the Pauls, also supports an outcome in the Pauls' favor. Matsunoki's delay was unreasonable, because it was well aware that Timberwork continued to conduct its business using the marks, and Timberwork might involve third parties in that course of conduct. The Pauls were acting in good faith, not knowing about the dispute that had

arisen in 2001. Likewise, Matsunoki's delay prejudiced the Pauls. Steen's death deprived the Pauls of testimony that could have clarified the intellectual property's authorship and transfer. Greater clarity about these facts would have aided the fair resolution of these claims.

III. Matsunoki's Motion to Exclude Expert Testimony

On February 15, 2011, Matsunoki moved to exclude the expert testimony of Jerry P. Loving. Docket No. 227. The Court denies **[*16]** Matsunoki's motion without prejudice because it does not comply with the Court's case management order. Docket No. 41. Motions in limine may be made only in accordance with the Court's order for pre-trial preparation, and heard at the final pre-trial conference, absent the Court's permission, for good cause shown. All other motions, except discovery motions, must be included in a single round of briefing and noticed to be heard on April 8, 2011.

CONCLUSION

The Court DENIES Timberwork's motion for certification of an interlocutory appeal, and Matsunoki's motion for leave to file a motion for reconsideration. The Court also DENIES, without prejudice, Matsunoki's motion to exclude the expert testimony of Jerry P. Loving.

IT IS SO ORDERED.

Dated: 2/18/2011

/s/ Claudia Wilken

CLAUDIA WILKEN

United States District Judge

TAB 6

ALICE MCCABE and CHRISTINE NELSON, Plaintiffs, vs. W. RALPH BASHAM, TOM RIDGE, MICHAEL PARKER, HOLLY MICHAEL, BRUCE MACAULAY, MICHELLE MAIS and THE UNITED STATES OF AMERICA, Defendants.

No. 05-CV-73-LRR

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA, CEDAR RAPIDS DIVISION

2008 U.S. Dist. LEXIS 81941

October 14, 2008, Decided
October 14, 2008, Filed

SUBSEQUENT HISTORY: Motion denied by *McCabe v. Basham, 2008 U.S. Dist. LEXIS 89986 (N.D. Iowa, Oct. 23, 2008)*

PRIOR HISTORY: *McCabe v. Mais, 2008 U.S. Dist. LEXIS 80175 (N.D. Iowa, Oct. 2, 2008)*

COUNSEL: [*1] For Alice McCabe, Christine Nelson, Plaintiffs: David A O'Brien, LEAD ATTORNEY, Willey, O'Brien, Mullin, Laverty & Hanrahan, LC, Cedar Rapids, IA; Matthew James Reilly, LEAD ATTORNEY, Eells & Tronvold, Cedar Rapids, IA.

For United States Secret Service, United States of America, Defendants: Zachary Carl Richter, LEAD ATTORNEY, USDOJ, Civil -- Torts Branch, Washington, DC.

For Iowa State Patrol, Defendant: Jeffrey C Peterzalek, LEAD ATTORNEY, AAG, Des Moines, IA.

For Troy Bailey, Rich Busch, Defendants: Jeffrey C Peterzalek, LEAD ATTORNEY, AAG, Des Moines, IA; Jeanie Kunkle Vaudt, Iowa Attorney General, Des Moines, IA.

For Bruce Macaulay, Defendant: Megan Lindholm Rose, LEAD ATTORNEY, US Department of Justice, Washington, DC; Zachary Carl Richter, LEAD ATTORNEY, USDOJ Civil - Torts Branch, Washington, DC.

For Michelle Mais, Deputy Sheriff, Linn County, Defendants: Todd Davis Tripp, LEAD ATTORNEY, Linn County Attorney Office, Cedar Rapids, IA.

JUDGES: LINDA R. READE, UNITED STATES DISTRICT CHIEF JUDGE.

OPINION BY: LINDA R. READE

OPINION

ORDER

I. INTRODUCTION

The matter before the court is "Plaintiffs' Motion for Certification for Interlocutory Appeal" ("Motion") (docket no. 337).

II. RELEVANT PRIOR PROCEEDINGS

On October 13, [*2] 2008, Plaintiffs filed the Motion. Defendant Mais and the various former federal defendants ("Federal Defendants") have not filed responses, although the time for doing so has not passed. Because the Final Pretrial Conference is only three days away and trial is less than two weeks away, the court elects to rule on the Motion without waiting for responses. *See* LR 7.1(e) (providing that the district court may elect to rule on a motion without waiting for a response "if circumstances . . . warrant").

III. ANALYSIS

In the Motion, Plaintiffs ask the court to certify this entire matter for an interlocutory appeal to the Eighth Circuit Court of Appeals. Specifically, Plaintiffs "seek to appeal whether a [partial] new trial should have been

granted for Defendant Mais on damages, and whether judgment should have been entered with respect to many of the Federal Defendants." Brief in Support of Motion (docket no. 337-2) ("Brief"), at 2. Plaintiffs invoke *28 U.S.C. § 1292(b)*, which provides:

> **(b)** When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is [*3] substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, [she] shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

28 U.S.C. § 1292(b) (emphasis in original). "'*Section 1292(b)* establishes three criteria for certification: the district court must be of the opinion that (1) the order involves a controlling question of law; (2) there is substantial ground for difference of opinion; and (3) certification will materially advance the ultimate termination of the litigation.'" *Union County, Iowa v. Piper Jaffray & Co., 525 F.3d 643, 646 (8th Cir. 2008)* (per curiam) (quoting *White v. Nix, 43 F.3d 374, 377 (8th Cir. 1994))*. The party seeking certification "'bears the heavy burden of demonstrating [*4] that the case is an exceptional one in which immediate appeal is warranted.'" *Id.* (quoting *White, 43 F.3d at 376*). The court must "keep in mind that '[i]t has . . . long been the policy of the courts to discourage piece-meal appeals because most often such appeals result in additional burdens on both the court and the litigants.'" *Id.* "'Permission to allow interlocutory appeals should thus be granted sparingly and with discrimination.'"

Even if the court were to assume that Plaintiffs have properly identified "controlling questions of law," they have not shown that there is substantial ground for difference of opinion or that certification would materially advance the ultimate termination of this litigation. Any appeal on the merits of any order involving a Federal Defendant is destined to fail because of the retroactive application of *28 U.S.C. § 2676*, the Federal Tort Claims Act's judgment bar. *See McCabe v. Macaulay, No. 05-CV-73-LRR, 2008 U.S. Dist. LEXIS 105679, 2008 WL 2980013, *13-14 (N.D. Iowa Aug. 1, 2008)* (cited with approval by *Manning v. United States, Nos. 07-1120 & 07-1427, 546 F.3d 430, 2008 U.S. App. LEXIS 20996, 2008 WL 4459204, *7-*8 (7th Cir. Oct. 6, 2008))*. [1] With respect to the court's order granting Defendant Mais's motion for a partial [*5] new trial on damages, there is not substantial ground for difference of opinion. "'The authority to grant a new trial . . . is confided almost entirely to the exercise of discretion on the part of the trial court.'" *Allied Chem. Corp. v. Daiflon, Inc., 449 U.S. 33, 36, 101 S. Ct. 188, 66 L. Ed. 2d 193 (1980)*. Further, on the issue of damages, "'excessiveness of a verdict is basically, and should be, a matter for the trial court which has had the benefit of hearing the testimony and of observing the demeanor of witnesses and which knows the community and its standards . . . .'" *Wilmington v. J.I. Case Co., 793 F.2d 909, 922 (8th Cir. 1986)* (quoting *Solomon Dehydrating Co. v. Guyton, 294 F.2d 439, 447-48 (8th Cir. 1961))*. Therefore, the court's decision to order a partial new trial in this case on the issue of damages is, by its very nature, a particularly poor candidate for interlocutory review. *See White, 43 F.3d at 377* ("A legal question of the type referred to in *§ 1292(b)* contrasts with a 'matter for the discretion of the trial court.'") (quoting *Garner v. Wolfinbarger, 430 F.2d 1093, 1096-97 (5th Cir. 1970))*. In any event, the motion for a partial new trial on damages did not present the court with novel legal issues [*6] or unsettled law. *See White, 43 F.3d at 377 n.3* ("[T]hese issues are not novel, nor is there a substantial basis for difference of opinion, as the law is relatively well-settled."). Plaintiffs opine that the court erred in comparing the jury's now-vacated damage awards to awards in other garden-variety strip- and visual-body-cavity-search cases yet Plaintiffs cite no cases to demonstrate that such comparison was, as they allege, "inconsistent with Eighth Circuit and United States Supreme Court precedent." Brief at 2. At most, the Eighth Circuit Court of Appeals has cautioned courts about the helpfulness of such comparisons; the court recognized this cautionary principle in its order granting the partial new trial. *See* Order (docket no. 318), at 29-30 n. 14 (citations omitted). Lastly, permitting an interlocutory appeal would not materially advance the ultimate termination of this litigation. An interlocutory appeal would (1) delay one of the oldest open cases on the court's docket; (2) needlessly complicate matters in an already complicated case; and (3) impose significant burdens upon both the Eighth Circuit Court of Appeals and the litigants, because it would most likely result in [*7] piece-meal appeals.

1 Further, the record belies Plaintiffs' argument that "Judgment was entered in favor of the United States allegedly because Plaintiff [sic] did not file a Brief, when in fact Plaintiff [sic] did file a Brief that is viewable in PACER." Brief at 3. Judgment was entered in favor of the United States because Plaintiffs failed to respond to the United States's argument. *See McCabe v. United States, No. 05-CV-73-LRR, 2007 U.S. Dist. LEXIS 85811, 2007 WL 4179831, *1-*2 (N.D. Iowa Nov. 20, 2007)* (explaining that Plaintiffs failed to respond to one of the United States's arguments for dismissal and granting motion to dismiss as unresisted (citing *LR 7.1* & LR 1.1)). In conjunction with this argument, Plaintiffs also erroneously state: "Judgment was entered against Defendant Macaulay by the Court after summary judgment had been denied." Brief at 3. The court never entered judgment against Defendant Macaulay.

IV. CONCLUSION

The Motion (docket no. 337) is **DENIED.**

IT IS SO ORDERED.

DATED this 14th day of October, 2008.

/s/ Linda R. Reade

LINDA R. READE

CHIEF JUDGE, U.S. DISTRICT COURT

NORTHERN DISTRICT OF IOWA

TAB 7

SAFEWAY INC.; WALGREEN CO.; THE KROGER CO.; NEW ALBERTSON'S, INC.; AMERICAN SALES COMPANY, INC.; and HEB GROCERY COMPANY, LP, Plaintiffs, v. ABBOTT LABORATORIES, Defendant. MEIJER, INC. & MEIJER DISTRIBUTION, INC.; ROCHESTER DRUG CO-OPERATIVE, INC.; and LOUISIANA WHOLESALE DRUG COMPANY, INC., on behalf of themselves and all others similarly situated, Plaintiffs, v. ABBOTT LABORATORIES, Defendant. RITE AID CORPORATION; RITE AID HDQTRS CORP.; JCG (PJC) USA, LLC; MAXI DRUG, INC. D/B/A BROOKS PHARMACY; ECKERD CORPORATION; CVS PHARMACY, INC.; and CAREMARK LLC, Plaintiffs, v. ABBOTT LABORATORIES, Defendant. SMITHKLINE BEECHAM CORPORATION, d/b/a GLAXOSMITHKLINE, Plaintiff, v. ABBOTT LABORATORIES, Defendant.

No. C 07-05470 CW,No. C 07-05985 CW,No. C 07-06120 CW,No. C 07-05702 CW

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

2010 U.S. Dist. LEXIS 61721*; *2010-1 Trade Cas. (CCH) P77,060

June 1, 2010, Decided
June 1, 2010, Filed

SUBSEQUENT HISTORY: Summary judgment granted, in part, summary judgment denied, in part by *Safeway Inc. v. Abbott Labs., 2011 U.S. Dist. LEXIS 4985 (N.D. Cal., Jan. 14, 2011)*

PRIOR HISTORY: *Safeway Inc. v. Abbott Labs., 2010 U.S. Dist. LEXIS 2145 (N.D. Cal., Jan. 12, 2010)*

COUNSEL: [*1] For Safeway Inc., Walgreen Co., The Kroger Co., New Alberton's, Inc., American Sales Company, Inc., Plaintiffs: William Francis Murphy, LEAD ATTORNEY, Barbara Lynne Harris Chiang, Edward Eldon Hartley, Dillingham & Murphy, LLP, San Francisco, CA; Lauren C. Ravkind, Kenny Nachwalter, PA, Austin, TX; Scott Eliot Perwin, Kenny Nachwalter, P.A., Miami, FL.

For HEB Grocery Company LP, Plaintiff: Scott Eliot Perwin, LEAD ATTORNEY, Kenny Nachwalter, P.A., Miami, FL; Barbara Lynne Harris Chiang, Dillingham & Murphy, LLP, San Francisco, CA.

For Abbott Laboratories, Defendant: David Michael Rosenzweig, LEAD ATTORNEY, Grant A. Davis-Denny, Jeffrey I. Weinberger, Munger, Tolles & Olson LLP, LOS ANGELES, CA; Stuart Neil Senator, LEAD ATTORNEY, Munger Tolles & Olson, Los Angeles, CA; Charles B. Klein, Matthew A. Campbell, Winston & Strawn LLP, Washington, DC; David J. Doyle, James F. Hurst, Samuel S. Park, Winston & Strawn LLP, Chicago, IL; Michelle Friedland, Munger, Tolles & Olson LLP, San Francisco, CA; Nicole Michelle Norris, Winston & Strawn, LLP, San Francisco, CA; Scott Eliot Perwin, Kenny Nachwalter, P.A., Miami, FL; Stephanie Suzanne McCallum, Chicago, IL.

JUDGES: CLAUDIA WILKEN, United States District **[*2]** Judge.

OPINION BY: CLAUDIA WILKEN

OPINION

ORDER DENYING DEFENDANT ABBOTT LABORATORIES' MOTION TO CERTIFY ISSUES FOR INTERLOCUTORY APPEAL

(Docket No. 137)

Defendant Abbott Laboratories moves for an order certifying an interlocutory appeal of three issues:

1. Whether Plaintiffs have properly stated a predatory pricing antitrust claim even though they admittedly have not satisfied the standard set forth by the Supreme Court in *Linkline*, which requires llegations of a dangerous probability of recoupment and below-cost pricing for the retail product in the challenged market?

2. Whether Plaintiffs have properly stated a refusal-to-deal antitrust claim without any actual refusal to deal in the challenged market, based on the allegation that the combined pricing of products in two separate markets makes it difficult for rivals to compete?

3. Whether Plaintiffs can state an antitrust claim based on a theory that Abbott charged a low (but not below-cost) price for Norvir to discourage innovation by rivals?

Def.'s Mot. at 1. Plaintiffs oppose the motion. The motion was taken under submission on the papers. Having considered all of the papers submitted by the parties, the Court DENIES Abbott's motion.

BACKGROUND

On January **[*3]** 12, 2010, the Court denied Abbott's motion to dismiss, which was based in large part on *John Doe 1 v. Abbott Laboratories, 571 F.3d 930 (9th Cir. 2009)*, and *Pacific Bell Telephone Co. v. Linkline Communications, Inc., U.S. , 129 S. Ct. 1109, 172 L. Ed. 2d 836 (2009)*. In *Doe*, the Ninth Circuit considered whether, under the *Doe* plaintiffs' monopoly leveraging theory, Abbott violated section 2 of the Sherman Act, *15 U.S.C. § 2*, through its conduct in pricing Norvir and Kaletra. [1] *571 F.3d at 932-33*. The court held that the plaintiffs' theory, which did not include allegations of an antitrust duty to deal or below-cost pricing, was the "functional equivalent" of the price squeeze theory rejected by the Supreme Court in *Linkline*. *Id. at 934-35*; *see also Linkline, 129 S. Ct. at 1114*. In *Linkline*, the Supreme Court addressed "whether a plaintiff can bring price-squeeze claims under *§ 2 of the Sherman Act* when the defendant has no antitrust duty to deal with the plaintiff." *129 S. Ct. at 1116-17*. The Court rejected the plaintiffs' theory, holding that "the price-squeeze claims . . . are not cognizable under the Sherman Act." *Id. at 1123*.

1 In *Doe*, the parties agreed that, as a condition of settlement, Abbott **[*4]** would take an interlocutory appeal of the Court's decisions. *571 F.3d at 932*.

Here, it is alleged, among other things, that Abbott violated *§ 2* by engaging in predatory pricing of a bundled product and by breaching its antitrust duty to deal. Because Plaintiffs here do not base their claims on the monopoly leveraging or price squeeze theories addressed in *Doe* and *Linkline*, the Court rejected Abbott's argument that those cases barred Plaintiffs' antitrust claims. The Court also rejected Abbott's arguments that *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004)*, and *MetroNet Services Corp. v. Qwest Corp., 383 F.3d 1124 (9th Cir. 2004)*, preclude the antitrust duty to deal claims.

LEGAL STANDARD

Pursuant to *28 U.S.C. § 1292(b)*, a district court may certify an appeal of an interlocutory order only if three factors are present. First, the issue to be certified must involve a "controlling question of law." *28 U.S.C. § 1292(b)*. Establishing that a question of law is controlling requires a showing that the "resolution of the issue on appeal could materially affect the outcome of litigation in the district court." *In re Cement Antitrust Litig., 673 F.2d 1020, 1026 (9th Cir. 1982)* **[*5]** (citing *U.S. Rubber Co. v. Wright, 359 F.2d 784, 785 (9th Cir. 1966)*).

Second, there must be "substantial ground for difference of opinion" on the issue. *28 U.S.C. § 1292(b)*. A substantial ground for difference of opinion is not established by a party's strong disagreement with the court's ruling; the party seeking an appeal must make some greater showing. *Mateo v. M/S Kiso, 805 F. Supp. 792, 800 (N.D. Cal. 1992)*.

Third, it must be likely that an interlocutory appeal will "materially advance the ultimate termination of the litigation." *28 U.S.C. § 1292(b)*; *Mateo, 805 F. Supp. at 800*. Whether an appeal may materially advance termination of the litigation is linked to whether an issue of law is "controlling" in that the court should consider the effect of a reversal on the management of the case. *Id*. In light of the legislative policy underlying *§ 1292*, an interlocutory appeal should be certified only when doing so "would avoid protracted and expensive litigation." *In re Cement, 673 F.2d at 1026*; *Mateo, 805 F. Supp. at 800*. If, in contrast, an interlocutory appeal would delay resolution of the litigation, it should not be certified. *See Shurance v. Planning Control Int'l, Inc., 839 F.2d 1347, 1348 (9th Cir. 1988)* **[*6]** (refusing to hear a certified appeal in part because the Ninth Circuit's decision might come after the scheduled trial date).

"*Section 1292(b)* is a departure from the normal rule that only final judgments are appealable, and therefore

must be construed narrowly." *James v. Price Stern Sloan, Inc., 283 F.3d 1064, 1068 n.6 (9th Cir. 2002)*. Thus, the court should apply the statute's requirements strictly, and should grant a motion for certification only when exceptional circumstances warrant it. *Coopers & Lybrand v. Livesay, 437 U.S. 463, 475, 98 S. Ct. 2454, 57 L. Ed. 2d 351 (1978)*. The party seeking certification of an interlocutory order has the burden of establishing the existence of such exceptional circumstances. *Id*. A court has substantial discretion in deciding whether to grant a party's motion for certification. *Brown v. Oneonta, 916 F. Supp. 176, 180 (N.D.N.Y. 1996) rev'd in part on other grounds, 106 F.3d 1125 (2nd Cir. 1997)*.

DISCUSSION

Abbott does not meet its burden to show that an interlocutory appeal is warranted. First, an appeal will not materially advance the ultimate termination of this litigation. On the contrary, an immediate appeal is likely to delay, rather than advance, the end of these cases. Dispositive **[*7]** motions are scheduled to be heard this summer, with trial calendared for February, 2011. Abbott suggests that the trial would not be materially delayed because the Ninth Circuit would hear an appeal on an expedited basis and might decide before the trial date. Abbott's assertions do not persuade the Court. As Plaintiffs correctly note, an interlocutory appeal could only materially advance the ultimate termination of this litigation if the Ninth Circuit accepts the appeal and rules in favor of Abbott on all the above-mentioned issues. Further, at least with regard to GSK, resolution of these issues does not address all claims asserted against Abbott. Thus, litigation would nevertheless continue.

Second, Abbott does not establish a substantial ground for difference of opinion. As it did in its omnibus motion to dismiss, Abbott insists that *Doe* and *Linkline* control the outcome of this case. However, as explained further in the Court's Order on the motion to dismiss, neither of those cases addressed the antitrust theories proffered by Plaintiffs in their amended complaints. Abbott quotes a portion of *Doe*, which states, "However labeled, Abbott's conduct is the functional equivalent of the **[*8]** price squeeze the Court found unobjectionable in Linkline." *571 F.3d at 935*. This statement is taken out of context. In the section preceding the language Abbott quotes, the Ninth Circuit stated:

> Does try to distance themselves from *Linkline* on the footing that their claim is for monopoly leveraging, not price squeezing, and that Abbott provides products to consumers in both the booster and boosted markets whereas AT & T provided products in retail and wholesale markets. We understand the difference, but it is insubstantial. However labeled, Abbott's conduct is the functional equivalent of the price squeeze the Court found unobjectionable in Linkline.

Id. The Court reads this discussion to address the *Doe* plaintiffs' attempt to distinguish monopoly leveraging from price squeezing, not to immunize Abbott from liability under any antitrust theory. The Ninth Circuit did not rule on the theories proffered by Plaintiffs here and, as a result, *Doe* does not apply.

Abbott also argues that the Court's prior orders demonstrate a substantial ground for difference of opinion. However, like *Doe* and *Linkline*, those orders addressed different antitrust theories and positions taken by the parties at **[*9]** that time. Although Plaintiffs' claims arise from the same series of acts as those complained of in *Doe*, their allegations and theories materially differ.

Abbott vehemently disagrees with the Court's reading of various cases, including *Trinko* and *MetroNet*. However, Abbott's contrary reading of authority is not enough to create a substantial ground for difference of opinion justifying an interlocutory appeal.

CONCLUSION

For the foregoing reasons, the Court DENIES Abbott's motion for certification of an interlocutory appeal. (Case No. 07-05470, Docket No. 137; Case No. 07-05985, Docket No. 233; Case No. 07-06120, Docket No. 126; Case No. 07-05702, Docket No. 199.) Dispositive motions are scheduled to be filed on June 17, 2010, with a hearing on the motions set for August 5, 2010 at 2:00 p.m.

IT IS SO ORDERED.

Dated: June 1, 2010

/s/ Claudia Wilken

CLAUDIA WILKEN

United States District Judge

TAB 8

JUNICHIRO SONODA, et al., Plaintiffs, v. AMERISAVE MORTGAGE CORPORATION, Defendant.

No. C-11-1803 EMC

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

2011 U.S. Dist. LEXIS 100275

September 7, 2011, Decided
September 7, 2011, Filed

PRIOR HISTORY: *Sonoda v. Amerisave Mortg. Corp., 2011 U.S. Dist. LEXIS 73940 (N.D. Cal., July 8, 2011)*

COUNSEL: **[*1]** For Junichiro Sonoda, individually and on behalf of the proposed class, Lien Duong, individually and on behalf of the proposed class, Marvin Kupersmit, individually and on behalf of the proposed class, Plaintiffs: Whitney Stark, LEAD ATTORNEY, Rukin Hyland Doria & Tindall LLP, San Francisco, CA; Craig L. Briskin, Steven A. Skalet, PRO HAC VICE, Mehri & Skalet, PLLC, Wasington, DC; James C. Sturdevant, The Sturdevant Law Firm, San Francisco, CA; Michael D. Donovan, PRO HAC VICE, Donovan Searles & Axler LLC, Philadelphia, PA; Noah I. Axler, PRO HAC VICE, Donovan Searles and Axler, Philadelphia, PA.

For Amerisave Mortgage Corporation, Defendant: Robert D Tadlock, LEAD ATTORNEY, Kilpatrick Townsend and Stockton LLP, Menlo Park, CA; Cindy Dawn Hanson, PRO HAC VICE, Kilpatrick Townsend & Stockton LLP, Atlanta, GA; James Francis Bogan, III, PRO HAC VICE, Atlanta, GA; Kathryn Charlotte Ederle, PRO HAC VICE, Kilpatrick Townsend Stockton LLP, Atlanta, GA.

JUDGES: EDWARD M. CHEN, United States District Judge.

OPINION BY: EDWARD M. CHEN

OPINION

ORDER DENYING DEFENDANT'S MOTION FOR CERTIFICATION OF INTERLOCUTORY APPEAL

(Docket No. 47)

Defendant's motion for certification of interlocutory appeal came on for hearing before the Court **[*2]** on September 2, 2011. Docket No. 47. Defendant asks the Court to certify the portion of its July 8, 2011 Order denying Amerisave's motion to dismiss Plaintiffs' state law claims to the extent that they are based on alleged violations of the Truth in Lending Act ("TILA") for interlocutory review pursuant to *28 U.S.C. § 1292(b)*. Docket No. 41. For the following reasons and for the reasons stated on the record at the hearing, the Court **DENIES** Defendant's motion.

"The general rule is that an appellate court should not review a district court ruling until after entry of a final judgment." *Notmeyer v. Stryker Corp., No. C 06-04096 SI, 2007 U.S. Dist. LEXIS 69773, 2007 WL 2688462, at *1 (N.D. Cal. Sept. 10, 2007)* (citing *Coopers & Lybrand v. Livesay, 437 U.S. 463, 98 S. Ct. 2454, 57 L. Ed. 2d 351 (1978)).* However, certification of an order for interlocutory appeal is appropriate when "such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." *28 U.S.C. § 1292(b)*; *In re Cement Antitrust Litig., 673 F.2d 1020, 1026 (9th Cir.1982), aff'd mem. sub nom. Arizona v. U.S. Dist. Ct., 459 U.S. 1191, 103 S. Ct. 1173, 75 L. Ed. 2d 425 (1983).* **[*3]** *Section 1292(b)* certifications should be used sparingly and "only in exceptional situations in which allowing an interlocutory appeal would avoid protracted and expensive litigation." *In re Cement, 673 F.2d at 1026*; *see also Coopers & Lybrand, 437 U.S. at 475*.

In this case, the Court finds that certifying an appeal would not materially advance the litigation. This criterion is satisfied when "allowing an interlocutory appeal would avoid protracted and expensive litigation." *In re Cement Antitrust Litig., 673 F.2d at 1026.* As stated in its briefs and at oral argument, Defendant argues that an interlocutory appeal will advance the litigation because it will determine the viability of Plaintiffs' class claims and determine the scope of Defendant's potential damages exposure.

The Court is not persuaded. First, a successful interlocutory appeal would, at best, eliminate only a portion of Plaintiffs' class-wide claims -- the state law TILA-based claims. The interlocutory appeal would have no affect on Plaintiffs' direct TILA claim, which would remain regardless of how the Ninth Circuit decided the preemption question. The direct TILA claims as well as the TILA-based state law claim focus in **[*4]** large part on the challenged conduct of charging appraisal fees before providing good faith estimates. Moreover, Plaintiffs assert non-TILA-based state claims challenging this and related practices. Thus, this Court would still have to entertain a motion for and opposition to class certification with respect to the direct TILA claim and non-TILA-based state claims, and Defendant has provided no indication that this process would be simpler or substantially different absent the TILA-based state law claims.

Second, Defendant asserts without argument that Plaintiffs' other, non-TILA based claims will not be "susceptible to class-wide proof and certification." Mot. at 6. Defendant provides no support for this assertion. Plaintiffs' complaint belies this claim, as Plaintiffs assert class-wide claims for relief throughout their complaint. *See* Am. Compl. ¶¶ 100, 109, 121, 127, 133, 145, 155, 163. There is thus no basis at this stage for the Court to conclude that removing the TILA-based state law claims from the equation would materially change the course of Plaintiffs' motion for class certification.

Finally, with respect to the scope of damages, the Court has not found, nor have the parties **[*5]** provided, any cases suggesting that the scope of exposure to damages alone is sufficient to create the exceptional circumstances necessary for an interlocutory appeal. Moreover, while Plaintiffs' direct TILA claim would be subject to a statutory damages cap, Plaintiffs assert additional common law claims for which damages are uncertain at this juncture. *See, e.g.*, Am. Compl., Docket No. 56, ¶¶ 93-110 (asserting claims for breach of contract and breach of implied covenant of good faith and fair dealing). Thus, an interlocutory appeal would not necessarily remove uncertainty regarding the scope of Defendant's potential exposure.

"When litigation will be conducted in substantially the same manner regardless of our decision, the appeal cannot be said to materially advance the ultimate termination of the litigation." *Hansen Beverage Co., 2010 U.S. Dist. LEXIS 18003, 2010 WL 743750 at *4* (quotation omitted) (denying motion where interlocutory appeal would delay resolution of another valid counterclaim while court of appeals determined whether another counterclaim was preempted). To the contrary, in this case an interlocutory appeal would offer little assistance in "avoid[ing] protracted and expensive litigation." *In re Cement, 673 F.2d at 1026.* **[*6]** "If an interlocutory appeal would actually delay the conclusion of the litigation, the Court should not certify the appeal." *Notmeyer, 2007 U.S. Dist. LEXIS 69773, 2007 WL 2688462 at *2*. Accordingly, the Court denies Defendant's motion for certification.

This order disposes of Docket No. 47.

IT IS SO ORDERED.

Dated: September 7, 2011

/s/ Edward M. Chen

EDWARD M. CHEN

United States District Judge

TAB 9

UNITED STATES OF AMERICA ex rel. RICHARD WILSON and CHRIS MARANTO, Plaintiffs, v. MAXXAM, INC., et al., Defendants.

No. C 06-7497 CW

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

2009 U.S. Dist. LEXIS 14375

February 9, 2009, Decided
February 9, 2009, Filed

SUBSEQUENT HISTORY: Summary judgment denied by, Motion granted by, in part, Motion denied by, in part *United States ex rel. Wilson v. Maxxam, Inc., 2009 U.S. Dist. LEXIS 24823 (N.D. Cal., Mar. 10, 2009)*

PRIOR HISTORY: *United States ex rel. Wilson v. Maxxam, Inc., 2009 U.S. Dist. LEXIS 5426 (N.D. Cal., Jan. 16, 2009)*

COUNSEL: **[*1]** For United States of America Ex Rel., Plaintiff: Joseph W. Cotchett, LEAD ATTORNEY, Cotchett, Pitre & McCarthy, Burlingame, CA; Paul N. McCloskey, Jr., LEAD ATTORNEY, Law Offices of Paul N. McCloskey, Jr., Redwood City, CA; William Gerard Bertain, LEAD ATTORNEY, Attorney at Law, Eureka, CA; Joseph C. Wilson, V, Niall Padraic McCarthy, Philip L. Gregory, Sean Eric Ponist, Cotchett, Pitre & McCarthy, Burlingame, CA; Sara Winslow, United States Attorney's Office, San Francisco, CA.

For Richard Wilson, Chris Maranto, Plaintiffs: Joseph W. Cotchett, LEAD ATTORNEY, Cotchett, Pitre & McCarthy, Burlingame, CA; Paul N. McCloskey, Jr., LEAD ATTORNEY, Law Offices of Paul N. McCloskey, Jr., Redwood City, CA; William Gerard Bertain, LEAD ATTORNEY, Attorney at Law, Eureka, CA; Joseph C. Wilson, V, Niall Padraic McCarthy, Philip L. Gregory, Sean Eric Ponist, Cotchett, Pitre & McCarthy, Burlingame, CA.

For Maxxam, Inc., a Delaware corporation, Charles E. Hurwitz, an individual, Defendants: Edgar B. Washburn, James J. Brosnahan, LEAD ATTORNEYS, Brian Martinez, Christopher J. Carr, Shaye Diveley, William M. Sloan, Esq., Morrison & Foerster LLP, San Francisco, CA; Andrew David Muhlbach, Morrison & Foerster, **[*2]** San Francisco, CA.

For The Pacific Lumber Corporation, a Delaware corporation, Scotia Pacific Company, LLC, a Delaware limited liability company, Salmon Creek LLC, a Delaware limited liability company, Defendants: Christopher J. Carr, Morrison & Foerster LLP, San Francisco, CA.

For United States of America, Miscellaneous: Sara Winslow, LEAD ATTORNEY, United States Attorney's Office Northern District of California, San Francisco, CA.

For Morrison & Foerster LLP, Miscellaneous: Carl Brandon Wisoff, Douglas R. Young, Farella Braun & Martel LLP, San Francisco, CA; Christopher Scott Andrews, Farella Braun + Martel LLP, San Francisco, CA.

JUDGES: CLAUDIA WILKEN, United States District Judge.

OPINION BY: CLAUDIA WILKEN

OPINION

ORDER DENYING DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS

This is a *qui tam* action filed under the False Claims Act by Plaintiffs/Relators Richard Wilson and Chris Maranto, on behalf of the United States, based upon allegations that Defendants made false statements to the California Department of Forestry and Fire Protection (CDF) in a sustained yield plan (SYP) in order to defraud the United States into contributing $ 250 million toward the purchase of the Headwaters Forest and Elk Head

Springs **[*3]** Forest. The United States Attorney has declined to intervene in this action. Defendants Maxxam Inc. and Charles E. Hurwitz [1] now move for judgment on the pleadings, on the basis that their alleged activities are protected by the *First Amendment* right to petition the government. Plaintiffs oppose the motion. The matter was heard on October 16, 2008. Having considered oral argument and all of the papers submitted by the parties, the Court denies Defendants' motion.

1 Defendants Pacific Lumber Company, Scotia Pacific Company LLC and Salmon Creek LLC filed a voluntary petition for reorganization under Chapter 11 of the Bankruptcy Code in the U.S. Bankruptcy Court for the Southern District of Texas. The bankruptcy action has been resolved, and these Defendants have been, or are being, dissolved and their assets transferred to other entities. They do not join in the present motion. All references to "Defendants" in this order are to Hurwitz and Maxxam only.

BACKGROUND

According to the complaint, the origins of this case date back to late 1985, when Hurwitz, a corporate raider, initiated the takeover by Maxxam of the Pacific Lumber Company. [2] Hurwitz controls a majority of Maxxam's stock and **[*4]** combined voting power. "As a result, Mr. Hurwitz is able to control the election of the Company's Board of Directors and controls the vote on virtually all matters which might be submitted to a vote." Compl. P 38.

2 Defendants Scotia Pacific Company LLC and Salmon Creek LLC were wholly owned subsidiaries of Pacific Lumber.

Included in Pacific Lumber's land was the largest privately owned redwood forest in the United States. Before the takeover, Pacific Lumber had carefully managed its redwood forests. Soon after the takeover, however, it became clear that Defendants' priority was short-term profits, not long-term sustainability. Maxxam announced that it would escalate Pacific Lumber's logging activities to pay off its debt. Pacific Lumber's conservative forest practices became a thing of the past.

In the 1990s, Pacific Lumber was enjoined from harvesting old-growth timber that served as a habitat for the marbled murrelet, an endangered species of bird. It responded by suing both the state and federal governments, arguing that the enforcement of the Endangered Species Act constituted an unlawful taking of its property. To resolve this dispute, Maxxam, Pacific Lumber, the State of California **[*5]** and the United States entered into an agreement under which Pacific Lumber agreed to dismiss its pending lawsuits and to sell its old-growth forest, known as the Headwaters Forest, and certain other land, including the Elk Head Springs Forest, to California and the United States. Headwaters Forest is now a public wildlife reserve.

As a condition of the purchase, Pacific Lumber agreed to develop and to implement an SYP for its retained properties. An SYP is a master plan for the operational, environmental, economic and other issues related to timber harvesting over a large area. It is based on a computer simulation that estimates projected timber growth and stocking requirements in relation to a proposed harvest.

In 1997, Congress authorized the appropriation of $ 250 million to purchase the land from Defendants. California agreed to pay an additional $ 130 million. Before Congress would allocate any money, however, Pacific Lumber had to dismiss its taking lawsuits and California had to approve the SYP. In addition, the Secretary of the Interior had to issue an opinion of value. Both the United States General Accounting Office and the Secretary of the Interior concluded that the $ 380 **[*6]** million authorized for the purchase fell within the appraised value of the land.

Pacific Lumber developed an SYP that included different "alternatives": Alternative 25a provided for an average annual harvest of 136 million board feet; Alternative 25, Pacific Lumber's preferred alterative, provided for a permissible harvest of 178.8 million board feet per year. In February, 1999, the CDF approved Alternative 25a. Presented with the lower figure, Hurwitz threatened to cancel the sale of Headwaters Forest.

The United States Fish and Wildlife Service encouraged CDF to approve Alternative 25. On March 1, 1999, Plaintiff Wilson, then Director of CDF, approved Alternative 25. At the time, Wilson believed that the SYP model was accurate. He later learned, however, that the SYP did not comply with California environmental standards. For example, Pacific Lumber included hardwoods in the SYP model and, even including hardwood inventories, the residual stocking levels provided in the SYP were below the Forest Practice Rules' minimum stocking standards. According to Plaintiffs, truthful disclosure of growth and yield in the SYP would have resulted in an annual harvest of approximately ninety to 125 **[*7]** million board feet per year, far less than the 178 million that Defendants needed to pay off their substantial debt. Plaintiffs allege that it was Defendants' debt, and not the long-term sustainability of Pacific Lumber's timber harvesting practices, that determined the outputs of the SYP model. Plaintiffs estimate that Pacific Lumber erroneously increased its harvest forecasts by ap-

proximately thirty percent. Wilson would not have approved the SYP had he known it was false.

Just a couple of years after the Headwaters Forest sale was completed, issues arose with the SYP. On November 16, 2001, Plaintiff Maranto, a CDF Sustained Yield Forester, received a memo from CDF Humboldt Ranger Unit inspectors that concluded, "As matters have developed, we are concerned that the SYP document is viewed by [Pacific Lumber] as an academic modeling exercise with little or no connection to any actual on-the-ground practices that are implemented." Compl. P 108. In 2002, Maranto noted inconsistencies in Pacific Lumber's SYP modeling outputs. In a September, 2002 email to his supervisors, Maranto noted that Pacific Lumber had "a lot of explaining to do." A few months later, he sent another email to his **[*8]** supervisors: "I don't know if all this is nothing more than a comedy of errors, or outright fraud purposefully devised to liquidate as much as possible, or the Department has been dealing with a bunch of amateurs since day one, but it is mind boggling that some very basic modeling elements could have been innocently overlooked." *Id*. P 117.

In an April, 2003 meeting, Maranto expressed his concerns with Pacific Lumber's SYP modeling to then-CDF Director Andrea Tuttle and others at CDF. Specifically, he noted the use of hardwoods in meeting residual stocking levels, the conversion to Douglas fir, allowing Pacific Lumber to harvest more in the beginning of the harvest schedule, and the apparent liquidation of conifers in certain silviculture regime modeling routines. [3] He informed Ms. Tuttle that "competent foresters don't make all of these kinds of mistakes." *Id*. P 122. In the summer of 2004, Maranto concluded that Pacific Lumber's 1999 SYP model "was likely intentionally skewed with a view to inflating the permissible timber harvest." *Id*. P 131.

> 3 According to the complaint, "silviculture" is the "practice of growing trees by determining how a stand of trees should be tended, harvested, **[*9]** and regenerated to achieve future stand conditions." Compl. P 56 n.2.

In 2005, after learning of the high volume of timber Pacific Lumber was harvesting, Wilson started questioning the accuracy of the SYP. In July, 2006, Wilson called Maranto to inquire about Pacific Lumber's SYP modeling. Plaintiffs met the next month. Wilson learned from Maranto that Pacific Lumber's SYP was false because it was based on a flawed and distorted modeling methodology. Collectively, the two concluded that Defendants had defrauded the United States government by submitting a fraudulently modeled SYP in order to obtain $ 250 million in federal funds for the Headwaters and Elk Head Springs Forests.

Plaintiffs filed this lawsuit in December, 2006, asserting claims under the federal False Claims Act based on the false statements contained in the SYP. Plaintiffs also filed a parallel lawsuit in the Superior Court of San Francisco County alleging violations of California's False Claims Act. On September 8, 2008, the state court granted Defendants' motion for judgment on the pleadings, finding that Plaintiffs' claims were barred by the *First Amendment* right to petition the government. In doing so, the court adopted **[*10]** the decision of the California Court of Appeal in *People ex rel. Gallegos v. Pacific Lumber Co., 158 Cal. App. 4th 950, 70 Cal. Rptr. 3d 501 (2008)*, in which Pacific Lumber was charged with violating the California Unfair Competition Law (UCL) in connection with its efforts to obtain approval of the SYP.

LEGAL STANDARD

Rule 12(c) of the Federal Rules of Civil Procedure provides, "After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." Judgment on the pleadings is proper when the moving party clearly establishes on the face of the pleadings that no material issue of fact remains to be resolved and that it is entitled to judgment as a matter of law. *Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc., 896 F.2d 1542, 1550 (9th Cir. 1990).*

DISCUSSION

Defendants argue that the claims against them are barred by the *First Amendment of the United States Constitution*, which provides, "Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances." *U.S. Const. amend. I.* [4] Defendants' argument is based on the *Noerr-Pennington* doctrine, which arose in the antitrust context. **[*11]** The Ninth Circuit has described the origin of the doctrine as follows:

> In *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961)*, trucking companies brought suit against railroad companies alleging that efforts by the railroads to influence legislation regulating trucking violated the Sherman Act. *Id. at 129*. The Court held that "the Sherman Act does not prohibit . . . persons from associating . . . in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly." *Id. at 136-37*. In reaching this conclusion, the Court observed that construing the Sherman Act to

> reach such conduct "would raise important constitutional questions" respecting the right of petition, stating "we cannot . . . lightly impute to Congress an intent to invade . . . freedoms" protected by the *Bill of Rights*. *Id. at 138*.
>
> *United Mine Workers v. Pennington, 381 U.S. 657, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965)*, extended this antitrust immunity to those engaging in lobbying activities directed toward executive branch officials, regardless of any anticompetitive intent or purpose. Subsequently, in *California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 92 S. Ct. 609, 30 L. Ed. 2d 642 (1972)*, **[*12]** the Court, recognizing that "the right to petition extends to all departments of the government" and that "[t]he right of access to the courts is . . . but one aspect of the right of petition," extended *Noerr-Pennington* immunity to the use of "the channels and procedures of state and federal . . . courts to advocate [groups'] causes and points of view respecting resolution of their business and economic interests *vis-a-vis* their competitors." *Id. at 510-11*.

Sosa v. DIRECTV, Inc., 437 F.3d 923, 929-30 (9th Cir. 2006) (alteration and omissions in *Sosa*).

> 4 Plaintiffs argue that, because Defendants did not invoke *First Amendment* immunity in their answer, they have waived their right to do so now. The Ninth Circuit has not ruled on whether *Noerr-Pennington* immunity is an affirmative defense that must be plead. The Court finds that, because it would be unconstitutional to impose sanctions for a defendant's exercise of its *First Amendment* rights, and because a complaint must therefore "contain specific allegations demonstrating that the *Noerr-Pennington* protections do not apply," *Boone v. Redevelopment Agency of City of San Jose, 841 F.2d 886, 894 (9th Cir. 1988)*, *First Amendment* immunity is **[*13]** "not merely an affirmative defense," *McGuire Oil Co. v. Mapco, Inc., 958 F.2d 1552, 1558 n.9 (11th Cir. 1992)*. Defendants thus did not waive their right to invoke such immunity.

The *Noerr-Pennington* doctrine has subsequently been extended to prohibit claims other than for violations of the antitrust laws where the cause of action is based on the defendant's exercise of its right to petition the government. *See Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731, 103 S. Ct. 2161, 76 L. Ed. 2d 277 (1983)* (applying the doctrine to preclude a claim under the National Labor Relations Act based on the filing of a lawsuit in retaliation for employees' picketing the defendant's restaurant); *Sosa, 437 F.3d 923* (holding that a claim under the Racketeer Influenced and Corrupt Organizations Act could not be based on the plaintiffs' allegation that the defendant committed extortion and wire fraud by sending a pre-litigation letter demanding payment in order to avoid being sued).

An exception exists to the general rule of the *Noerr-Pennington* doctrine: immunity can be lost if the efforts to petition the government "are a mere sham, undertaken solely to interfere with free competition and without the legitimate expectation that such **[*14]** efforts will in fact induce lawful government action." *Omni Res. Dev. Corp. v. Conoco, Inc., 739 F.2d 1412, 1413 (9th Cir. 1984)*. The Supreme Court has explained:

> The "sham" exception to *Noerr* encompasses situations in which persons use the governmental process -- as opposed to the outcome of that process -- as an anticompetitive weapon. A classic example is the filing of frivolous objections to the license application of a competitor, with no expectation of achieving denial of the license but simply in order to impose expense and delay. A "sham" situation involves a defendant whose activities are not genuinely aimed a procuring favorable government action at all, not one who genuinely seeks to achieve his governmental result, but does so through improper means.

City of Columbia v. Omni Outdoor Adver., Inc., 499 U.S. 365, 380, 111 S. Ct. 1344, 113 L. Ed. 2d 382 (1991).

The scope of the sham exception depends on the particular nature of the petitioning activity. The exception is relatively well defined when it is invoked to enjoin the filing of lawsuits. In this scenario, the Ninth Circuit has identified three circumstances in which the exception applies:

> first, where the lawsuit is objectively baseless and the defendant's **[*15]** motive in bringing it was unlawful; second, where the conduct involves a series of lawsuits brought pursuant to a policy of starting legal proceedings without regard to the merits and for an unlawful purpose;

> and third, if the allegedly unlawful conduct consists of making intentional misrepresentations to the court, litigation can be deemed a sham if a party's knowing fraud upon, or its intentional misrepresentations to, the court deprive the litigation of its legitimacy.

Sosa, 437 F.3d at 939 (citations and internal quotation marks omitted). If any of these exceptions applies, liability can be constitutionally imposed for the act of initiating litigation.

It is less clear how the sham exception applies when the petitioning conduct is something other than the filing of lawsuits:

> For instance, if the alleged anticompetitive behavior consisted of lobbying a state legislature (as in *Noerr*), rather than filing a suit in state court, it would seem quite pointless to ask whether the lobbying effort was "objectively baseless." To decide objective baselessness, we would need objective standards, of which there are few, if any, in the political realm of legislation, against which to measure the **[*16]** defendant's conduct.
>
> Similarly, the second and third variants of the litigation sham exception do not make sense in the legislative realm. Subjecting a defendant to antitrust liability because it pursued a pattern of baseless legal claims does not generate the same collateral consequences as subjecting the same defendant to antitrust liability because it engaged in numerous unsuccessful attempts to lobby a state legislature -- the latter would eviscerate the *Petition Clause*. And the sham exception for intentional fraud on a court cannot lightly be taken to apply in a legislative context because, as the Supreme Court has observed, the political arena has a higher tolerance for outright lies than the judicial arena does.

Kottle v. Nw. Kidney Ctrs., 146 F.3d 1056, 1061 (9th Cir. 1998). Accordingly, all that can be said is that, if the petitioning activity is oriented toward the legislature, "the sham exception is extraordinarily narrow" and the activity enjoys a broader scope of immunity. *Id.*

With respect to petitioning administrative agencies, the scope of *Noerr-Pennington* immunity depends on the degree of political discretion exercised by the government agency. If the agency acts as an **[*17]** adjudicative body, the range of petitioning activities afforded immunity is narrower than if it is essentially a political body. *Id. at 1061-62*. Matters before an administrative agency should be treated like judicial proceedings to the extent the agency's actions "are guided by enforceable standards subject to review." *Id. at 1062*. Thus, under these circumstances, liability cannot be imposed for petitioning an administrative agency unless the petition is a sham: objectively baseless, part of a series of meritless petitions or rendered illegitimate by misrepresentations made to the agency. If, on the other hand, the agency is not guided by enforceable standards and is thus more akin to a political body, the sham exception is "extraordinarily narrow" and the activity enjoys a broader scope of immunity.

Defendants' argument that the *Noerr-Pennington* doctrine protects their conduct fails for two principal reasons. First, Defendants' interactions with the United States did not constitute petitioning activity and thus do not implicate *Noerr-Pennington* immunity in any way. Defendants did not, for example, lobby Congress to pass legislation that was favorable to them or attempt to persuade **[*18]** a federal regulatory body to grant them permission to take a particular course of action. [5] Rather, they entered into a business deal with the United States for the purchase of their land. Defendants have not cited any case in which the *Noerr-Pennington* doctrine was found to protect conduct in connection with business negotiations with the government. This alone is a sufficient basis for denying the present motion.

> 5 Defendants' efforts to obtain approval of the SYP from the CDF, in contrast, could be considered petitioning activity.

Second, even assuming that Defendants' negotiations with the United States did constitute a petition -- and they did not -- the *Noerr-Pennington* doctrine does not apply here because it merely precludes liability from being imposed for the *act of petitioning* the government. Plaintiffs do not assert that Defendants violated the False Claims Act by "petitioning" the government -- that is, by attempting to persuade the United States to purchase their land. Such a claim would arguably be precluded by the *Noerr-Pennington* doctrine, assuming the negotiations constituted a petition to begin with. Rather, Plaintiffs assert that Defendants violated the False Claims **[*19]** Act by submitting during the course of the negotiations an SYP in which they presented false information to the United States, and the approval of which had been obtained through committing fraud on the CDF. Plain-

tiffs seek to impose liability, not for the act of "petitioning" the government, but for specific acts committed in the course of "petitioning" the government. This is a critical distinction. The *First Amendment* provides that liability generally cannot be imposed on the basis that one has exercised his or her right to petition the government. It does not provide that liability cannot be imposed for any conduct whatsoever that occurs during the course of petitioning the government. While citizens have a *First Amendment* right to petition the government, they do not have a *First Amendment* right to lie while doing so. Were it otherwise, application of the False Claims Act itself would, in many cases, be unconstitutional.

Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc.., 690 F.2d 1240 (9th Cir. 1982), demonstrates this point. In that case, the Ninth Circuit addressed the viability of various antitrust claims based on protests filed with the Interstate Commerce Commission **[*20]** (ICC), an administrative agency that regulated the rates that the plaintiff, a freight forwarder, was permitted to charge. In order to compete with lower rates offered by unregulated "shipper associations," the plaintiff petitioned the ICC to allow it to lower its rates. The plaintiff's competitors filed protests with the ICC to prevent the plaintiff from charging the lower rates, which had the potential to draw away their business. The new rates were approved, and the plaintiff sued its competitors for antitrust violations.

The plaintiff in *Clipper Exxpress* relied on three different theories of antitrust liability. First, it alleged that the defendants unlawfully interfered with competition by protesting the new rates. To avoid application of *Noerr-Pennington* immunity, the plaintiff asserted that the protests were shams lacking any legal basis and were filed solely for the purpose of restricting competition. Second, the plaintiff alleged that the defendants were liable for antitrust violations under the *Walker Process* doctrine for attempting to influence ICC action by supplying the agency with fraudulent information. This doctrine, which originated in *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp., 382 U.S. 172, 86 S. Ct. 347, 15 L. Ed. 2d 247 (1965),* **[*21]** "extends antitrust liability to one who commits fraud on a court or agency to obtain competitive advantage." *Clipper Exxpress, 690 F.2d at 1247*. Third, the plaintiff "contended that the protests were simply part of a larger independent antitrust violation." *Id*.

The *Clipper Exxpress* court discussed the applicability of the sham exception to *Noerr-Pennington* immunity with respect to the first claim. It concluded that the exception applied because the defendants' protests with the ICC were "spurious, baseless, and prosecuted without regard to their merit, intended only to delay competitive action, not to influence governmental action." *Id. at 1253*.

The court then addressed, as a separate matter, whether antitrust liability could be constitutionally imposed under the *Walker Process* doctrine for supplying the ICC with false information. The court noted that administrative proceedings are distinct from the political sphere, where debate can "accommodate false statements and reveal their falsity." *Id. at 1261*. Because supplying administrative agencies with false information "threatens the fair and impartial functioning of these agencies," the court reasoned, such conduct does not deserve *First Amendment* **[*22]** immunity from the antitrust laws. *Id*. Accordingly, the court held, "There is no *first amendment* protection for furnishing with predatory intent false information to an administrative or adjudicatory body. The *first amendment* has not been interpreted to preclude liability for false statements." *Id*. In so holding, the court did not craft a new exception to *Noerr-Pennington* immunity. Rather, the court established that *Noerr-Pennington* immunity does not protect the act of making false statements in the first place.

Although *Clipper Exxpress* addressed the scope of protection, under the *Noerr-Pennington* doctrine, afforded false statements that are alleged to violate the antitrust laws, there is no reason why the scope of constitutional protection would differ with respect to false statements that are alleged to violate the False Claims Act. Similarly, although *Clipper Exxpress* addressed false statements made to an agency acting in an adjudicatory capacity, the false statements at issue here threatened the United States' ability to make an informed decision on a matter of interest to the public, and were not made in a sphere where debate was likely to reveal their falsity. Accordingly, *Clipper* **[*23]** *Exxpress* is dispositive of the present motion. Here, as in that case, Defendants allegedly "knew the falsity of their statements, and made those statements in a deliberate attempt to mislead" the United States into believing that their remaining holdings would be sustainably harvested. *Id*. Accordingly, the *First Amendment* offers Defendants no protection from liability under the False Claims Act.

Defendants dispute that *Clipper Exxpress* is applicable to the present case and assert that there is "no exception to the *Noerr-Pennington* doctrine for false statements." This assertion oversimplifies the relationship between false statements and *Noerr-Pennington* immunity. Although Defendants cite a number of cases involving application of the *Noerr-Pennington* doctrine when the defendant is alleged to have made false statements, those cases involve harm flowing from the very *act of petitioning* the government. Where the cases discuss the issue of false statements, it is in the context of determining whether such statements are sufficient to render the

petition a sham, thereby removing the act of petitioning from the realm of *First Amendment* protection. As discussed above, when false statements are **[*24]** made in the course of judicial or other adjudicative proceedings, the petition can be deemed a sham only if "a party's knowing fraud upon, or its intentional misrepresentations to" the court or agency deprive the proceedings of their legitimacy. *Sosa, 437 F.3d at 939*. The cases do not, as Defendants assert, hold that misrepresentations to the government are themselves protected by the *First Amendment*; they hold merely that, unless the misrepresentations strip the underlying petition of legitimacy, *Noerr-Pennington* immunity continues to protect the act of petitioning.

Assuming for the purpose of this discussion that Defendants' business negotiations with the United States constituted a petition, the sham exception is not relevant here. Plaintiffs do not need to demonstrate that Defendants' "petitioning" activities were a sham because they do not seek to impose liability for engaging in those activities. The act for which Plaintiffs seek to impose liability -- submitting to the United States an SYP containing false statements and approved by the CDF under false pretenses -- is not protected by the *Noerr-Pennington* doctrine in the first place, as *Clipper Exxpress* makes clear. It is therefore **[*25]** neither necessary nor possible to determine whether an exception to the doctrine applies to Defendants' conduct.

A closer look at the specific cases cited by Defendants demonstrates that Defendants' alleged conduct with respect to the SYP, even if it occurred within the context of petitioning activity, is not protected by the *First Amendment*. In *Kottle v. Northwest Kidney Centers, 146 F.3d 1056 (9th Cir. 1998)*, the Ninth Circuit addressed an antitrust claim based on the defendant's opposition to the plaintiff's application to a state agency for approval to build two kidney dialysis centers. The defendant, the only provider of kidney dialysis services in the area, "aggressively opposed" the plaintiff's application "using methods and means which were improper and unlawful," including making false statements and misrepresentations to the agency. *Id. at 1058*. The court held that the "lobbying effort designed to influence [the] state administrative agency's decision . . . [was] within the ambit of the [*Noerr-Pennington*] doctrine." *Id. at 1059*. When the court discussed the significance of the defendant's misrepresentations to the agency, it was in the context of the sham exception. It found **[*26]** that the exception did not apply because the plaintiff's allegations of misrepresentations were too vague to demonstrate that the agency proceedings had been stripped of their legitimacy. *Id. at 1063-64*. Unlike Plaintiffs here, the plaintiff in *Kottle* charged the defendant with liability for engaging in petitioning activity. Thus, the court had no opportunity to consider whether the defendant could have been held liable for the independent act of making false statements to the agency.

Liberty Lake Investments, Inc. v. Magnuson, 12 F.3d 155 (9th Cir. 1993) is similarly inapplicable to the present case. In *Liberty Lake*, the defendant had allegedly initiated baseless litigation, in violation of the antitrust laws, challenging on environmental grounds the plaintiff's plan to build a shopping center. As in *Kottle*, the court's discussion of fraud and misrepresentation focused on the sham exception and whether the litigation had been deprived of its legitimacy. *Id. at 159*. This discussion is not relevant here, where the sham exception is inapposite because the challenged activity is not protected by *Noerr-Pennington* immunity to begin with. Similarly, *Oregon Natural Resources Council v. Mohla, 944 F.2d 531 (9th Cir. 1991)*, **[*27]** and *Omni Resource Development Corp. v. Conoco, Inc., 739 F.2d 1412 (9th Cir. 1984)*, both involved attempts to impose liability based on the initiation of litigation. In *Mohla*, the counter-claim plaintiff alleged that the counter-claim defendant had interfered with the former's business relations by filing a lawsuit to enjoin it from logging a tract of national forest land. In *Omni*, the plaintiff charged the defendant with violating the antitrust laws by pursuing a trespass lawsuit in state court to prevent the plaintiff from conducting mining operations. In both cases, the plaintiff sought to impose liability for the act of petitioning and the court's discussion of misrepresentations focused on the applicability of the sham exception. *Mohla, 944 F.2d at 535-36*; *Omni, 739 F.2d at 1414-15*. Notably, in *Omni*, the court's finding that the lawsuit was not a sham was based on the fact that "nothing more [was] alleged than the use of false affidavits in the state suit." *739 F.2d at 1414*. **[*28]** Although filing false affidavits was not sufficient to render the litigation a sham, it goes without saying that liability could nonetheless be imposed for the act of submitting a false affidavit to a court.

In *Boone v. Redevelopment Agency of San Jose, 841 F.2d 886 (9th Cir. 1988)*, a developer was alleged to have violated the antitrust laws by conspiring with city officials to amend a redevelopment plan in a way that would drive down the value of its competitors' buildings. Although the antitrust claim in *Boone* was not based on the initiation of litigation as in the cases just discussed, the plaintiffs nonetheless sought to impose liability on the developer based on the fact that it had petitioned the government. The court found that the city officials and the redevelopment agency responsible for the plan "were carrying out essentially legislative tasks in amending the plan." *Id. at 896*. Because the amendment process operated in the political realm, where misrepresentations are commonplace, the misrepresentation was not sufficient to remove *Noerr-Pennington* immunity from the lobby-

ing efforts. *Id. at 896-97*. While *Boone* held that antitrust liability could not be imposed for engaging **[*29]** in those efforts, the case did not address whether liability could be imposed under a statute that made it independently unlawful to make misrepresentations to the redevelopment agency or to city officials. Thus, *Boone* does not address the issue before the Court. Moreover, even if *Boone* is read to stand for the proposition that liability could not be imposed for making such misrepresentations, the facts in *Boone* are not similar to those here. Defendants are not alleged to have made false statements in the course of lobbying a legislative body. The tolerance afforded to lobbying of the type described in *Boone* is premised on the notion that debate in the political realm is capable of exposing misrepresentations. No such tolerance is warranted here.

It is true that conduct that is "incidental" to a petition is protected under the *First Amendment*. However, no case cited by Defendants has extended immunity to anything more than the *act* of engaging in incidental conduct. In *Sosa v. DIRECTV, Inc., 437 F.3d 923 (9th Cir. 2006)*, the Ninth Circuit considered whether the defendant could be held liable under the Racketeer Influenced and Corrupt Organizations Act for sending a pre-litigation demand **[*30]** letter. The court extended *Noerr-Pennington* immunity to the act of communicating settlement demands prior to initiating actual litigation because such communication is incidental to the litigation.

In *Freeman v. Lasky, Haas & Cohler, 410 F.3d 1180 (9th Cir. 2005)*, the Ninth Circuit addressed whether the defense of a lawsuit could serve as the basis of an antitrust claim where the defendants committed discovery misconduct, including subornation of perjury and intimidation of witnesses, that allegedly had an anti-competitive effect. The court noted that discovery is "incidental" to a petition, and thus is entitled to protection under the *Noerr-Pennington* doctrine. Nonetheless, *Freeman* did not purport to immunize all discovery conduct from sanctions; the court's analysis demonstrates that it was concerned with whether antitrust liability could be imposed for the act of defending the lawsuit, not with whether the specific instances of discovery misconduct were entitled to protection in and of themselves. In evaluating the applicability of the "baseless litigation" prong of the sham exception, the court focused on whether the defense *as a whole* was baseless, and therefore not entitled to **[*31]** *First Amendment* protection; it noted that whether "particular misconduct violates the Sherman Act depends on whether the defense as a whole would be actionable." *Id. at 1185*. The court did not suggest that the discovery misconduct, which allegedly involved criminal acts, could not constitutionally be penalized. Similarly, in discussing whether misrepresentations allegedly made to the court eliminated *Noerr-Pennington* immunity under the "fraud or misrepresentations" prong of the sham exception, the court evaluated whether the misrepresentations were severe and persuasive enough to deprive the proceedings of their legitimacy. The court stated, "Our conclusion that the defense as a whole was not a sham also establishes that this isolated instance of litigation misconduct would not, if proven, deprive the defense as a whole of its legitimacy." *Id. at 1185 n.2*. This passage further emphasizes that the *Freeman* court treated the conduct for which the plaintiff sought to impose liability as the act of defending the lawsuit, not the act of making misrepresentations to the court in the course of defending the lawsuit. Importantly, the Ninth Circuit did not suggest that the defendants' *First Amendment* **[*32]** right would be violated by the imposition of sanctions for committing discovery misconduct or for the act of making misrepresentations to the court. In fact, the court noted without comment that the district court had imposed sanctions for discovery misconduct. *Id. at 1185*.

Defendants have not cited any case in which the Ninth Circuit or the Supreme Court has held that liability cannot be imposed for submitting a false statement to the government in the course of petitioning it. [6] Moreover, Defendants' implicit position -- that, once an individual has initiated petitioning activity, any conduct whatsoever taken in the course of that activity is out of the law's reach -- is simply untenable. The *First Amendment* does not grant individuals the unbridled right to do whatever they like so long as it takes place in the context of petitioning the government. Parties to litigation are not allowed to perjure themselves on the witness stand. Lobbyists do not have a constitutional right to bribe legislators. Contractors may not submit falsified safety reports when applying for building permits. Drivers are not entitled to file forged smog certificates when registering their vehicles.

> 6 The Court **[*33]** again notes that Defendants did not petition the United States, but merely engaged in negotiations for a real estate transaction.

The Court is aware that the San Francisco Superior Court, relying on the decision of the California Court of Appeal in *Gallegos*, reached a different conclusion with respect to the application of the *Noerr-Pennington* doctrine to the claim against Pacific Lumber under the California False Claims Act. However, *Gallegos* involved a claim under California's Unfair Competition Law. The appeals court was not concerned simply with Defendants' alleged false statements to the CDF, but with Defendants' overall efforts to obtain approval of the SYP. The Superior Court did not distinguish the claim under the Cali-

fornia False Claims Act from *Gallegos* on this basis; it did not address the fact that the plaintiff was not seeking to impose liability on Pacific Lumber for engaging in lobbying activity. The court's discussion of the sham exception and its focus on the protection afforded to petitioning activity in general are not relevant to this case. The Court respectfully disagrees with the reasoning of the Superior Court to the contrary.

At oral argument, Defendants requested **[*34]** leave to file an interlocutory appeal should the Court deny their motion. A district court may certify appeal of interlocutory orders only if three factors are present. First, the issue to be certified must involve a "controlling question of law." *28 U.S.C. § 1292(b)*. Second, there must be "substantial ground for difference of opinion" on the issue. *Id*. Third, it must be likely that an interlocutory appeal will "materially advance the ultimate termination of the litigation." *Id*.

The application of the *Noerr-Pennington* doctrine is a controlling question of law in that Plaintiffs may not pursue their claim if it applies. Because Plaintiffs assert only one claim, an interlocutory appeal, if successful, would likely advance the ultimate termination of this litigation. However, if the appeal were to fail, the termination of the litigation would be delayed, and the Court of Appeals would be burdened with a second appeal. In addition, the Court finds that the grounds for difference of opinion on the issue presented are not substantial enough to justify an interlocutory appeal. Although the Superior Court found that the *Noerr-Pennington* doctrine shields Defendants' conduct, no precedent binding **[*35]** on this Court suggests that the doctrine should be extended in such a manner.

CONCLUSION

For the foregoing reasons, the Court DENIES Defendants' motion for judgment on the pleadings. [7]

7 The Court overrules as moot Defendants' objections to the Maranto declaration. The Court did not rely on the declaration in reaching its decision. The Court grants Defendants' request for judicial notice of the state court's order granting their motion for judgment on the pleadings and the transcript of the associated proceedings. The request is denied in all other respects.

IT IS SO ORDERED.

Dated: 2/9/09

/s/ Claudia Wilken

CLAUDIA WILKEN

United States District Judge