IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

TRI COUNTY WHOLESALE DISTRIBUTORS, INC., et al.,	:	
Plaintiff,	:	**Case No. 2:13-CV-317**
v.	:	
LABATT USA OPERATING CO., LLC, et al.,	:	**JUDGE ALGENON L. MARBLEY**
	:	**Magistrate Judge Deavers**
Defendants.	:	

OPINION & ORDER

I. INTRODUCTION

This matter comes before the Court on Plaintiffs', Tri County Wholesale Distributors, Inc. ("Tri County") and the Bellas Company d/b/a Iron City Distributing ("Iron City") (collectively "Plaintiffs" or the "Distributors"), Motion to Certify Merit Decisions for Interlocutory Appeal under 28 U.S.C. § 1292(b). (Doc. 92).

First, Plaintiffs seek certification of the following questions of law resolved in Defendants' favor in this Court's January 6, 2014 Judgment on the Pleadings Order, (Doc. 66):

(1) Whether application of O.R.C. § 1333.85 (D) to this case would constitute an unconstitutional taking of private property without due process.

Second, Plaintiffs seek this Court's certification of the following questions of law resolved in Defendants' favor in this Court's December 11, 2014 Summary Judgment Order, (Doc. 91):

(1) Whether a successor manufacturer under O.R.C. § 1333.85 (D) of the Ohio Alcoholic Beverages Franchise Act ("Franchise Act" or "Act") must be a "manufacturer" as that term is defined under O.R.C. § 1333.82(B);

(2) Whether a parent-holding company that purchases 100 % of a manufacturer in a remote transaction qualifies as a "*successor* manufacturer" such that it has a right to avail itself of § 1333.85(D), even when the corporate structure and the distribution contracts of the licensed manufacturer purchased in the transaction remain in place.[1]

For the reasons set forth herein, Plaintiffs' Motion is **DENIED**.

II. BACKGROUND

A. Factual Background

This action arises out of the termination of beer and flavored malt beverage distribution contracts in alleged contravention of O.R.C. § 1333.82-7, the Ohio Alcoholic Beverages Franchise Act ("Franchise Act" or "Act"), which governs the contractual relationship between beer distributors and manufacturers. Plaintiffs, Tri County and Iron City, are Ohio distributors of alcoholic beverages that have franchise relationships with Defendant, Labatt USA Operating. As an entity that supplies alcoholic beverages to distributors in Ohio, Labatt USA Operating is a "manufacturer" of beer and flavored malt beverages, as that term is defined in O.R.C. § 1333.82(B). (Doc. 77 at ¶ 7).

Labatt USA Operating is indirectly wholly owned by Defendant North American Breweries Holdings, LLC ("NAB Holdings"). (Doc. 77 at ¶ 20). Prior to December 11, 2012, all membership interests in NAB Holdings were owned by three entities: 1) KPS Special Situations Fund III, LP; 2) KPS Special Situations Fund III (A), LP; and 3) KPS Capital Partners[2] (collectively "KPS" or the "KPS entities"). *Id*. at ¶¶ 17, 20; *KPS Ownership Chart*, D. Ex. 1. By a Unit Purchase Agreement dated October 25, 2012, Defendant Cerveceria Costa Rica, S.A.

[1] Plaintiffs actually seek to certify the question, "whether there can be a '***successor*** manufacturer' when there was no change in the actual manufacturer." This Court, however, disagrees that this is the correct question for review under the precise facts of the instant case.

[2] KPS Capital Partners include Richard Lozyniak, James Pendegraft, Kenneth Yartz, Peter Bodenham, Jeff Cardell, Sandy Ford, and Mark Minunni.

("CCR"), through its affiliate CCR Breweries, Inc., contracted to buy 100% of the membership interests in NAB Holdings from the KPS entities (the "KPS/CCR Transaction"). (Doc. 77 at ¶ 23; P. Ex. 8). On December 11, 2012, KPS transferred all of its interests in NAB Holdings – including the accompanying distribution rights – to CCR or one of its affiliates. (Doc. 77 at ¶¶ 18, 22; P. Exs. 8, 9). As part of the KPS/CCR Transaction, CCR Breweries, Inc. was merged into NAB Holdings with NAB Holdings being the surviving entity, resulting in CCR American Breweries, Inc. owning 100% of NAB Holding's membership interests. *Id*.; P. Ex. 9. From December 11, 2012 to the present, CCR American Breweries, Inc. has been owned 100% by CCR. (Doc. 77 at ¶ 24).

Below the level of NAB Holdings, the various operating and licensing entities retained the same corporate structure they had prior to the KPS/CCR Transaction.[3] *Id*. at ¶ 20; *compare KPS Ownership Chart*, D. Ex. 1, *with CCR Ownership Chart*, P. Ex. 3. Following the KPS/CCR Transaction, the Distribution Contracts between Plaintiffs and Labatt USA Operating remained

[3] The parties stipulate that, prior to and after December 11, 2012, the following were and continue to be true:

a. Defendant Labatt USA Operating has been owned 100% by Labatt USA Operating Holdings, LLC.
b. High Falls Operating Company ("High Falls Operating") has been owned 100% by High Falls Operating Holdings, LLC.
c. Labatt USA Operating Holdings, LLC and High Falls Operating Holdings, LLC have both been owned 100% by North American Breweries Operating Holdco, LLC.
d. North American Breweries Operating Holdco, LLC has been owned 100% by NAB Holdco, LLC.
e. North American Breweries Licensing Holdco, LLC has been owned 100% by NAB Holdco, LLC.
f. NAB Holdco, LLC has also owned 1 share of the 1,000 outstanding shares (0.1%) of 1793161 Ontario, Inc. ("Ontario, Inc.), a Canadian entity. The other 999 shares of Ontario, Inc. (99.9%) are owned by Labatt Brewing Company Limited, a Canadian entity unaffiliated with Defendants.
g. NAB Holdco, LLC has been owned 100% by North American Breweries, Inc.
h. North American Breweries, Inc. has been owned 100% by North American Breweries Intermediate Holdings, LLC.
i. North American Breweries Intermediate Holdings, LLC has been owned 100% by Defendant NAB Holdings.
j. High Falls Licensing Co., LLC has been owned 100% by High Falls Licensing Holdings, LLC.
k. Labatt USA Licensing Co., LLC has been owned 100% by Labatt USA Licensing Holdings, LLC.
l. High Falls Licensing Holdings, LLC and Labatt USA Licensing Holdings, LLC are both 100% owned by North American Breweries Licensing Holdco, LLC.

(Doc. 77 at ¶ 20).

in place, the Distributors continued to order the Specified Brands from Labatt USA Operating, and the Specified Brands continued to be invoiced to the Distributors by Labatt USA Operating.

In March of 2013, Distributors received letters from CCR purporting to terminate the Distribution Contract between them and Labatt USA Operating. (Doc. 77 at ¶ 12-13). The sole basis on which Defendants relied to terminate the Distributors' distribution rights was the successor manufacturer provision of Ohio Rev. Code §1333.85(D). (Doc. 77 at ¶ 14).

B. Procedural History

On April 4, 2013, Plaintiffs filed a complaint alleging breach of contract and additionally sought a declaratory judgment, asking the Court to find one of the following: (1) that Defendants are prohibited from terminating their existing distribution franchises with Labatt pursuant to O.R.C. § 1333.85(D); (2) or that O.R.C. § 1333.85(D) so-applied would constitute an unconstitutional taking; and, (3) a determination of the diminished value of Defendants' business pursuant to § 1333.851 of the Franchise Act should the Defendants prevail on the preceding three counts. (Doc. 1).

On April 11, 2014, Plaintiffs moved for a preliminary injunction seeking to enjoin Defendants from terminating their contracts and from taking any actions that would frustrate or prevent delivery of the brands at issue. (Doc. 9). Following a preliminary injunction hearing, the Court granted Plaintiffs' preliminary injunction on October 16, 2013, but only on one basis. (Doc. 56). The Court found fair ground in litigation on Distributors' argument against application of § 1333.85(D) to written franchises contracts, because that issue had been accepted for discretionary review by the Ohio Supreme Court, and the decision was pending. *See Esber Beverage Co. v. Labatt USA Operating Co.*, 2013-Ohio-4544, 138 Ohio St. 3d 71 *reconsideration denied*, 2014-Ohio-566, 138 Ohio St. 3d 1418.

The Court also held, however, that Plaintiffs were unlikely to succeed on the merits on the following proposed findings of law: (1) CCR is not a "successor manufacturer" for the purposes of O.R.C. § 1333.85(D); (2) Distribution Contracts preclude a successor manufacturer from terminating pursuant to O.R.C. § 1333.85(D) absent a basis under the contracts for such termination; and, (3) Defendants' termination of the contracts pursuant to O.R.C. §1333.85(D) constitutes an unconstitutional taking.

On October 17, 2013, however, the Ohio Supreme Court issued its opinion in *Esber,* holding that O.R.C. §1333.85(D) permitted a "successor manufacturer" to terminate a written franchise agreement, without cause, assumed in its purchase of another manufacturer, brand, or product. *Id.* Subsequently, Defendants moved this Court to vacate its preliminary injunction order pursuant to the holding in *Esber*. This Court found in Defendants' favor on August 14, 2014. (Doc. 73). Then, Plaintiffs appealed the Court's order vacating the preliminary injunction, and that appeal is currently pending before the Sixth Circuit.

In addition, on May 9, 2013, Defendants moved for judgment on the pleadings requesting the Court to dismiss Count Three—that termination of the contracts pursuant to O.R.C. §1333.85(D) would constitute an unconstitutional taking. The Court granted Defendants' motion on January 6, 2014, holding that though termination of the Plaintiffs' contracts resulted in consequential losses, those losses did not amount to a taking under the United States or Ohio Constitutions. (Doc. 66).

On September 15, 2014, Defendant moved for Partial Summary Judgment, (Doc. 78), and Plaintiff moved for Summary Judgment. (Doc. 80). The Court granted summary judgment to Defendants on Distributors' claims for breach of contract (Count I), and violation of the

Franchise Act, under O.R.C. §1333.85(D), thus resolving the legality of the Defendants' termination of Distributors. (Doc. 91). The Court denied Plaintiff's Motion. *Id*.

III. STANDARD OF REVIEW

The standard for when an interlocutory appeal will be permitted is set forth in 28 U.S.C. § 1292(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 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.

28 U.S.C. § 1292(b). Allowing for interlocutory appeal is generally disfavored and should be applied sparingly, in only exceptional cases. *In re City of Memphis*, 293 F.3d 345, 350 (6th Cir.2002); *U.S. ex rel. Elliott v. Brickman Group Ltd., LLC*, 845 F.Supp.2d 858, 863 (S.D.Ohio 2012); *Takacs v. Hahn Automotive Corp.*, No. C-3-95-404, 1999 WL 33117266, at *1 (S.D. Ohio 1999. "Attractive as it may be to refer difficult matters to a higher court for advance decision, such a course of action is contrary to our system of jurisprudence." *U.S. ex rel. Elliott* 845 F.Supp.2d at 863. (internal quotations omitted).

As the Sixth Circuit explained, "'Congress intended that section 1292(b) should be sparingly applied. It is to be used only in exceptional cases where an intermediate appeal may avoid protracted and expensive litigation and is not intended to open the floodgates to a vast number of appeals from interlocutory orders in ordinary litigation.'" *Kraus v. Bd. of Cnty. Road Comm'rs of the Cnty. of Kent,* 364 F.2d 919, 922 (6th Cir.1966).

In determining whether to certify a matter for interlocutory appeal, the Court must decide whether: "(1) the order involves a controlling question of law, (2) a substantial ground for

difference of opinion exists regarding the correctness of the decision, and (3) an immediate appeal may materially advance the ultimate termination of the litigation." *In re City of Memphis,* 293 F.3d 345, 350 (6th Cir.2002). "The burden of showing exception circumstances justifying an interlocutory appeal rests with the party seeking review." *Trimble v. Bobby,* No. 5:10–CV–00149, 2011 WL 1982919, at *1 (N.D.Ohio May 20, 2011).

IV. ANALYSIS

Plaintiffs argue that the three questions they wish to certify meet the Sixth Circuit's three-prong test for determining whether to certify a matter for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). Defendant responds that such interlocutory appeals are reserved for exceptional cases, and that this is not one. This Court will now analyze the three proposed questions for interlocutory appeal pursuant to the three-part test.

A. The Three-Part Test

1. Controlling Questions of Law

Plaintiffs assert, and Defendants do not contest, that the three proposed issues for interlocutory appeal are controlling questions of law that, once decided, would terminate litigation except for the calculation of compensation owed to Distributors for the diminished value of their businesses and remaining inventory should the appellate court find in favor of Defendants. This Court agrees that the three issues present pure questions of law that would determine, definitively, the outcome of the case. *See In re City of Memphis,* 293 F.3d at 350. Accordingly, the first prong of the test is satisfied.

2. Substantial Grounds for a Difference of Opinion Regarding the Legal Question

In terms of the second certification factor, a substantial ground for difference of opinion exists only when the "the question is difficult, novel and either a question on which there is little

precedent or one whose correct resolution is not substantially guided by previous decisions," and where there is either a "difference of opinion exists within the controlling circuit," or "the circuits are split." *DRFP, LLC v. Republica Bolivariana de Venezuela*, 945 F. Supp. 2d 890, 917-18 (S.D. Ohio 2013) (citing *U.S. ex rel. Fry v. Health Alliance of Greater Cincinnati,* No. 1:03–CV–00167, 2009 WL 485501, at *1 (S.D.Ohio Feb. 26, 2009)).

Plaintiffs argue that while this Court relied upon a number of authorities in resolving the three issues it wishes to certify, those authorities did not decide the precise issues presented in this case, and therefore do not present the kind of settled controlling authority that would preclude interlocutory review. Essentially, Plaintiffs argue that the questions are ones of first impression, and the Court's decisions were not substantially guided by previous decisions. Defendants retort that Plaintiffs utilize this motion to reargue issues that this Court has fully and fairly considered on multiple occasions, and that no contrary authority exists giving rise to a substantial ground for difference of opinion. Defendants argue that a long line of cases interpreting the application of the Franchise Act and the "successor manufacturer" provision preclude a finding of "substantial grounds for a difference of opinion" in this case. This Court agrees.

a. Summary Judgment Motion

Plaintiffs argue that while the Court relied on several sources to determine whether the CCR is a "successor manufacturer" entitled to avail itself of the O.R.C. § 1333.85(D), no court has directly addressed the issue of whether an entity which is not a "manufacturer" within the meaning of O.R.C. § 1333.82(B) can avail itself of O.R.C. § 1333.85(D). Further, Plaintiffs argue no controlling authority exits stating that an entity such as CCR, a remote parent holiding company, which purchases a manufacturer, can be a "successor" within the meaning of

"successor manufacturer" when the licensed manufacturer with whom distributors have contracts remains in place.

In its Opinion & Order, the Court rejected Plaintiffs' strict reading of the term "successor manufacturer" as it applied to CCR and the KPS/CCR transaction. The Court held that considering the holdings in *Esber Beverage Co. v. Labatt USA Operating Co.*, 2013-Ohio-4544, 138 Ohio St. 3d 71 *reconsideration denied*, 2014-Ohio-566, 138 Ohio St. 3d 1418, and its extensive analysis of the legislative history of O.R.C. § 1333.85(D), "Plaintiffs' efforts to disaggregate the term 'successor manufacturer' misread §1333.85(D)." Accordingly, this Court held that the "successor manufacturer"

> is the entity which "acquires all or substantially all of the stock or assets of another manufacturer through merger or acquisition or acquires or is the assignee of a particular product or brand of alcoholic beverage from another manufacturer," and which, as a result of that acquisition of a manufacturer, product, or brand, is tasked with making business decisions on how to operate most efficiently in its newly acquired business of supplying or manufacturing alcoholic beverages."

(Doc. 91). The Court's above definition of "successor manufacturer" relied upon a plain reading of O.R.C. § 1333.85(D), and the type of transaction which triggers the just cause exception. The Court also relied upon *Esber* to undermine Plaintiffs' position that CCR could not be a successor manufacturer because after it purchased 100% of Labatt USA Operating, Labatt's corporate structure and distribution contracts remained in place. This Court followed *Esber's* rationale that § 1333.85(D) permitted an entity which purchased a manufacturer to terminate written contracts that it assumed in that transaction. Additionally, this Court followed *Esber*'s rationale that so long as an entity completely acquires a new manufacturer, product, or brand, even when the corporate structure of the prior manufacturer essentially stays the same, that entity may avail itself of § 1333.85(D).

Lastly, this Court relied upon *Esber's* determination that a successor manufacturer need not be a manufacturer within the strict definition of the Act, but need only be the entity faced with making business decisions on how to operate most efficiently. Although the issue prompting the *Esber* Court to define broadly "manufacturer" was different than in the case *sub judice*, the Court can rely on such an interpretation to apply law to fact accordingly.

While no court has dealt with the precise issue in this case, the fact that this court addressed an issue of first impression does not in and of itself demonstrate the existence of substantial ground for difference of opinion. *Lang v. Crocker Park, LLC*, No. 1:09 CV 1412, 2011 WL 3297865, at *3 (N.D. Ohio July 29, 2011) (citing *Baden-Winterwood v. Life Time Fitness*, No. 2:06CV99, 2007 WL 2326877, at *3 (S.D. Ohio Aug. 10, 2007) ("The fact that this Court addressed an issue of first impression . . . does nothing to demonstrate a substantial ground for a difference of opinion as to the correctness of that ruling."). Instead, "serious doubt as to how an issue should be decided must exist in order for there to be substantial ground for difference of opinion." *City of Dearborn v. Comcast of Michigan III, Inc.*, No. 08-10156, 2008 WL 5084203, at *3 (E.D. Mich. Nov. 24, 2008) (citing *Baden–Winterwood v. Life Time Fitness*, 2007 WL 2326877 at *2 (S.D.Ohio August 10, 2007) (citing *Kraus v. Bd. of County Rd. Commissioners for the County of Kent*, 364 F.2d 919, 921 (6th Cir.1966))). To gauge whether substantial grounds for difference of opinion exits in the context of an issue of first impression, and thus, whether serious doubt exists, this Court must "analyze the strength of the arguments in opposition to the challenged ruling." *Lang v. Crocker Park, LLC*, No. 1:09 CV 1412, 2011 WL 3297865, at *3 (N.D. Ohio July 29, 2011). This is because "28 U.S.C. §

1292(b) is a rare exception to the final judgment rule" and thus "it is not intended merely to provide an avenue for review of difficult rulings in hard cases." *Id*. (holding "[t]he dearth of cases treating this issue is not, by itself, sufficient to show that substantial ground for difference of opinion is present in this case, despite the fact that Defendants disagree with the court's interpretation of the statute.").

Plaintiffs contend that since the cases on which this Court relied did not address the precise issues at hand, they were not controlling. This Court concludes, however, that Plaintiffs have not demonstrated "substantial doubt" simply by stating that the facts are novel and that no precisely controlling authority exists. A long line of case law interpreting O.R.C. § 1333.85(D), as well as a plain reading of the Act, substantially guided this Court's decision. While Plaintiffs may not agree with this Court's interpretation of the Franchise Act or controlling case law, that is not a consideration under § 1292(b). As Plaintiffs fail to put forth arguments in opposition to this Court's decision, or present authority undermining this Court's decision, Plaintiffs have failed to meet prong two of the test on the first two questions it wishes to certify. *Alexander v. Provident Life & Acc. Ins. Co.*, 663 F. Supp. 2d 627, 640 (E.D. Tenn. 2009) (finding second prong of § 1292(b) not satisfied where Plaintiff simply challenged the Court's application of law to the facts rather than presenting a case where there are substantial disputes as to the applicable law).

b. Judgment on the Pleadings

Like the issues it wishes to certify from the Summary Judgment Order, Plaintiffs wish to certify their "takings" claim from the Judgment on the Pleadings Order because it is an issue of first impression on which there is no precisely controlling authority. Plaintiffs argued in their Opposition to Defendants' Judgment on the Pleadings Motion that an application of O.R.C. § 1333.85(D) was an unconstitutional taking because: (1) their franchise is property within the

meaning of the takings clause; (2) there is governmental action because under O.R.C. § 1333.851, Defendants cannot transfer Distributor's franchise without a court order; (3) Defendants' proposed application of § 1333.85(D) under the KPS/CCR transaction would be a taking because it would nullify their franchise agreements, on which their businesses rely; and (4) the taking would not be for public use.

In granting Defendants' Motion for Judgment on the Pleadings, this Court relied on *Omnia Commercial Co. v. U.S.*, 261 U.S. 502 (1923) and *Huntleigh USA Corp. v. United States*, 525 F.3d 1370 (Fed. Cir. 2008), which held that even though contracts may be property within the meaning of the Fifth Amendment, there is no taking where legislation indirectly results in a consequential loss that frustrates a business purpose, and government takes nothing. Plaintiffs argue that *Omnia* and *Huntleigh* do not settle the issue presented here because they both addressed governmental action that only indirectly affected contractual rights, while, here, §1333.85(D) directly and explicitly permits government action to result in taking property from Plaintiffs. Plaintiffs cite to *Cienega Gardens v. United States*, 331 F.3d 1319 (Fed. Cir. 2003) and *Love Terminal Partners v. United States*, 97 Fed. Cl. 355 (Fed. Cl. 2011), two cases it believes address direct rather than indirect takings. Plaintiffs assert that these two cases support its contention that a "substantial difference of opinion" exists on its taking claim. This Court, however, dismissed both cases as inapposite in its Judgment on the Pleadings Order because under those cases, legislation was passed after property rights had been established which was aimed directly at taking those property interests away. In contrast, in the case *sub judice* § 1333.85(D) was in place when the contracts were entered into, and § 1333.85(D) itself permits the cancellation of contracts.

In sum, like in the previous section, the Plaintiffs only argument in opposition to the Court's ruling on the takings issue is that the issue is one of first impression, and that since the cases on which this Court relied did not address the precise issues at hand, they were not controlling. This Court finds that Plaintiffs cannot demonstrate "substantial doubt," establishing that substantial grounds for a difference of opinion exists on their takings claim simply by stating that no other court has passed precisely on the issue they wish to certify. This Court relied on clearly established law regarding regulatory takings and the plain language of § 1333.85(D). Plaintiffs do not raise compelling arguments in opposition sufficient to show that this Court should have serious doubt about its prior interpretations of case law Plaintiffs raised. Accordingly, this Court holds that Plaintiffs have failed to meet prong two of the test on the third question it wishes to certify. *See Alexander* 663 F. Supp. at 640.

3. Materially Advance this Litigation to its Ultimate Termination

Plaintiffs argue that that an interlocutory appeal of the Court's merit decisions will materially advance the ultimate termination of the litigation. There is no dispute that if the Sixth Circuit finds in Distributors' favor on any of the three challenged issues, it would bring an immediate end to this litigation. Thus, a Sixth Circuit holding in favor of Plaintiffs would obviate the necessity to address Count Four of the Complaint by conducting a hearing to determine the diminished value of Plaintiffs' business pursuant to § 1333.85(D) and § 1333.851.

While a one to two day hearing on Count Four would no longer be necessary if the Appellate Court were to find in Plaintiffs' favor, this Court finds that this minimal benefit in advancing the litigation is not of the kind the legislature presumed when it passed § 1292(b). Instead, "the significance of considering whether an appeal would materially advance the ultimate termination of the litigation lies in whether exceptionally expensive and protracted

litigation may be avoided." *Lang*, 2011 WL 3297865, at *5 (citing *Paschall v. Kansas City Star Co.,* 605 F.2d 403, 406 (8th Cir.1979); *Berry v. Sch. Dist. of Benton Harbor,* 467 F.Supp. 721, 727 (W.D.Mich.1978)); *see also Newsome v. Young Supply Co.*, 873 F. Supp. 2d 872, 876 (E.D. Mich. 2012) (holding "the role of interlocutory appeal is diminished when a case is nearing trial and large expenditures have already been made").

In this case, parties have conducted all discovery, and all dispositive issues have been resolved on summary judgment. All that remains for this Court to do is hold a one to two day hearing pursuant to § 1333.85(D) and § 1333.851 on the costs owed to Plaintiffs as a result of termination of the franchises. In *Kraus v. Bd. of Cnty. Rd. Comm'rs for Kent Cnty.*, the Court denied interlocutory appeal because only a few days would be required for a jury trial and, thus, final disposition of the case. 364 F.2d 919, 922 (6th Cir. 1966). It held that such a case was not of the "extraordinary type contemplated by § 1292 (b)," and that it was preferable to go through with the brief trial to "avoid a piecemeal appeal." *Id*.

Like in *Kraus*, this Court finds it preferable to deny interlocutory appeal and resolve the remaining technical issue presented by Count Four in order to avoid a piecemeal appeal. This is not an extraordinary case in which an interlocutory appeal might allow parties and this Court to avoid protracted litigation. While the Court is aware that Plaintiffs' appeal of this Court's denial of the protective order is currently pending before the Sixth Circuit, that protective order addresses the same issues as those raised in this motion. Further, an appeal from the Summary Judgment Order can be consolidated with the protective order appeal immediately after the brief hearing on Count Four, which this Court will schedule promptly.

Finally, Plaintiffs are unlikely to experience any harsh effects as a result of this Court's denial of their motion for interlocutory appeal because they are likely to file for an appeal on all

counts in their complaint pursuant to Fed. R. App. P. 3 and 4 immediately after this Court resolves Count Four. In addition, pursuant to Fed. R. Civ. P. 62 (a), no execution may issue on a judgment until fourteen days have passed after entry, and under Fed. R. Civ. P. 62(d), appellant may obtain a stay from the district court by supersedeas bond upon or after filing a notice of appeal. *Abercrombie & Fitch, Co. v. ACE European Grp. Ltd.*, No. 2:11-CV-1114, 2014 WL 4915269, at *9 (S.D. Ohio Sept. 30, 2014)("[p]ursuant to Rule 62 of the Federal Rules of Civil Procedure, the district court may stay the proceedings to enforce a judgment pending an appeal."). Lastly, if for whatever reason the Plaintiffs are unable to obtain a stay of the judgment from this Court, the Plaintiffs may move the appellate court for a stay pursuant to Fed. R. App. P. 8.

Thus, Plaintiffs have not met the third prong of the § 1292(b) analysis.

IV. Conclusion

For the foregoing reasons, Plaintiffs' Motion to Certify Merit Decisions for Interlocutory Appeal under 28 U.S.C. § 1292(b), (Doc. 92), is **DENIED**.

IT IS SO ORDERED.

s/ Algenon L. Marbley
ALGENON L. MARBLEY
UNITED STATES DISTRICT JUDGE

DATED: February 12, 2015