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**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

<p>ALLSTATE INSURANCE COMPANY, et al.,</p> <p style="text-align: center;">Plaintiffs,</p> <p style="text-align: center;">v.</p> <p>OBTEEN N. NASSIRI, D.C., et al.,</p> <p style="text-align: center;">Defendants.</p>	2:08-CV-369 JCM (GWF)
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**ORDER**

Presently before the court is defendants Albert Noorda, M.D., et al.’s (“Noorda defendants”) motion for certification pursuant to 28 U.S.C. § 1292(b). (Doc. # 463). Plaintiffs Allstate Insurance Company, et al. have responded. (Doc. # 464).

The Noorda defendants request the court to certify an order for interlocutory appeal (doc. # 463) that denied a motion to reconsider (doc. # 462).

**Factual Background**

On March 29, 2012, this court issued an order denying the Noorda defendant’s motion for summary judgment for failure to authenticate the evidence supporting the motion under *Orr v. Bank of America*, 285 F.3d 764, 773 (9th Cir. 2002). (Doc. # 446). On April 6, 2012, the Noorda defendants moved the court to reconsider its order denying the motion for summary judgment and filed a “corrected version” of their motion for summary judgment. (Doc. # 450, 451). On July 13, 2012, the court denied the motion to reconsider and struck the “corrected” motion for summary judgment. (Doc. # 462). On July 23, 2012, the Noorda defendants filed the instant motion for

1 certificate of appealability (doc. # 463) of the court's July 13, 2012, order and on August, 2, 2012,  
2 plaintiffs filed a response (doc. # 464).

3 **Discussion**

4 1. Legal standard

5 The instant motion is brought pursuant to 28 U.S.C. § 1292(b), which provides:

6 When a district judge, in making in a civil action an order not otherwise appealable  
7 under this section, shall be of the opinion that such order involves a controlling  
8 question of law as to which there is substantial ground for difference of opinion and  
9 that an immediate appeal from the order may materially advance the ultimate  
10 termination of the litigation, he shall so state in writing in such order. The Court of  
11 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.

12 A district court may certify an order for interlocutory appeal under 28 U.S.C. § 1292(b) if:

13 (1) there is a controlling question of law; (2) there are substantial grounds for difference of opinion;  
14 and (3) an immediate appeal may materially advance the ultimate termination of the litigation. *In re*  
15 *Cement Antitrust Litigation*, 673 F.3d 1020, 1026 (9th Cir. 1982).

16 “[S]ection 1292(b) requires that the district judge be ‘of the opinion’ that the criteria for  
17 section 1292(b) appeal are met,” *Green v. Occidental Petroleum Corp.*, 541 F.2d 1335, 1339 (9th  
18 Cir. 1976), and this section is intended “to be used only in exceptional situations in which allowing  
19 an interlocutory appeal would avoid protracted and expensive litigation.” *In re Cement Antitrust*  
20 *Litigation*, 673 F.3d at 1026. Further, “[s]ection 1292(b) is not intended to make denials of summary  
21 judgment routinely appealable.” *Ahrenholz v. Board of Trustees of Univ. of Ill.*, 219 F.3d 674, 676  
22 (7th Cir. 2000). The district court possesses “inherent power” to reconsider an order over which it  
23 maintains jurisdiction. *See City of Los Angeles, Harbor Div. v. Santa Monica Baykeeper*, 254 F.3d  
24 882, 887 (9th Cir. 2001); *see also Marconnie Wireless Tel. Co. v. United States*, 320 U.S. 1, 47  
25 (1943).

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1 2. Analysis

2 a. *Controlling question of law*

3 The Noorda defendants argue that “[w]hether a court, in its own discretion, may deny a  
4 motion for summary judgment on the grounds that the evidence is not authenticated where the  
5 opposing party did not take issue with the evidence” (doc. # 463, 3:15-17) and whether denying a  
6 motion for summary judgment without such objections “creates a manifest injustice” (doc. # 463,  
7 3:19-20) are controlling questions of law and thus warrant certifying the order for appeal.

8 The Noorda defendants’ first contention fails to understand the requirements set forth in *Orr*.  
9 As stated in the court’s March 29, 2012, order, *Orr* states that

10 “[a] trial court can only consider admissible evidence in ruling on a motion for  
11 summary judgment.” *Orr*, 285 F.3d at 773. “Authentication is a condition precedent  
12 to admissibility . . .” *Id.* (citations omitted). Unauthenticated documents “cannot be  
13 considered in a motion for summary judgment.” *Id.*

14 Nothing in *Orr* indicates that its holding as to the authentication of documents turns on the opposing  
15 party filing objections. *See id.* Thus, there is no question as to the requirement that the district court  
16 consider only admissible evidence for motions for summary judgment.

17 The Noorda defendants’ second contention fails for two reasons. First, the Noorda defendants  
18 do not show that the court’s adherence to the requirements in *Orr* creates a “manifest injustice.”  
19 Further, defendants fail to appreciate the substantial discretion the court has in determining what is  
20 “manifestly unjust.” Thus, there is no question that considering only authenticated documents for  
21 motions for summary judgment is not “manifestly unjust.”

22 b. *Substantial basis for difference of opinion as to the law*

23 The Noorda defendants rely on *FDIC v. New Hampshire Ins. Co.*, 953 F.2d 478 (9th Cir.  
24 1991 and *Wiley v. United States*, 20 F.3d 222 (6th Cir. 1994), to argue that plaintiffs failure to object  
25 to the admissibility of the evidence should preclude this court from denying the motion for summary  
26 judgment on evidentiary grounds. (Doc. # 463, 4:21-22). However, the Noorda defendants  
27 misconstrue these cases, as neither case requires the court to consider evidence where the opposing  
28 party makes no objection. Therefore, the Noorda defendants have not demonstrated that there is a

1 substantial ground for difference of opinion justifying certification.

2 The Noorda defendants also point out that “[t]here is little case law” on this issue. (Doc. #  
3 463, 4:12). However, the lack of case law does not demonstrate “arguments in opposition to the  
4 challenged ruling,” *In re Flor*, 79 F.3d 281, 284 (2nd Cir. 1996) (citations omitted), and thus there  
5 is no substantial ground for a difference of opinion where the court cannot analyze the strength of  
6 the arguments in opposition.

7 c. *Immediate appeal may materially advance the ultimate termination of the litigation*

8 The Noorda defendants assert that if the court granted certification, and if the appellate court  
9 permitted the appeal, and if the appellate court decided in their favor then this court would be  
10 required to review their motion for summary judgment and if this court found in their favor, they  
11 could be extricated from this lawsuit; thus demonstrating that an immediate appeal may materially  
12 advance the litigation. (Doc. # 463, 5:3-8).

13 However, this matter has been litigated for four years and the parties have recently submitted  
14 a joint pretrial order pursuant to court order (doc. # 469). Thus, based on the current stage of  
15 litigation, an appeal on this matter will not “appreciably shorten the time, effort, or expense of  
16 conducting [the] lawsuit.” *See In re Cement Antitrust Litigation*, 673 F.2d at 1027 (citations omitted).  
17 Instead, it would create further unwarranted delay to an already laborious and protracted case.

18 3. Conclusion

19 In light of the issue the Noorda defendants seek to appeal and appreciating the current stage  
20 of litigation, the court does not find that the Noorda defendants’ contentions warrant certification  
21 of the July 13, 2012, order for interlocutory review.

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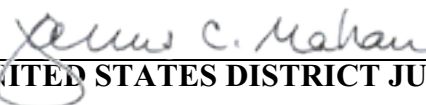
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Accordingly,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the Noorda defendants motion for certification pursuant to 28 U.S.C. § 1292(b) (doc. # 463) be, and the same hereby is, DENIED.

DATED August 16, 2012.

  
UNITED STATES DISTRICT JUDGE