

United States District Court
For the Northern District of California

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

KATHLEEN HANNI, individually and on behalf of all others similarly situated, TIMOTHY T. HANNI, CHASE L. COSTELLO, and LANDEN T. HANNI, a minor, by and through his parent and Natural Guardian, Kathleen Hanni.

Plaintiffs,

v.

AMERICAN AIRLINES, INC., and DOES 1 through 20, inclusive,

Defendants.

No. C 08-00732 CW

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS IN PART AND DENYING IT IN PART AND DENYING PLAINTIFF'S MOTION FOR INTERLOCUTORY APPEAL

Defendant American Airlines, Inc. (AA) has filed a motion to dismiss Plaintiff Kathleen Hanni's third amended complaint (TAC). Plaintiff opposes Defendant's motion. Plaintiff moves for an order certifying an interlocutory appeal on the portions of the Court's July 11, 2008 order which dismissed with prejudice parts of Plaintiff's first amended complaint (FAC). Defendant opposes the motion. The motions were taken under submission on the papers. Having considered all of the papers filed by the parties, the Court grants in part Defendant's motion to dismiss and denies it in part and denies Plaintiff's motion for an interlocutory appeal.

BACKGROUND

As discussed in the Court's previous orders, on December 28, 2007, Plaintiff filed this putative class action, alleging claims based on Plaintiff's experiences on a December 29, 2006 American Airlines flight from San Francisco, connecting at Dallas-Forth Worth Airport (DFW), to Mobile, Alabama. Plaintiff alleges that the seven hour trip took over fifty hours due to various delays, which included nine-and-one-half hours confined on the airplane on the runway at the Austin, Texas airport. The complaint included claims for false imprisonment, intentional infliction of emotional distress, negligence, breach of contract and intentional misrepresentation.

Defendant moved pursuant to Federal Rules of Civil Procedure 9(b) and 12(b)(6) to dismiss the complaint. The Court granted the motion in part and denied it in part, giving Plaintiff leave to file an amended complaint. (April 25, 2008 order.) On May 15, 2008, Plaintiff filed her first amended complaint (FAC). Plaintiff again alleged claims for false imprisonment, negligence, breach of contract, fraud and included three additional causes of action for conversion, civil conspiracy and a claim pursuant to the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961. Defendant again moved pursuant to Federal Rule of Civil Procedure 12(b)(6) to dismiss the FAC.

On July 11, 2008, the Court issued an order granting the motion in part and denying it in part. The Court dismissed with prejudice Plaintiff's claims for false imprisonment, intentional infliction of emotional distress and fraud and dismissed her claim

1 for breach of contract to the extent it was based on paragraphs
2 three, ten, nineteen or the specified portions of paragraph
3 eighteen of the Conditions of Carriage (COC). The Court also
4 dismissed without prejudice Plaintiff's claims for civil conspiracy
5 and RICO. (July 11, 2008 order at 6, 16, 19-20.) The Court gave
6 Plaintiff leave to file a second amended complaint that could
7 include: (1) a negligence claim based on Defendant's failure to
8 provide adequate food, water, restroom facilities and ventilation
9 in violation of its duties as a common carrier; (2) a breach of
10 contract claim based on paragraph five of the COC or the portions
11 of paragraph eighteen of the COC identified in paragraphs 124(e)
12 and (g) of the FAC; and (3) a conversion claim. The Court also
13 allowed Plaintiff to include a claim for civil conspiracy if,
14 consistent with Rule 11, she could name at least one alleged
15 conspirator as a defendant and allege facts to support a finding
16 that the individual conspired with other individuals with unlawful
17 intent. (July 11, 2008 order at 20.)

18 On July 31, 2008, Plaintiff filed her second amended complaint
19 (SAC). On August 12, 2008, the parties stipulated that Plaintiff
20 would file a third amended complaint (TAC) that included
21 Plaintiff's husband and sons as plaintiffs and that modified the
22 allegations of the complaint.¹ (Stipulation to File an Amended
23 Complaint, August 12, 2008.) On August 13, 2008, Plaintiff filed
24 her TAC alleging claims for negligence, breach of contract,

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26 ¹ For the sake of convenience in comparison to previous
27 orders, the Court will continue to use the singular Plaintiff
instead of the plural Plaintiffs in this order.

1 conversion and civil conspiracy. (TAC, August 13, 2008 ¶ 87-109.)

2 On August 8, 2008, Plaintiff filed a notice of appeal based on
3 the portions of her FAC that the Court dismissed with prejudice.
4 (Plaintiff's Notice of Appeal, August 8, 2008.) On August 12,
5 2008, the Court issued an order stating that it retained
6 jurisdiction of this case pursuant to Federal Rule of Civil
7 Procedure 54 in that not all of Plaintiff's claims had been
8 adjudicated. (August 12, 2008 order at 1.) On October 3, 2008,
9 the Ninth Circuit dismissed Plaintiff's appeal for failure to
10 prosecute. (United States Court of Appeals for the Ninth Circuit,
11 October 3, 2008 order at 1.)

12 LEGAL STANDARD

13 As stated in the Court's previous orders regarding the first
14 and second motions to dismiss, when considering a motion to dismiss
15 under Rule 12(b)(6) for failure to state a claim, dismissal is
16 appropriate only when the complaint does not give the defendant
17 fair notice of a legally cognizable claim and the grounds on which
18 it rests. Bell Atl. Corp. v. Twombly, __ U.S. __, 127 S. Ct. 1955,
19 1964 (2007). In considering whether the complaint is sufficient to
20 state a claim, the court will take all material allegations as true
21 and construe them in the light most favorable to the plaintiff. NL
22 Indus., Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986).

23 DISCUSSION

24 I. Negligence

25 Defendant argues that the Court should dismiss with prejudice
26 Plaintiff's negligence claim because she does not appear able to
27 plead it based only on Defendant's failure to provide adequate
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1 food, water, restroom facilities and ventilation in violation of
2 its duties as a common carrier without also re-pleading the false
3 imprisonment and intentional infliction of emotional distress
4 claims that the Court has dismissed with prejudice. Defendant also
5 argues that Plaintiff, in the context of her negligence claim, has
6 re-plead her Fourth Amendment allegation, which the Court stated in
7 its July 11, 2008 order could not be applied to Defendant as a
8 matter of law.

9 Plaintiff argues that the high duty of care of a common
10 carrier includes a duty not to imprison passengers falsely, not to
11 intentionally inflict emotional distress and to comply with the
12 Fourth Amendment.

13 The Court has already addressed Plaintiff's argument in its
14 July 11, 2008 order and dismissed with prejudice Plaintiff's claims
15 for false imprisonment and intentional infliction of emotional
16 distress. (July 11, 2008 order at 6 and 19.) Further, the Court
17 already held that there is no basis in law for Plaintiff's Fourth
18 Amendment claim and did not give Plaintiff leave to amend this
19 claim. (July 11, 2008 order at 5, 20.) Plaintiff's negligence
20 allegations that include charges of false imprisonment, intentional
21 infliction of emotional distress and violation of the Fourth
22 Amendment are dismissed with prejudice. Plaintiff must comply with
23 the Court's July 11, 2008 order, which limited her negligence claim
24 to Defendant's failure to provide adequate food, water, restroom
25 facilities and ventilation in violation of its duties as a common
26 carrier.

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1 II. Special Needs Contract Claim

2 Defendant argues that the claim in Plaintiff's TAC that
3 Defendant breached its contract by failing to meet Plaintiff's
4 special needs should be dismissed because the Court's July 11, 2008
5 order did not specify that Plaintiff could make such a claim and
6 because the COC clearly states that Defendant is not liable for
7 checked medicines.

8 In granting leave to amend, the Court advised Plaintiff that
9 she could include her breach of contract claim to the extent it was
10 based on paragraph five of the COC or the portions of paragraph
11 eighteen of the COC identified in paragraphs 124(e) and (g) of the
12 FAC. In the TAC, Plaintiff alleges that Defendant breached its
13 contract to meet Plaintiff's special needs, and specifies in her
14 opposition that the special needs were her anti-seizure medications
15 and her son's attention deficit hyperactivity disorder (ADHD)
16 medications that were in their checked baggage to which they were
17 denied access for two days. (Plaintiff's Opposition at 3.)

18 This allegation, however, was paragraph 124(h) in the FAC and
19 Defendant moved to dismiss it. In its July 11, 2008 order, the
20 Court did not specifically address this point, but indicated that
21 only the portions of paragraph eighteen of the COC mentioned in
22 paragraphs 124(e) and 124(g) of the FAC could be pursued. The
23 Court did not specifically give Plaintiff leave to include
24 paragraph 124(h) of the FAC in her amended complaint.

25 Plaintiff's special needs contract claim fails because
26 paragraph six of the COC specifically states that Defendant does
27 not accept medicines in checked baggage and assumes no liability

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1 for such items. (COC ¶ 6.) Thus, Plaintiff's contract claim based
2 on special needs is dismissed with prejudice.

3 III. Civil Conspiracy

4 Defendant argues that Plaintiff's civil conspiracy cause of
5 action should be dismissed because (1) Defendant's managers, whom
6 Plaintiff claims are conspirators, were acting within the scope of
7 their employment and were not seeking independent pecuniary gain;
8 (2) Plaintiff's substantive allegations are barred in that there
9 can be no civil conspiracy based on negligence or breach of
10 contract; (3) the allegation of civil conspiracy to commit fraud
11 fails to meet the pleading requirements of Federal Rule of Civil
12 Procedure 9(b); and (4) Plaintiff's allegations of a conspiratorial
13 agreement amount to pure speculation.

14 In its July 11, 2008 order, the Court granted Plaintiff leave
15 to amend the civil conspiracy claim if, consistent with the
16 requirements of Rule 11 of the Federal Rules of Civil Procedure,
17 she could name at least one of the alleged conspirators as a
18 defendant and allege facts sufficient to support a finding that the
19 individual conspired with other individuals with unlawful intent.

20 In the TAC, Plaintiff asserts a claim for civil conspiracy
21 based on allegations that AA managers Al Tinsley, Don Dillman,
22 Bonnie Sutton and other operations or general managers² agreed to

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24 ² The use of Doe Defendants is not favored in the Ninth
25 Circuit. Gillespie v. Civiletti, 629 F.2d 637, 642 (9th Cir.
26 1980). In its July 11, 2008 order, the Court gave Plaintiff leave
27 to amend if she could name at least one of the alleged conspirators
28 as a defendant. Although Plaintiff refers to these individuals as
Doe Defendants in the body of the complaint, she does not name any
of them as a defendant in the caption of the complaint nor state
any basis for jurisdiction over them.

1 participate in committing torts against Plaintiff, breached the
2 standard of care owed to her and threatened her physical safety and
3 emotional well-being for their own commercial convenience and
4 pecuniary gain. (TAC ¶ 105.) It appears that Plaintiff is
5 alleging that these individuals engaged in civil conspiracy to
6 commit negligence, breach of contract and fraud.

7 A. Standing

8 Plaintiff argues that Defendant AA lacks standing to move for
9 dismissal of the civil conspiracy claim because she is not bringing
10 it against AA. On July 11, 2008, this Court issued an order
11 dismissing Plaintiff's FAC with leave to amend on certain
12 conditions. Plaintiff filed a TAC that fails to conform to these
13 conditions so Defendant is within its rights to file another motion
14 to dismiss. Further, a district court may dismiss a complaint, or
15 part thereof, under Rule 12(b)(6) on its own motion provided a
16 plaintiff has had an opportunity to file a memorandum in support of
17 his or her pleading, which Plaintiff has had in this action. Wong
18 v. Bell, 642 F.2d 359, 361-62 (9th Cir. 1981).

19 B. Civil Conspiracies Among Corporate Employees

20 There can be no civil conspiracy among a corporation and its
21 own employees. Icasiano v. Allstate Ins. Co., 103 F. Supp. 2d
22 1187, 1192 (N.D. Cal. 2000) (applying California law); Leasehold
23 Expense Recovery, Inc. v. Mothers Work, Inc., 331 F.3d 452, 463
24 (5th Cir. 2003) (applying Texas law). However, civil conspiracies
25 among corporate employees to violate the rights of plaintiffs are
26 actionable, even if the employees are purportedly acting within the
27 scope of their employment, if the conspirators are independently
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1 seeking individual pecuniary gain through unlawful conduct.
2 Gardner v. UICI, 508 F.3d 559, 562 (9th Cir. 2007); Berg & Berg
3 Enterprises, LLC v. Sherwood Partners, Inc., 131 Cal. App. 4th 802,
4 817-818 (2005). "Cases have interpreted the 'financial advantage'
5 exception to the agent's immunity rule to mean a personal advantage
6 or gain that is over and above ordinary professional fees earned as
7 compensation for performance of the agency." Id. at 834. In Berg
8 & Berg Enterprises, LLC, an allegation of excessive fees charged
9 for services was not considered over and above monetary
10 compensation received in exchange for professional services. Id.
11 at 836.

12 Plaintiff alleges that AA's employees conspired against
13 Plaintiff for personal financial reasons because they receive
14 higher bonuses if AA pays less to passengers in compensation for
15 diversions and delays. (TAC ¶ 108.) Defendant claims that the
16 exception to the intra-corporate conspiracy doctrine does not
17 include compensation paid to the employee by the employer and this
18 is not considered independent pecuniary gain.

19 By analogy to Berg & Berg Enterprises, LLC, bonuses are not
20 independent pecuniary gain because they are part of the
21 compensation earned by employees from AA. Thus, because the AA
22 employees are not seeking individual pecuniary gain, Plaintiff has
23 not alleged an exception to the law that there can be no civil
24 conspiracy among employees of a corporation.

25 C. Adequacy of Civil Conspiracy Claim

26 Defendant argues that Plaintiff's specific allegations of a
27 civil conspiracy fail to state a claim as a matter of law because
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1 negligence and breach of contract do not support such a cause of
2 action, the allegations of conspiracy to commit fraud fail to meet
3 the requirements of Federal Rule of Civil Procedure 9(b) and the
4 conspiracy charges are speculative.

5 (1) Civil Conspiracy based on Negligence and Breach of
6 Contract

7 An allegation that persons entered into a conspiracy to commit
8 negligence as a matter of law cannot support a cause of action for
9 civil conspiracy. Koehler v. Pulvers, 606 F. Supp. 164, 173, n. 10
10 (S.D. Cal. 1985) (applying California law); Firestone Steel
11 Products Co. v. Barajas, 927 S.W. 2d 608, 617 (Tex. 1996).

12 Likewise, there is no cause of action for civil conspiracy to
13 breach a contract. Mintel Learning Tech., Inc. v. Beijin Kaidi
14 Educ. & Tech. Dev. Co., No. C 06-7541 PJH, 2007 WL 2288329 at *5
15 (N.D. Cal. Aug. 9, 2007) (applying California law); Leasehold
16 Expense Recovery, Inc., 331 F.3d at 463 (applying Texas law).

17 Paragraph 105 in the TAC alleging that Doe Defendants
18 committed "torts against Plaintiffs" and other conspiracy
19 allegations that sound in negligence are dismissed with prejudice
20 for this reason. Likewise, paragraph 106(e) of the TAC contains
21 allegations that are covered by the COC contract and thus is
22 dismissed with prejudice because there can be no civil conspiracy
23 for breach of contract.

24 (2) Civil Conspiracy to Commit Fraud

25 In order to establish intentional fraud under California and
26 Texas law, plaintiffs must prove "(1) misrepresentation;
27 (2) knowledge of falsity; (3) intent to defraud, i.e., to induce
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1 reliance; (4) justifiable reliance; and (5) resulting damage."
2 Conrad v. Bank of America, 45 Cal. App. 4th 133, 156 (1996); see
3 also Lane v. Halliburton, 529 F.3d 548, 564 (5th Cir. 2008)
4 (applying Texas law). A fraud claim requires the plaintiff to show
5 that he or she has "suffered consequential damages. . . . And the
6 damages suffered must be referable to, and caused by, the fraud."
7 Conrad, 45 Cal. App. 4th at 159.

8 Plaintiff alleges that Tinsley, Dillman, Sutton and other
9 unnamed individuals made misrepresentations to American pilots, who
10 repeated them to her, that there were no gates or busses available
11 to permit passengers to exit the aircraft safely, that aircraft
12 were cleared for takeoff or would be taking off shortly and that
13 the Dallas DFW airport was closed. (TAC ¶ 106(b).)

14 Plaintiff's claim of conspiracy to commit fraud fails for
15 omitting to plead reasonable reliance. There is no indication in
16 the TAC that Plaintiff relied on the AA managers' alleged
17 misrepresentations. In Plaintiff's opposition to Defendant's
18 motion to dismiss the FAC, she stated that she relied on the AA
19 managers' representations in remaining on the aircraft; however,
20 this contradicts her earlier statement that she revoked her consent
21 to remain on the aircraft. (FAC ¶ 89 and June 19, 2008 Opposition
22 at 7.) Hence, as in the July 11, 2008 order, the Court finds that
23 Plaintiff has failed adequately to allege that she reasonably
24 relied on the statements she alleges were fraudulent. The claim of
25 conspiracy to commit fraud is dismissed with prejudice for this
26 reason.

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1 (3) Speculative Civil Conspiracy Claim

2 A claim for civil conspiracy consists of three elements:

3 "(1) the formation and operation of the conspiracy, (2) wrongful
4 conduct in furtherance of the conspiracy, and (3) damages arising
5 from the wrongful conduct." Kidron v. Movie Acquisition Corp., 40
6 Cal. App. 4th 1571, 1581 (1995).³ "The conspiring defendants must
7 . . . have actual knowledge that a tort is planned and concur in
8 the tortious scheme with knowledge of its unlawful purpose." Id.
9 at 1582 (citing Wyatt v. Union Mortgage Co., 24 Cal. 3d 773, 784-86
10 (1979)). This knowledge must be combined with an intent to aid in
11 achieving the objective of the conspiracy. Id.; Schick v. Bach,
12 193 Cal. App. 3d 1321, 1328 (1987). An unlawful conspiracy claim
13 must contain "enough fact to raise a reasonable expectation that
14 discovery will reveal evidence of illegal agreement." Bell
15 Atlantic Corp. v. Twombly, __ U.S. __, 127 S. Ct. 1955, 1965
16 (2007). A bare allegation that a conspiracy existed does not
17 suffice. Id. at 1966, 1970.

18 Plaintiff fails to allege when and how the AA managers entered
19 into an agreement to keep her on the plane and to deny her services
20 and compensation. The claim contains little more than a bare
21 allegation that the conspiracy existed. Therefore, Plaintiff's
22 civil conspiracy claim also fails on this ground.

23 _____
24 ³ Texas law on civil conspiracy is the same as California law.
25 Civil conspiracy elements include: "(1) two or more persons; (2) an
26 object to be accomplished; (3) a meeting of the minds on the object
27 or course of action; (4) one or more unlawful, overt acts; and
28 (5) damages as the proximate result." Operation Rescue-National v.
Planned Parenthood of Houston and Southeast Texas, Inc., 975 S.W.
2d 546, 553 (Tex. 1998).

1 IV. Interlocutory Appeal

2 Plaintiff moves for an order certifying an interlocutory
3 appeal on the portions of the July 11, 2008 order which dismissed
4 with prejudice the causes of action in her FAC for false
5 imprisonment, intentional infliction of emotion distress and fraud
6 and parts of the causes of action for negligence and breach of
7 contract.

8 Pursuant to 28 U.S.C. § 1292(b), a district court may certify
9 an appeal of an interlocutory order only if three factors are
10 present. First, the issue to be certified must involve a
11 "controlling question of law." 28 U.S.C. § 1292(b). Establishing
12 that a question of law is controlling requires a showing that the
13 "resolution of the issue on appeal could materially affect the
14 outcome of litigation in the district court." In re Cement
15 Antitrust Litig., 673 F.2d 1020, 1026 (9th Cir. 1982).

16 Second, there must be "substantial ground for difference of
17 opinion" on the issue. 28 U.S.C. § 1292(b). A substantial ground
18 for difference of opinion is not established by a party's strong
19 disagreement with the court's ruling; the party seeking an appeal
20 must make some greater showing. Mateo v. M/S Kiso, 805 F. Supp.
21 792, 800 (N.D. Cal. 1992).

22 Third, it must be likely that an interlocutory appeal will
23 "materially advance the ultimate termination of the litigation."
24 28 U.S.C. § 1292(b); Mateo, 805 F. Supp. at 800. Whether an appeal
25 may materially advance termination of the litigation is linked to
26 whether an issue of law is "controlling" in that the court should
27 consider the effect of a reversal on the management of the case.

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1 Id. In light of the legislative policy underlying § 1292, an
2 interlocutory appeal should be certified only when doing so "would
3 avoid protracted and expensive litigation." In re Cement, 673 F.2d
4 at 1026; Mateo, 805 F. Supp. at 800. If, in contrast, an
5 interlocutory appeal would delay resolution of the litigation, it
6 should not be certified. Shurance v. Planning Control Int'l, Inc.,
7 839 F.2d 1347, 1348 (9th Cir. 1988).

8 "Section 1292(b) is a departure from the normal rule that only
9 final judgments are appealable, and therefore must be construed
10 narrowly." James v. Price Stern Sloan, Inc., 283 F.3d 1064, 1068
11 n.6 (9th Cir. 2002). Thus, the court should apply the statute's
12 requirements strictly, and should grant a motion for certification
13 only when exceptional circumstances warrant it. Coopers & Lybrand
14 v. Livesay, 437 U.S. 463, 475 (1978). The party seeking
15 certification of an interlocutory order has the burden of
16 establishing the existence of such exceptional circumstances. Id.
17 A court has substantial discretion in deciding whether to grant a
18 party's motion for certification. Brown v. Oneonta, 916 F. Supp.
19 176, 180 (N.D.N.Y. 1996) rev'd in part on other grounds, 106 F.3d
20 1125 (2nd Cir. 1997).

21 Plaintiff argues that there are substantial differences of
22 opinion on controlling questions of law regarding the issues she
23 wishes to appeal. For support, she cites Ray v. American Airlines,
24 Inc., No. 08-5025, slip op. (W.D. Ark. June 2, 2008), a nearly
25 identical case involving Defendant. In that case, the judge granted
26 Defendant's Rule 12(b)(6) motion on Plaintiff's contract and fraud
27 claims and denied it on Plaintiff's negligence and false
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1 imprisonment claims. Id. at 29-37. That different district courts
2 in different circuits ruled differently on Rule 12(b)(6) motions
3 does not provide a substantial ground for difference of opinion on
4 controlling questions of law.

5 Plaintiff argues that continuing the litigation on the
6 remaining issues will be time-consuming, expensive and a potential
7 waste of judicial resources if the Ninth Circuit disagrees with the
8 Court's Rule 12(b)(6) ruling after trial. However, an
9 interlocutory appeal on the issues identified by Plaintiff will not
10 advance the ultimate termination of the litigation. If the Ninth
11 Circuit affirms the Court's order, the interlocutory appeal would
12 have delayed the termination of this case. If the Ninth Circuit
13 reverse, the claims will go forward and one party may take a second
14 appeal, thus burdening the court of appeals with two appeals in the
15 same case.

16 Finally, there are no exceptional circumstances warranting
17 interlocutory appeal. For the foregoing reasons, Plaintiff's
18 motion for certification of an interlocutory appeal is denied.

19 V. Appeal Under the Collateral Order Doctrine

20 Plaintiff claims that an appeal is justified under the
21 collateral order doctrine.

22 Under 28 U.S.C. § 1291, appellate jurisdiction is typically
23 limited to final decisions of the district courts. The Supreme
24 Court, however, has held that under the collateral order doctrine a
25 party may appeal from a "narrow class of decisions that do not
26 terminate the litigation, but must, in the interest of achieving a
27 healthy legal system, nonetheless be treated as final." Digital

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1 Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863, 867 (1994). An
2 order is immediately appealable under the collateral order doctrine
3 when it "(1) conclusively determines the disputed question,
4 (2) resolves an important issue completely separate from the merits
5 of the action, and (3) is effectively unreviewable on appeal from a
6 final judgment." Sell v. United States, 539 U.S. 166, 176 (2003).
7 "This determination should not be made lightly because the
8 principle that appellate review should be deferred pending the
9 final judgment of the district court is central to our system of
10 jurisprudence." United States v. Amlani, 169 F.3d 1189, 1192 (9th
11 Cir. 1999). Because collateral jurisdiction requires all three
12 elements, the court lacks collateral order jurisdiction if even one
13 element is not met. McElmurry v. U.S. Bank Nat'l Ass'n, 495 F.3d
14 1136, 1140 (9th Cir. 2007).

15 Plaintiff argues that there is no realistic probability that
16 the Court will change its opinion on dismissal. The collateral
17 order doctrine, however, is not based on whether the district court
18 is likely to change its mind. Plaintiff can appeal after a final
19 judgment is entered. Plaintiff's motion for permission to appeal
20 is denied.

21 CONCLUSION

22 For the foregoing reasons, the Court GRANTS in part
23 Defendant's motion to dismiss the TAC and DENIES it in part.
24 (Docket #88.) Specifically, the Court dismisses with prejudice
25 Plaintiff's special needs contract claim, and her negligence claim
26 except to the extent that it is based on Defendant's failure to
27 provide adequate food, water, restroom facilities and ventilation
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1 in violation of its duties as a common carrier. In addition, the
2 Court dismisses with prejudice Plaintiff's claim for civil
3 conspiracy.

4 Plaintiff may pursue the following claims: (1) the negligence
5 claim to the extent it is based on Defendant's failure to provide
6 adequate food, water, restroom facilities and ventilation in
7 violation of its duties as a common carrier; (2) the breach of
8 contract claim to the extent it is based on paragraph five of the
9 COC or the portions of paragraph eighteen of the COC identified in
10 paragraphs 124(e) and (g) of the FAC; and (3) the conversion claim.
11 Plaintiff need not file a Fourth Amended Complaint.

12 Plaintiff's motion for certification of an interlocutory
13 appeal is DENIED. (Docket #90.)

14 The hearing, previously scheduled for November 13, 2008, is
15 vacated.

16 IT IS SO ORDERED.

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18 Dated: 11/21/08



CLAUDIA WILKEN
United States District Judge

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