

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

CHARLES ROBERTS, an individual;
and KENNETH MCKAY, an individual,
on behalf of themselves and
others similarly situated,

Plaintiffs,

v.

C.R. ENGLAND, INC., a Utah
corporation; OPPORTUNITY LEASING,
INC., a Utah corporation; and
HORIZON TRUCK SALES AND LEASING,
LLC., a Utah Limited Liability
Corporation,

Defendants.

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No. C 11-2586 CW

ORDER DENYING
PLAINTIFFS' MOTION
FOR CERTIFICATION
OF AN
INTERLOCUTORY
APPEAL PURSUANT TO
28 U.S.C.
§ 1292(b), Docket
No. 46, MOTION FOR
ENTRY OF PARTIAL
JUDGMENT PURSUANT
TO RULE 54(b),
Docket No. 47, AND
MOTION TO STAY
PENDING RESOLUTION
OF WRIT PETITION
OR DIRECT APPEAL,
Docket No. 52, AND
CONTINUING THE
EXISTING STAY OF
THE COURT'S
TRANSFER ORDER FOR
FOURTEEN DAYS

On January 25, 2012, the Court granted Defendants' motions to
dismiss Plaintiffs' claim under the California Franchise
Investment Law and to transfer venue for this putative class
action. In an effort to seek appellate review of this order,

1 Plaintiffs moved for certification of an interlocutory appeal,
2 pursuant to 28 U.S.C. § 1292(b), and moved for entry of partial
3 judgment under Federal Rule of Civil Procedure 54(b). Docket
4 Nos. 46 and 47. The Court stayed its order transferring the case
5 to the District of Utah, pending resolution of the motion for
6 certification and the motion for entry of partial judgment.
7 Having considered the parties' submissions, the Court denies both
8 motions. The stay of the Court's order to transfer the action is
9 lifted, allowing, however, fourteen days for Plaintiffs to seek a
10 stay from the Ninth Circuit.
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12 DISCUSSION

13 I. Certification Pursuant to 28 U.S.C. § 1292(b) and Partial
14 Judgment Pursuant to Rule 54(b)

15 Pursuant to 28 U.S.C. § 1292(b), the district court may
16 certify an appeal of an interlocutory order if (1) the order
17 involves a controlling question of law, (2) appealing the order may
18 materially advance the ultimate termination of the litigation, and
19 (3) there is substantial ground for difference of opinion as to the
20 question of law. See also, Reese v. BP Exploration (Alaska) Inc.,
21 643 F.3d 681, 687-88 (9th Cir. 2011) ("A non-final order may be
22 certified for interlocutory appeal where it 'involves a
23 controlling question of law as to which there is substantial
24 ground for a difference of opinion' and where 'an immediate appeal
25 from the order may materially advance the ultimate termination of
26 the litigation.'" (citing § 1292(b)).
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1 "Section 1292(b) is a departure from the normal rule that
2 only final judgments are appealable and therefore must be
3 construed narrowly." James v. Price Stern Sloan, Inc., 283 F.3d
4 1064, 1068 n.6 (9th Cir. 2002). Thus, the court should apply the
5 statute's requirements strictly, and should grant a motion for
6 certification only when exceptional circumstances warrant it.
7 Coopers & Lybrand v. Livesay, 437 U.S. 463, 475 (1978). The party
8 seeking certification to appeal an interlocutory order has the
9 burden of establishing the existence of such exceptional
10 circumstances. Id. A court has substantial discretion in
11 deciding whether to grant a party's motion for certification.
12 Brown v. Oneonta, 916 F. Supp. 176, 180 (N.D.N.Y. 1996), rev'd in
13 part on other grounds, 106 F.3d 1125 (2d. Cir. 1997).

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16 None of the requirements for certification under §1292(b) is
17 satisfied. First, Plaintiffs have not established a controlling
18 issue of law. "While Congress did not specifically define what it
19 meant by 'controlling,' the legislative history of 1292(b)
20 indicates that this section was to be used only in exceptional
21 situations in which allowing an interlocutory appeal would avoid
22 protracted and expensive litigation." In re Cement Antitrust
23 Litigation, 673 F.2d 1020, 1026 (9th Cir. 1982). In In re Cement,
24 the Ninth Circuit declined to consider an interlocutory appeal of
25 a district judge's order of recusal because "review involves
26 nothing as fundamental as the determination of who are the
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1 necessary and proper parties, whether a court to which a cause has
2 been transferred as jurisdiction, or whether state or local law
3 should be applied." Id. Here, Plaintiffs contend that they seek
4 to appeal a pure question of law. However, the Court's dismissal
5 of the CFIL claim resulted from Plaintiffs' failure to allege two
6 of the three elements required for such a claim. The Court found
7 that Plaintiffs inadequately alleged that the purported franchisor
8 granted them a right to offer or distribute services or goods to
9 customers and that the operation of their business was
10 substantially associated with the purported franchisor's trademark
11 or other commercial symbols. Although Plaintiffs characterize the
12 order of dismissal as turning on a single legal issue, that
13 characterization is incorrect.
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15 The present lawsuit is unlike Helman v. Alcoa Global
16 Fasteners, Inc., 2009 WL 2058541 (C.D. Cal.), aff'd, 637 F.3d 986,
17 990-92 (9th Cir. 2011), a case upon which Plaintiffs rely, in
18 which the district court certified a dismissal order for
19 interlocutory appeal and the Ninth Circuit accepted the appeal.
20 In Helman, the district court and court of appeal were required to
21 determine the statutory interpretation of the phrase "high seas"
22 in the Death on the High Seas Act. Id. at *1-2, 5. The
23 defendants argued that the DOSHA preempted the plaintiffs' state
24 law claims, and the outcome of the decision affected, among other
25 things, whether the case would be tried as a suit in admiralty,
26 the identities of the proper plaintiffs, and what damages could be
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1 recovered. Id. at *5. As explained earlier, the viability of
2 Plaintiffs' CFIL claim presents a mixed question of law and fact
3 and does not affect Plaintiffs' access to federal court, but
4 rather impacts in which venue Plaintiffs will be able to litigate
5 their class action. Plaintiffs have not demonstrated a
6 controlling question of law.

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8 With respect to the second requirement for certification,
9 that the appeal materially advance the ultimate termination of the
10 litigation, the Ninth Circuit recently stated that neither
11 § 1292(b)'s literal text nor controlling precedent requires that
12 the interlocutory appeal have a final, dispositive effect on the
13 litigation, only that it may "materially advance" the litigation.
14 Reese, 643 F.3d at 688. In Reese the litigation was sufficiently
15 likely to be materially advanced because the resolution of the
16 legal issue could remove one defendant from the lawsuit and remove
17 a set of claims against the other defendants in the lawsuit. Id.
18 The legal issue here will only determine whether one claim can
19 proceed, without affecting other claims, and without removing any
20 Defendants.

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22 In L.H. Meeker v. Belridge Water Storage District, 2007 WL
23 781889, *5-6 (E.D. Cal.), a district court case upon which
24 Plaintiffs rely, the legal issue involved in the appeal was found
25 to be controlling and likely materially to advance the litigation
26 because the plaintiffs would be much more likely to prevail if
27 dismissal of the claim were reversed on appeal. The remaining
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1 claims were more difficult to prove. Even though case management
2 issues that are affected by an appeal can materially advance the
3 outcome of litigation, the appeal here will not have a similar
4 effect. Plaintiffs have not demonstrated that a successful appeal
5 will improve their chances of success by preserving a claim that
6 is substantially easier to prove compared to the others.

7 Furthermore, as noted earlier, the appeal will not dispose of any
8 Defendants or a set of claims. The appeal only affects where the
9 case is litigated and Plaintiffs' ability to pursue their CFIL
10 claim, which is based on the same facts as their other claims.

11 Plaintiffs have also failed to satisfy the third requirement
12 for certification under §1292(b) by demonstrating that there exist
13 substantial grounds for a difference of opinion. Plaintiffs
14 assert that this case presents an issue of first impression. The
15 Ninth Circuit has held that "when novel legal issues are
16 presented, on which fair-minded jurists might reach contradictory
17 conclusions, a novel issue may be certified for interlocutory
18 appeal without first awaiting development of contradictory
19 precedent." Reese, 643 F.3d at 688. However, this action is not
20 a case of first impression. The Court's order discussed factually
21 similar cases that involved truck drivers working on behalf of
22 delivery service companies and addressed the cognizability of CFIL
23 claims and claims under equivalent law. The fact that the CFIL
24 does not expressly or implicitly address whether the law covers a
25 purported franchisee that sells its goods or services only to its
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1 purported franchisor does not give rise to substantial grounds for
2 a difference of opinion on this question.

3 The Court declines to certify the case for an interlocutory
4 appeal.

5 Plaintiffs also seek entry of a partial final judgment, as to
6 their CFIL claim only, based on Federal Rule of Civil Procedure
7 54(b). "Rule 54(b) provides that '[w]hen more than one claim for
8 relief is presented in an action, . . . the court may direct entry
9 of final judgment as to one or more but fewer than all of the
10 claims . . . only upon an express determination that there is no
11 just reason for delay and upon an express direction for the entry
12 of judgment.'" Wood v. GCC Bend, LLC, 422 F.3d 873, 877 (9th Cir.
13 2005) (alterations in original).

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16 "A district court must first determine that it has rendered a
17 final judgment, that is, a judgment that is an ultimate
18 disposition of an individual claim entered in the course of a
19 multiple claims action." Id. at 878. This requirement is
20 satisfied because the Court has dismissed Plaintiffs' CFIL claim
21 without leave to amend.

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23 Next the district court "must determine whether there is any
24 just reason for delay." Id. "[I]n deciding whether there are no
25 just reasons to delay the appeal of individual final
26 judgments . . . a district court must take into account judicial
27 administrative interests as well as the equities involved."
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1 Curtiss-Wright Corp. v. General Elec. Co., 446 U.S. 1, 8 (1980).

2 "Whether a final decision on a claim is ready for appeal is a
3 different inquiry from the equities involved, for consideration of
4 judicial administrative interests is necessary to assure that
5 application of the Rule effectively preserves the historic federal
6 policy against piecemeal appeals." Id.

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8 Plaintiffs rely foremost on Varsic v. United States District
9 Court for Central District of California, 607 F.2d 245 (9th Cir.
10 1979). This case, however, addressed the propriety of a petition
11 for writ of mandamus and did not consider entry of partial
12 judgment pursuant to Rule 54(b). Id. at 250-251 (considering
13 factors set forth in Bauman v. U.S. Dist. Court, 557 F.2d 650,
14 654-55 (9th Cir. 1977), not the test for Rule 54(b)).

15 Nevertheless, Plaintiffs argue that the interests weighed in
16 Varsic bear on the requirements for entry of partial judgment
17 under Rule 54.

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19 Varsic found that the petitioner proceeding in forma pauperis
20 would face substantial hardship absent extraordinary relief from
21 the district court's transfer order. The court reasoned that the
22 petitioner would have been forced to litigate his ERISA claims in
23 a far-away venue before having the opportunity to appeal the
24 order, and if he prevailed he would have to litigate a second
25 trial. The delay would amount to a substantial hardship to a
26 person in his position, and such a result was contrary to the
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1 venue provision in the ERISA, which sought to prevent such
2 hardships.

3 Plaintiffs in this action also seek to preserve their venue
4 in California. However, they are not similarly situated to
5 Varsic. Plaintiffs seek to represent a nationwide class with
6 respect to claims that do not involve ERISA benefits. Thus, a
7 second trial in this action would not impose similar burdens on
8 Plaintiffs in this case.
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10 Apart from the equities, Plaintiffs must also show that entry
11 of partial judgment would foster efficient judicial
12 administration. If partial judgment were entered, Plaintiffs
13 could pursue an appeal of the dismissal of the CFIL claim to the
14 Ninth Circuit. Unless the Court granted a stay, the remainder of
15 the case would be transferred to the District of Utah and proceed
16 there. Plaintiffs' claims under Utah's Business Opportunity
17 Disclosure Act and Indiana's Business Opportunity Transaction Law
18 likely overlap with their CFIL claim. Whether the proceedings on
19 the other claims were stayed or pursued, they could require
20 duplicative appeals, resulting in wasted judicial resources.
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22 Thus, entry of partial judgment under Rule 54(b), which is
23 disfavored, would not help streamline this case. Even if the
24 remainder of the case were stayed pending the Ninth Circuit
25 appeal, the equities do not justify such a delay. Plaintiffs'
26 primary interest in submitting the present motions appears to be
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1 preserve their preferred venue in California for this class
2 action.

3 Plaintiffs suggest that the Court must grant a certification
4 pursuant to § 1292(b) or enter partial judgment pursuant to Rule
5 54(b) to ensure that the Ninth Circuit is able to review this
6 Court's transfer order. The cases Plaintiffs cite demonstrate
7 that they may petition for a writ of mandamus from the Ninth
8 Circuit even after the case has been transferred and docketed in
9 the new district. Plaintiffs cite NBS Imaging Systems, Inc. v.
10 United States District Court, 841 F.2d 297, 298 (9th Cir. 1988),
11 for the proposition that the docketing of a transferred case in an
12 out-of-circuit transferee court terminates the jurisdiction of
13 both the transferor court and the corresponding appellate court to
14 consider an appeal. However, in NBS Imaging, the court stated,
15 "We have long held that in extraordinary circumstances involving a
16 grave miscarriage of justice, we have power via mandamus to review
17 an order transferring a case to a district court in another
18 circuit." Id. See also, Mothershed v. Durbin, 161 F.3d 13 (9th
19 Cir. 1998) (unpublished memorandum) (citing NBS Imaging, and
20 stating, "The proper method of challenging the transfer order was
21 by way of mandamus").
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25 NBS Imaging, after holding that the district court improperly
26 applied the ERISA's venue provision, considered factors to
27 determine whether the petitioner was entitled to mandamus.
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1 Contrary to Plaintiffs' argument, Varsic treated the district
2 court's denial of a motion to certify an interlocutory appeal as
3 an indication that the petitioner would suffer "peculiar hardship"
4 from the transfer order, such that extraordinary relief was
5 warranted. The court did not otherwise imply that a district
6 court should grant, as a matter of course, motions for §1292(b)
7 certification when the moving party claims a wrongful transfer.
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9 Plaintiffs' motions for certification pursuant to §1292(b)
10 and entry of partial judgment pursuant to Rule 54(b) are denied.

11 III. Stay of the Transfer Order

12 Previously, the Court granted Plaintiffs' request for a stay
13 of the transfer order pending resolution of their motions for
14 certification of an interlocutory appeal and entry of partial
15 judgment under Rule 54(b). These motions have now been denied.
16 On February 24, 2012, Plaintiffs filed a request for a writ of
17 mandate in the Ninth Circuit and, on February 27, 2012, a request
18 in this Court to stay transfer of the case to Utah pending
19 adjudication of their writ petition or their direct appeal, if the
20 Court certified their interlocutory appeal. Docket No. 52. For
21 the reasons discussed in this order, the Court will not stay the
22 transfer pending adjudication of the writ petition or a direct
23 appeal, but will continue the existing stay for fourteen days from
24 the date of this order to allow Plaintiffs the opportunity to seek
25 a stay from the Ninth Circuit.
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CONCLUSION

Plaintiffs' motions are denied. Docket Nos. 46, 47 and 52.

IT IS SO ORDERED.

Dated: 3/5/2012



CLAUDIA WILKEN
United States District Judge

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