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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

CALIFORNIA PARENTS FOR THE EQUALIZATION OF EDUCATIONAL MATERIALS,

Plaintiff,

v.

KENNETH NOONAN, RUTH BLOOM, ALAN BERSIN, YVONNE CHAN, DONALD G. FISHER, RUTH E. GREEN, JOE NUNEZ, JOHNATHAN WILLIAMS, and DAVID LOPEZ, all in their official capacities as Members of the California State Board of Education; and TOM ADAMS, in his official capacity as Director of the Curriculum Frameworks and Instructional Resources Division and Executive Director of the Curriculum Commission (of the California State Department of Education),

Defendants.

2:06-CV-00532-FCD-KJM

DEFENDANTS' MOTION FOR RECONSIDERATION OR REQUEST FOR CERTIFICATION OF INTERLOCUTORY APPEAL AND STAY PENDING THE APPEAL

Date: May 23, 2008
Time: 10:00 a.m.
Dept: Courtroom 2

The Honorable Frank C. Damrell

Trial Date: February 24, 2009

Action Filed: March 14, 2006

INTRODUCTION

Defendants respectfully request that the Court reconsider its order denying Defendants' motion for summary judgment on res judicata and collateral estoppel grounds. The Court's order found that privity did not exist between Plaintiff California Parents for the Equalization of Educational Materials (CAPEEM) and the plaintiffs in a prior state court proceeding, the Hindu American Foundation (HAF) and parents of California public school children who participated in the textbook adoption process (*HAF* plaintiffs). Defendants bring this motion for reconsideration on the ground that the Court committed clear error in failing to consider whether the *HAF* plaintiffs represent the same interests as CAPEEM and in imposing federal standards in its analysis of whether the *HAF* plaintiffs had a motive to assert CAPEEM's interests. The motive analysis is contrary to California law, the governing law in the case. In addition, the Court improperly looked upon Defendants' motion with disfavor, ignored the principles of res judicata and collateral estoppel in its privity analysis, and relied upon CAPEEM's arguments regarding the content standards, which are beyond the scope of the complaint.

If the Court denies Defendants' motion for reconsideration, Defendants request that the Court certify its order for interlocutory appeal. Interlocutory appeal is appropriate in this case because res judicata/collateral estoppel is a controlling question of law on which there are substantial grounds for difference of opinion, and an immediate appeal will materially advance the ultimate termination of the litigation. Pending the resolution of the interlocutory appeal or the decision on reconsideration, Defendants request that the Court stay the proceeding to avoid the needless expenditure of time and resources.

BACKGROUND

On February 5, 2008, Defendants filed a motion for summary judgment with the Court on the basis that this action is barred by res judicata and collateral estoppel. (PsAs, Docket No. 78.) Defendants contend that the undisputed facts in this case compel the conclusion that res judicata and collateral estoppel bar this action because the *HAF* plaintiffs are in privity with CAPEEM and have already litigated the claims and issues that CAPEEM pursues. The *HAF* plaintiffs are the virtual representatives of CAPEEM and adequately represented the interests that CAPEEM now seeks to

relitigate. The motion was fully briefed, and the Court issued its order on March 25, 2008, on the basis of the papers submitted. (Order, Docket No. 92.) The Court denied Defendants' motion finding that CAPEEM is not in privity with the *HAF* plaintiffs.

ARGUMENT

I. RECONSIDERATION IS APPROPRIATE TO CORRECT CLEAR ERROR IN THE COURT'S DECISION.

Defendants respectfully submit that the Court committed clear error in its privity analysis. Although Defendants argued that the *HAF* plaintiffs are the virtual representatives of CAPEEM, the Court's analysis focused on traditional privity, spending less than a page on virtual representation. (Order 15:7-16:4.) In its analysis, the Court erroneously declined to consider whether the *HAF* plaintiffs and CAPEEM represent the same or sufficiently similar interests, and the Court imposed federal requirements that directly contradict California law. Under Rule 60(b), a court may grant reconsideration of an order on the grounds of, inter alia, "mistake, inadvertence, surprise, or excusable neglect." Fed. R. Civ. Proc. 60(b)(1). The "mistake" component of Rule 60(b)(1) allows a court to correct its own error of law. *See Kingsvision Pay-Per-View v. Lake Alice Bar*, 168 F.3d 347, 350 (9th Cir.1999) (citing *Liberty Mut. Ins. Co. v. E.E.O.C.*., 691 F.2d 438, 441 (9th Cir.1982)). Reconsideration of an order is appropriate where the district court "committed clear error." *School Dist. No. 1J Multnomah County v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993).

A. The Court Committed Clear Error in Failing to Consider Whether the *HAF* Plaintiffs and CAPEEM Possess the Same Interests.

The Court declined to consider whether the *HAF* plaintiffs and CAPEEM have the same or sufficiently similar interests so as to justify a finding of privity. In so doing, the Court committed clear error because California's law on virtual representation requires such an analysis before determining whether the party in the prior litigation had a motive to assert those common interests. Under California law, a party to a prior action may be deemed the virtual representative of the party in a subsequent action so long as the party in the earlier action has interests sufficiently similar to the party in the latter case. *Alvarez v. May Dep't Stores*, 143 Cal. App. 4th 1223, 1233 (Cal. Ct. App. 2006). A party is adequately represented if the party in the prior litigation had the same

interests as the party to be precluded and the motive to assert those interests. *Citizens for Open Access to Sand and Tide, Inc. v. Seadrift Ass'n*, 60 Cal. App. 4th 1053, 1071 (Cal. Ct. App. 1998). The heart of the virtual representation inquiry under California law is whether the parties share the same interests. It is not possible to analyze whether the party to the first action was a virtual representative without identifying the interest at issue and analyzing whether the parties shared the same interest:

> We measure the adequacy of representation by inference, examining whether the . . . party in the suit which is asserted to have a preclusive effect had the same interest as the party to be precluded, and whether that . . . party had a strong motive to assert that interest. If the interests of the parties in question are likely to have been divergent, one does not infer adequate representation and there is no privity. If the . . . party's motive for asserting a common interest is relatively weak, one does not infer adequate representation and there is no privity.

Id. (quotations and citations omitted). Thus, under the governing California law, the privity inquiry is whether the *HAF* plaintiffs have the same or similar interest as CAPEEM, and whether the *HAF* plaintiffs had a strong motive to assert *that interest* in the prior adjudication. *See Seadrift*, 60 Cal. App. 4th at 1071.

Accordingly, the Court must first identify whether there is a same or similar interest before determining whether the *HAF* plaintiffs had a motive to assert that interest in the prior action. Here, the Court erred by failing to perform any analysis to determine whether the *HAF* plaintiffs and CAPEEM have the same or sufficiently similar interests. Instead, the Court's analysis improperly focused on whether the *HAF* plaintiffs adequately represented CAPEEM, rather than on whether the *HAF* plaintiffs adequately represented their common interests in the prior action. *Compare, Seadrift*, 60 Cal. App. 4th at 1071.

Defendants presented uncontroverted evidence to support the fact that both sets of plaintiffs seek to vindicate the same interests for the same large group of citizens in the greater Hindu community (i.e., Hindu groups and individuals who participated in the same textbook adoption process, parents who supported the views of those groups, and children affected by the State Board of Education's decisions). (PsAs, 13-16.)[1/] Contrary to the Court's finding, CAPEEM did not

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1. The Court cites to portions of CAPEEM's opposition papers and notes that Defendants do not address CAPEEM's "evidence." (Order 4, n. 3.) Defendants' silence does not indicate

dispute Defendants' assertions that the *HAF* plaintiffs and CAPEEM have the same interests. (Order 15:15-16; Opposition 19-23 [arguing against privity based solely on lack of control, participation, and opportunity to participate in the state court case and its settlement].) As such, an analysis of the parties' interests would have compelled the conclusion that the *HAF* plaintiffs represented the same or sufficiently similar interests as CAPEEM.

B. The Court Committed Clear Error in Finding That the *HAF* Plaintiffs Did Not Have Motive to Assert CAPEEM's Interests Because Control and the Ability to Participate in Prior Litigation is Not the Legal Standard to Determine Privity under California Law.

Defendants presented uncontroverted evidence to support the conclusion that the *HAF* plaintiffs had a motive to litigate their interests. (PsAs 16-17.) Moreover, CAPEEM did not dispute that the *HAF* plaintiffs adequately represented their same interests. Instead, CAPEEM relied upon federal law and argued that privity does not exist because CAPEEM did not participate in or control the state court litigation, lacked notice of the settlement in the state court case, and that no fairness hearing was held to determine the effect of the settlement on third parties. (Opposition, 20:9-10, 21:16-18, 22:20-22.) The Court adopted this reasoning, and apparently, the federal law cited by CAPEEM, in determining that the *HAF* plaintiffs did not have a motive to assert CAPEEM's interests. (Order 15:17-16:4.) This was clear error because California law does not impose control, participation, a fairness hearing, or notice of settlements on the second part of its adequate representation analysis: whether the prior plaintiffs had the motive to represent the same or similar interests in the previous litigation.[2/]

The Court relies on the declaration of the *HAF* plaintiffs' attorney, Deborah Caplan, to support the conclusion that there was no coordination of efforts by her and *separate* counsel for CAPEEM. (Order 15:19-22, emphasis in original.) Caplan's declaration also states that CAPEEM did not control the *HAF* litigation, coordinate with the *HAF* plaintiffs, or receive notice of the settlement

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concession with CAPEEM's argument. Rather, Defendants were mindful that they should only object to material facts, rather than legal conclusions, argumentative statements, or irrelevant facts, in accordance with recent guidance from this district. *See Burch v. Regents of Univ. of Cal.*, 433 F. Supp. 2d 1110, 1119 (E.D. Cal. 2006).

2. As noted above, the Court also erred in analyzing California's res judicata "motive" requirement by finding the *HAF* plaintiffs were not motivated to represent CAPEEM, instead of considering whether the *HAF* plaintiffs were motivated to represent their same or similar interests.

from the *HAF* plaintiffs prior to when the settlement was finalized. Noticeably absent from Caplan's declaration is any representation that the *HAF* plaintiffs were not strongly motivated, and did not vigorously prosecute their interests in the state court proceedings. To the contrary, the record amply reflects the *HAF* plaintiffs, led by Caplan, vigorously prosecuted their interests and claims in the prior action. (PsAs 16-17.) By relying on Caplan's declaration to conclude that the *HAF* plaintiffs lacked motive, the Court essentially imposes federal standards (control, notice of settlement, etc.) upon the privity analysis that are contrary to California law.[3/] *See Headwaters Inc. v. U.S. Forest Serv.*, 399 F.3d 1047, 1053, 1056 (9th Cir. 2005) (Order 14, n. 11.)

Under California law, a party may be bound by the preclusive effect of a prior judgment despite lacking an opportunity to participate in or control the prior proceeding. *See Seadrift*, 60 Cal. App. 4th at 1072-73 (party was adequately represented in case that ended in a settlement, despite denial of motion to intervene and failure to control or directly participate in prior action). Likewise, a party need not have had an opportunity to participate in a settlement in order to be bound by its preclusive effect. *See id.* In fact, a party's interests may be adequately represented despite the party's complete lack of notice of the prior proceeding. *Alvarez v. May Dep't Stores*, 143 Cal. App. 4th 1223, 1239 (Cal. Ct. App. 2006) (putative class members bound by prior litigation despite lack of notice of prior unsuccessful attempt to certify a class).[4/] The only requirement for privity is that the prior party adequately represented sufficiently similar interests in the prior litigation. *Id.; Seadrift*, 60 Cal. App. 4th at 1070-73.

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3. Even if the Court were to apply the federal standard to its privity analysis, it erred in its application of *Headwaters, Inc. v. United States Forest Service*, 399 F.3d 1047 (9th Cir. 2005). (Order, 15:18-21.) The two necessary factors to establish virtual representation are identity of interests between the parties and adequate representation of the absent party's interests in the prior action. *Irwin v. Mascott*, 370 F.3d 924, 930 (9th Cir. 2004); *Pedrina v. Chun*, 97 F.3d 1296, 1301-1302 (9th Cir. 1996). While the presence of other factors (i.e. control or participation in the prior action) will support a finding of virtual representation, the *absence* of one of the "other factors" does not compel a finding that the absent party's interests were not adequately represented as the Court determined here. *Irwin*, 370 F.3d at 930; *See also Headwaters*, 399 F.3d at 1054, citing to *Irwin.*

4. Having separate counsel does not preclude a party from being bound by the preclusive effect of prior litigation. *See e.g., Seadrift*, 60 Cal. App. 4th 1053. In some cases, having the same counsel is a factor that courts consider in determining whether there was adequate representation. *Alvarez*, 143 Cal. App. 4th at 1236.

In *Seadrift*, an association's action was barred by res judicata despite the denial of its motion to intervene in prior litigation brought by governmental agencies acting in a representative capacity. *Id.* The association was bound by the preclusive effect of the prior litigation despite its unsuccessful attempt to participate in the prior litigation and the resulting settlement agreement. *Id.* Coordination, control, and an opportunity to participate in settlement are simply not requisite elements under California's law to determine whether a party in a prior case was motivated to present the same or similar interests. The *Seadrift* court made clear that these elements are not necessary for privity regardless of the type of entity that brings the representative action:

> Appellant, even if not named or active as a party, would be bound by judgments in the same prior actions brought pursuant to statutory authority by a different *citizens* group acting in a representative capacity for the benefit of the public, or at least those members of it similarly situated, to determine the matter of public interest.

Id. at 1073 (emphasis in original). Both the *HAF* plaintiffs and CAPEEM initiated their lawsuits in a representative capacity for the benefit of the same members of the public - those members of the Hindu Community, including parents of school children, who support the textbook edits advocated by the Hindu Education Foundation, the Vedic Foundation, and Professor Bajpai. Because the *HAF* plaintiffs adequately represented the same interest that CAPEEM now seeks to vindicate, CAPEEM's action is barred notwithstanding its nonparticipation in the state court proceeding. Therefore, it is clear error for the Court to base its virtual representation analysis entirely on CAPEEM's lack of participation in the state court proceeding when California law imposes no such requirement.

The *Rodgers* case cited by the Court does not compel a different conclusion. (Order 14:6-9.) *Rodgers* was a personal injury action based on an asbestos exposure. *Rodgers v. Sargent Controls & Aerospace*, 136 Cal. App. 4th 82, 86 (Cal. Ct. App. 2006). The trial court had found that decisions in two prior cases brought by other plaintiffs represented by the same counsel collaterally estopped the *Rodgers* plaintiff from relitigating the issue of corporate successor liability. *Id.* Unlike the current case, the cases were brought by individual plaintiffs acting in their individual capacities. In reversing the trial court, the appellate court found that privity was lacking because the prior plaintiffs did not act as the subsequent plaintiff's representative and the subsequent plaintiff had no

control over the previous litigation. *Id.* at 92-93. Either control or adequate representation would have been sufficient to find privity. Rodgers had neither. The Rodgers court does *not* hold that a subsequent party must have had control of the prior proceeding in order to be adequately represented in it. Case law holding to the contrary forecloses such an interpretation. *See L.A. Unified Sch. Dist. v. L.A. Branch NAACP,* 714 F.2d 935, 943 (9th Cir. 1983) *aff'd en banc,* 750 F.2d 731 (1984); *Alvarez,* 143 Cal. App. 4th at 1233-1239; *Seadrift*, 60 Cal. App. 4th at 1070-73. Rather, the *Rodgers* case stands for the proposition that when a party has *neither* control *nor* adequate representation in prior litigation, privity does not apply.

Contrary to the facts in *Rodgers*, the *HAF* plaintiffs did bring their action in a representative capacity on behalf of the greater Hindu community, parents, and Hindu groups who participated in the textbook adoption process. Moreover, the *HAF* plaintiffs vigorously represented the interests of their constituency that CAPEEM now pursues. In such representative actions, the party to the prior litigation may adequately represent the interest of the subsequent party despite that subsequent party's lack of participation or control in the prior litigation. *See, e.g., Seadrift*, 60 Cal. App. 4th at 1070-73. Such lack of control does not compel a conclusion that the prior party lacks motive to assert the common interests. The case cited by *Seadrift* and other courts regarding lack of motive is instructive. *Seadrift*, 60 Cal. App. 4th at 1071, citing *Leader v. State of Cal.*, 182 Cal. App. 3d 1079, 1087 (Cal. Ct. App. 1986). The *Leader* court noted that when a prior party is charged with a minor misdemeanor offense, such as a traffic citation, the accused may plead guilty simply because the defense is more trouble than the resulting penalty. *Leader*, 182 Cal. App. 3d at 1087. In such cases, motive to assert a common interest is lacking. *Id.* Here, CAPEEM does not dispute that the *HAF* plaintiffs had the motive to pursue their interests.

The Court erroneously concludes that the cases cited by Defendants are inapposite because some of them are class actions. (Order 14:10-23). For example, the Court finds that the *NAACP* case relied upon by Defendants is inapposite because it involved a non-certified class action. (Order 14:11-18, PsAs, 14-15 citing *L.A. Unified Sch. Dist. v. L.A. Branch NAACP,* 714 F.2d 935, 943 (9th Cir. 1983) *aff'd en banc,* 750 F.2d 731 (1984).) There, the subsequent action was filed by a separate class of plaintiffs. *NAACP*, 714 F.2d at 942. The Ninth Circuit noted that to the extent the members

of the subsequent class overlapped with the members of the prior class, those members were clearly bound by traditional notions of privity. *NAACP*, 750 F.2d at 741. As to those members who were not identical, the Ninth Circuit found that their interests were sufficiently similar, such that the first class was the virtual representative of the second class under California law. *Id.*; *en banc* 750 F.2d at 741-742. There, as here, the emphasis was not on what procedural "safeguards" the subsequent party may or may not have received, but rather on the identity of interests. Just as in that case, the significant inquiry is not whether the *HAF* plaintiffs brought their action as a certified class, provided notice to CAPEEM, and represented the same individual plaintiffs; rather the inquiry is whether the *HAF* plaintiffs adequately represented the same or similar interests that CAPEEM now seeks to vindicate. (Order 14:18-21); *See Alvarez*, 143 Cal. App. 4th at 1239 (Cal. Ct. App. 2006) (putative class members bound by prior litigation despite lack of notice of prior unsuccessful attempt to certify a class). Thus, the cases cited by Defendants (only some of which are class actions) regarding representative actions *are* apposite because they hold that a party may be bound by the preclusive effect of a prior judgment even if it did not participate in the prior litigation, so long as its interests are adequately represented. (Order 14:17-18.) Here, the *HAF* plaintiffs adequately represented CAPEEM's interests.

C. The Court Commits Clear Error in Its Policy Analysis Because It Condones Relitigation of the Same Primary Right and Issues, Which is Contrary to the Principles of Res Judicata and Collateral Estoppel.

Res judicata and collateral estoppel promote the public policies of curtailing vexatious litigation, promoting judicial economy, and avoiding the issuance of inconsistent judgments that undermine the integrity of the judicial system. *Mycogen Corp. v. Monsanto Co.*, 28 Cal. 4th 888, 897 (2002)*; Lucido v. Superior Ct.*, 51 Cal. 3d 335, 343 (1990). The Court concluded that there was no danger of repetitive or vexatious litigation because the superior court found in favor of the *HAF* plaintiffs on their state APA claim, and because the claims at issue in this case derive from federal law while the *HAF* action involved state law claims. (Order 17:7-17.) This analysis is completely contrary to the principles governing res judicata and collateral estoppel.

The most salient characteristic of California's primary rights theory of res judicata is that a primary right is indivisible. *Mycogen*, 28 Cal.4th at 904. The violation of a primary right gives rise

to but a single cause of action, and all legal theories must be brought in a single suit. *Id.*

> Res judicata precludes piecemeal litigation by splitting a single cause of action or relitigation of the same cause of action on a different legal theory or for different relief. [Citations]. A predictable doctrine of res judicata benefits both the parties and the courts because it seeks to curtail multiple litigation causing vexation and expense to the parties and wasted effort and expense in judicial administration.

Id. at 897 (citations and emphasis omitted). The *HAF* plaintiffs could have brought the Constitutional claims in their state court proceeding, and indeed, failure to do so precludes CAPEEM, a subsequent party in privity with them, from litigating federal claims in federal court. In contrast to the Court's decision, the current action is repetitive and vexatious precisely because there was a state court case pursuing state law claims, and a federal case pursuing federal claims, both arising from a single cause of action. *See id.*

Similarly, CAPEEM is barred from relitigating issues that were previously adjudicated in the state court proceeding, regardless of whether the *HAF* plaintiffs achieved a favorable determination on some issues. *Alvarez*, 143 Cal. App. 4th at 1238 (fairness dictates that parties to the second action be bound by unfavorable and favorable portions of the prior decision). Defendants' summary judgment motion supports the conclusion that CAPEEM seeks to relitigate issues previously litigated by the *HAF* plaintiffs. (PsAs 6-9.) Thus, CAPEEM's attempts to relitigate the same issues is repetitive and vexatious, regardless of whether the *HAF* plaintiffs were successful on some of the issues in the state court proceeding.

D. Inconsistent Judgments Could Result, and the Court Improperly Relied on Matters Beyond the Scope of the Pleading in Finding to the Contrary.

In considering policy reasons in support of its decision, the Court noted, "this court could find that the underlying standards themselves violate the Establishment Clause." (Order 16:18-19). This is incorrect because the underlying content standards are not at issue in this litigation. The operative complaint does not contain any allegations challenging the content standards, and in a footnote CAPEEM makes clear that it is not bringing any claims under the standards. (SAC 21-22, n. 6.)

Even under liberal notice pleading standards, CAPEEM cannot assert that the Second Amended Complaint includes a challenge to the content standards. (Reply 3, n. 3.) Although CAPEEM raises challenges to the content standards in its opposition, a summary judgment brief is not the appropriate

place for CAPEEM to retool its complaint in order to redirect the course of this litigation. *Wasco Products Inc. v. Southwall Techs. Inc.*, 435 F.3d 989, 992 (9th Cir. 2006) ("Simply put, summary judgment is not a procedural second chance to flesh out inadequate pleadings."); *Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1291-93 (9th Cir. 2000) (plaintiff could not proceed at summary judgment stage on new theory of liability that was not raised in complaint or during discovery because it would prejudice the defendant). Because the standards are not part of the allegations, Defendants contend that the Court could not properly find that the standards violate the Establishment Clause.

E. The Motion for Summary Judgment Was Appropriate and Timely; Thus, the Court Erroneously Looked upon It with Disfavor.

Defendants timely brought this motion, and, thus, the Court erroneously looked upon it with disfavor. (Order 16, n. 12.) The Court suggests that Defendants failed to raise the res judicata and collateral estoppel defenses at the earliest practicable moment. It cites to several cases in which courts have refused to grant parties' tardy attempts to amend their complaints to add the affirmative defenses of res judicata or collateral estoppel. *Id.* In direct contrast to these cases, Defendants pleaded estoppel and res judicata as affirmative defenses in their answer to the Second Amended Complaint as required under Federal Rule of Civil Procedure 8(c). (Answer SAC, at 20:5 (First Affirmative Defense), 21:5 (Eighth Affirmative Defense).) As such, CAPEEM had adequate notice of the affirmative defenses. *Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 350, 91 S. Ct. 1434, 1453 (1971). The cases cited by the Court do not stand for the proposition that a party may waive a pleaded affirmative defense by failing to bring a dispositive motion prior to completing discovery.

Moreover, contrary to the Court's assertion, the state attorney general's office did not represent the defendants in *HAF* and did not inexplicably continue to engage in discovery in this action after the *HAF* decision became a final judgment in July 2007. (Order 16, n. 12); *see Franklin & Franklin v. 7-Eleven Owners for Fair Franchising*, 85 Cal. App. 4th 1168, 1174 (Cal. Ct. App. 2000) (decision final under California law when appeal has been exhausted). In August 2007, the Court ordered the case stayed, per the parties' stipulation, so that the parties could participate in Voluntary

Dispute Resolution (VDRP). (Stip. & Order, Docket No. 52.) At the end of November, the parties informed the Court that VDRP was unsuccessful, but the parties would continue to informally engage in settlement negotiations. Defendants also informed the Court that they planned on filing a motion for summary judgment. (Joint VDRP Report, Docket No. 54.) In January 2008, Defendants filed an ex parte application seeking a stay of discovery, precisely so that it need not continue to engage in discovery while the summary judgment motion was pending. (*Ex Parte*, Docket No. 56.)

Thus, the case was stayed for much of the time between when the decision became final in July, 2007 and when the Defendants brought their motion in February, 2008. When the case was not stayed, Defendants did conduct some discovery that was necessary to bolster its argument that res judicata and collateral estoppel apply. In sharp contrast to the Court's footnote, Defendants timely brought this motion after obtaining necessary discovery, but prior to the discovery cut-off, and far in advance of the dispositive motion cut-off. As such, the Court should not have looked upon the motion with disfavor.

II. INTERLOCUTORY APPEAL IS APPROPRIATE BECAUSE THE ORDER IS ON A CONTROLLING QUESTION OF LAW ON WHICH THERE ARE SUBSTANTIAL GROUNDS FOR A DIFFERENCE OF OPINION AND REVERSAL WOULD RESULT IN DISMISSAL OF THE CASE.

If the Court declines to reconsider its order denying Defendants motion for summary judgment, Defendants respectfully request that the Court certify its order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). *See Padfield v. AIG Life Ins. Co.*, 290 F.3d 1121, 1124 (9th Cir. 2002) (order denying summary judgment is not a final decision and not immediately appealable). Interlocutory appeal of non-final decisions is appropriate when there is 1) a controlling question of law, 2) substantial grounds for difference of opinion, and 3) a finding that an immediate appeal will materially advance the ultimate termination of the litigation. 28 U.S.C. § 1292(b). The denial of a summary judgment motion based on res judicata or collateral estoppel is a proper grounds for interlocutory appeal. *See Durkin v. Shea & Gould,* 92 F.3d 1510, 1513 (9th Cir. 1996); *Clark v. Bear Sterns & Co.*, 966 F.2d 1318, 1319-20 (9th Cir. 1992); *NAACP,* 750 F.2d at 734; *Derish v. San Mateo-Burlingame Bd. of Realtors*, 724 F.2d 1347 (9th Cir. 1983) overruling on other grounds

recognized by *Eichman v. Fotomat Corp*., 759 F.2d 1434, 1437 (9th Cir.1985); *see also* 16 Wright, Miller, and Cooper, Fed. Prac. and Proc., § 3931, at 460-461.

An order involves a controlling question of law if its resolution 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), *aff'd sub nom. Arizona v. Ash Grove Cement Co.*, 459 U.S. 1190, 103 S. Ct. 1173 (1983). Here, the summary judgment's material facts are not in dispute. The Court applied the undisputed facts to the law regarding the privity element of res judicata and collateral estoppel in deciding whether this action is barred by the preclusive effect of the judgment rendered in the prior state court action. That decision presents a controlling question of law because a finding that, under California law, all of the legal elements of the doctrine of res judicata or collateral estoppel have been established would terminate the action. Thus the first certification requirement is satisfied.

Similarly, in evaluating the third element, the Court considers the effect of reversal by the Court of Appeals on the termination of the case. *In re Cement Antitrust Litig*., 673 F.2d at 1026-1027. Should the Ninth Circuit reverse the Court's decision and find that res judicata and/or collateral estoppel applies, it would completely dispose of the case because the doctrines bar the current action in its entirety. Dismissal at this stage in the litigation would save significant time and resources since discovery, expert exchanges, dispositive motions, and trial still loom on the horizon. Accordingly, reversal would materially advance the ultimate termination of the litigation in accordance with the third element. 28 U.S.C. § 1292.

Defendants have demonstrated that substantial grounds exist for a difference of opinion regarding whether the *HAF* plaintiffs are in privity with CAPEEM. "Privity is not susceptible of a neat definition, and determination of whether it exists is not a cut-and-dried exercise." *Clemer v. Hartford Insur. Co.*, 22 Cal. 3d 865, 875 (1978); (Order 12:17-20). For the reasons discussed above, Defendants contend that the Court erred in its privity analysis and its decision is contrary to California law.

Moreover, the appeal presents unique questions of law, if not a matter of first impression. There are few cases applying "virtual representation" because it is a more recent extension of the

traditional privity analysis. *Seadrift*, 60 Cal. App. 4th at 1069-1070. For example, the Court's "virtual representation" analysis cites to only one case, which Defendants contend is not applicable because it does not involve representative actions (see *supra.*). (Order 15:7-16:4.) While there are a few cases based on representative actions, Defendants' research has not revealed any reported cases with the same circumstances as the current case: two public interest advocacy groups bringing non-class, representative actions on behalf of the same constituents and seeking to vindicate the same interests. The facts here are unique, lending further support to Defendants' request that the order be certified for interlocutory appeal. Thus, the second certification requirement is satisfied.

Because all three elements of interlocutory appeal exist, Defendants request that the Court certify for interlocutory appeal its order denying Defendants' motion for summary judgment issued March 25, 2007, pursuant to 28 U.S.C. § 1292(b).

III. A STAY IN THE CASE PENDING RECONSIDERATION OR RESOLUTION OF THE APPEAL WILL PROMOTE EFFICIENCY OF LITIGATION.

Defendants request that the Court stay this action pending reconsideration or interlocutory appeal. A granting of an interlocutory appeal does not stay the district court proceeding unless the district court or Court of Appeals orders a stay. 28 U.S.C. § 1292(b). The Court has the inherent authority to control its docket in a manner that will "promote economy of time and effort for itself, for counsel, and for litigants." *Filtrol Corp. v. Kelleher*, 467 F.2d 242, 244 (9th Cir. 1972). A stay will enable the parties to avoid spending significant time and resources on discovery, experts, and motions that may be futile if this Court or the Ninth Circuit determines that res judicata and/or collateral estoppel apply in this case. Defendants' request for a stay is especially applicable at this stage of litigation because the parties anticipate filing motions to compel discovery and are scheduling depositions that will require travel throughout the state of California and to the East Coast. Accordingly, Defendants request the Court stay the case pending the resolution of the reconsideration or appeal.

CONCLUSION

Defendants respectfully submit that the Court committed clear error in not determining whether the parties share the same interest prior to finding that the *HAF* plaintiffs did not have a motive to

represent CAPEEM's interests. In addition, the Court improperly imposed a "control" and "participation" requirement on the motive analysis, in direct contradiction to California law, the governing law in the case. The Court should not have looked upon Defendants' motion with disfavor, ignored the principles of res judicata and collateral estoppel in its privity analysis, or relied upon CAPEEM's arguments regarding the content standards, since they are beyond the scope of the complaint. Accordingly, Defendants request the Court reconsider its order.

Alternatively, Defendants request the Court certify the order for interlocutory appeal. Interlocutory appeal is appropriate in this case because res judicata/collateral estoppel is a controlling question of law on which there are substantial grounds for difference of opinion, and an immediate appeal will materially advance the ultimate termination of the litigation. Defendants request that the Court stay the proceedings pending resolution of the appeal or reconsideration of its order.

Dated: April 8, 2008

Respectfully submitted,

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