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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' REPLY TO PLAINTIFF'S OPPOSITION TO 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 the basis that the Court committed clear error in its analysis, which resulted in the conclusion that Plaintiff California Parents for the Equalization of Educational Materials (CAPEEM) and the Hindu American Foundation (HAF) lack privity. In the alternative, Defendants request that the Court certify its order for interlocutory appeal and grant a stay pending resolution by the Ninth Circuit. CAPEEM's opposition fails to respond to Defendants' arguments supporting a motion for reconsideration and does not dispute that the Court committed clear error in its analysis. In addition, CAPEEM barely addresses Defendants' request for an interlocutory appeal. Instead, CAPEEM inappropriately raises new arguments opposing Defendants' motion for summary judgment that CAPEEM could have raised in its original opposition. Thus, the Court should reconsider its ruling on Defendants' motion for summary judgment, grant the motion, and dismiss this action in its entirety. In the alternative, the Court should certify its summary judgment order for an interlocutory appeal to the Ninth Circuit and stay all proceedings pending a final decision by that court.

ARGUMENT

I. CAPEEM FAILS TO REBUT THE ARGUMENT THAT THE COURT COMMITTED CLEAR ERROR IN ITS DECISION, AND THE EVIDENCE ON RECONSIDERATION COMPELS THE CONCLUSION THAT CAPEEM'S CLAIMS ARE PRECLUDED.

The Court committed clear error in its privity analysis because it failed to consider whether the parties have similar interests and whether the *HAF* plaintiffs had a motive to assert those interests, and it imposed federal requirements that contradict California law.

In opposing the motion for reconsideration, CAPEEM presents new arguments in opposition to the underlying motion for summary judgment. A motion for reconsideration is not the place for parties to make new arguments not raised in their original briefs. *Carroll v. Nakatani*, 342 F.3d 934, 945 (9th Cir. 2003) (a motion for reconsideration "may not be used to raise arguments or present evidence for the first time when they could reasonably have been raised earlier in the litigation"); *Rosenfeld v. U.S. Dept. of Justice*, 57 F.3d 803, 811 (9th Cir. 1995) (district court did not abuse its discretion in declining to consider an argument raised for the first time on reconsideration). As such, the Court should disregard the portions of CAPEEM's brief that raise new arguments in opposition

to the motion for summary judgment (i.e., pages 3:3-7:7).

Regardless, CAPEEM's newly raised arguments lack sufficient evidentiary support or legal authority to overcome the conclusion that this action is barred by the principles of res judicata and collateral estoppel. *See* Fed. R. Civ. Proc. 56(e)(2) (when a motion for summary judgment is properly supported, an opposing party may not rely merely on allegations or denials in its own pleading); *Celotex v. Catrett*, 477 U.S. 317, 323-24, 106 S. Ct. 2548, 2552 (1986) (nonmoving party must present evidence to establish there is a genuine issue for trial). Contrary to CAPEEM's contention, the Court did not find that there is "no evidence supporting a finding that CAPEEM and HAF shared an identity of interests" or that "CAPEEM and HAF sought to vindicate different sets of primary rights, thus rendering preclusion inappropriate." (Recon. Opp. 2:25-3:2.) The Court specifically declined to address either of these issues. (Order 3:14-18, 15:15-21.) When the Court considers these factors on reconsideration, the uncontroverted evidence will show that all of the elements for claim and issue preclusion are satisfied.

A. Upon Reconsideration, the Uncontroverted Evidence Compels the Conclusion that Privity Exists Because the Parties Have Sufficiently Similar Interests.

The Court erred by failing to determine whether the parties have similar interests and whether the *HAF* plaintiffs had a motive to assert those interests. Instead, the Court skipped the "similar interests" analysis, and found privity lacking on the basis that the *HAF* plaintiffs did not have a strong motive to assert CAPEEM's interest. (Order 15:17-21.) CAPEEM argues for the first time that it has interests and goals distinct from the *HAF* plaintiffs. (Recon. Opp. 3-6; compare MSJ Opp. 19-23 [arguing against privity solely on basis of lack of control, participation, and opportunity to participate in the state court case and its settlement].) However, the undisputed facts and evidence in support of Defendants' motion for summary judgment proves that their interests are the same or sufficiently similar: 1) both parties bring representative actions for the parents of school-age children and the larger Hindu community; 2) both advocate for the same edits in the textbook adoption process; 3) both seek to enjoin Defendants from using the sixth grade history-social science textbook on the grounds that they denigrate Hindu religious beliefs, portray other religions more favorably than Hinduism, and wrongfully teach the Aryan Invasion Theory. (MSJ 13-16.)

Contrary to CAPEEM's contentions, Defendants have not asserted that all Hindus have identical interests. (Recon. Opp. 3:13-14.) Rather, Defendants acknowledged that there were a variety of Hindu interests represented in the textbook adoption process and that CAPEEM represented the interests of "Hindu Groups" who allege the adoption process and adopted textbooks are procedurally and substantively deficient. (MSJ 2, n. 4.) Although CAPEEM now argues for the first time that it did not bring its action on behalf of the larger Hindu Community (i.e., Hindu Groups), the complaint expressly states otherwise. (SAC ¶ 4.78.) The fact that CAPEEM filed the action on behalf of certain Hindu Groups is undisputed. (CAPEEM's SUF 10, ¶ 40.) Additionally, CAPEEM's Articles of Incorporation states that its purpose is to promote "the accurate portrayal of Hinduism." (Recon. Opp. 4, n. 1.) This purpose is necessarily representative in nature, and to the extent that CAPEEM fulfills this purpose, it will have an impact that extends far beyond its own individual members. A comparison of the two complaints further supports that both actions assert the same facts and seek to vindicate the same primary rights and issues, and both action pursue the same interests on behalf of the same Hindu Groups and parents.

CAPEEM now attempts to distinguish its interests from those of the *HAF* plaintiffs by arguing that it seeks to prevent religious indoctrination. (Recon. Opp. 3:26-4:2, 4:18-19.) However, this is neither CAPEEM's purpose (as identified in its Articles of Incorporation) nor the purpose of this litigation. (Recon. Opp. 4, n.1; SAC ¶ 1.1 ["This case challenges the derogatory and unequal treatment of the Hindu religion in social science textbooks used in the sixth grade in the California public education system"].) CAPEEM now also contends that CAPEEM does not share the same motive as the *HAF* plaintiffs. (Recon. Opp. 4, 2-10.) "Sharing the same motive" is not the correct legal standard to determine privity. Instead, the inquiry is whether the parties share the same or sufficiently similar interest and whether the party in the first litigation had a motive to assert that interest. *Alvarez v. May Dep't Stores*, 143 Cal. App. 4th 1223, 1233 (Cal. Ct. App. 2006).

CAPEEM contends that the parties are distinct because no CAPEEM members were members of *HAF*. (Recon. Opp. 3:7) This contention is inapposite in a virtual representation analysis. Any overlapping members would be bound by traditional notions of privity. *L.A. Unified Sch. Dist. v. L.A. Branch NAACP*, 750 F.2d 731, 741 (9th Cir. 1984). Here, non-participating CAPEEM members are

bound by the prior judgment because the *HAF* plaintiffs were their virtual representatives, regardless of whether the parties coordinated the lawsuits. *Id.; Citizens for Open Access to Sand and Tide, Inc. v. Seadrift Ass'n*, 60 Cal. App. 4th 1053, 1072-73 (Cal. Ct. App. 1998).

CAPEEM unconvincingly argues that *Seadrift* is distinguishable because the *HAF* plaintiffs are not vested by statute, contract, or otherwise with the right to represent CAPEEM's interests. (Recon. Opp. 5.) *Seadrift*, however, specifically recognized that a party with sufficiently similar interests may be bound by a citizens' group "acting in a representative capacity for the benefit of the public, or at least those members of it similarly situated." *Seadrift*, 60 Cal. App. 4th at 1073. Likewise, other cases have found parties bringing representative actions to be virtual representatives regardless of whether they were vested (by statute or contract) with the authority to represent the interests at stake. *See, e.g., 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). Here, the *HAF* plaintiffs were the virtual representatives of CAPEEM because they represented the same interests as CAPEEM and had a motive to assert those interests.

B. Applying Privity in this Case Comports with Due Process Because CAPEEM's Interests Were Adequately Represented in the Prior Proceeding.

Applying privity in this case satisfies due process because the parties have an identity of interests, and the *HAF* plaintiffs adequately represented the interests in the prior proceeding. *Seadrift*, 60 Cal. App. 4th at 1070 (identity of interests and adequate representation are due process prerequisites); *accord Irwin v. Mascott*, 370 F.3d 924, 930 (9th Cir. 2004). California's privity law does not require control, participation, coordination, or the opportunity to participate in settlement, and the Court erred in imposing such requirements. *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); *Alvarez*, 143 Cal. App. 4th at 1239 (putative class members bound by prior case despite lack of notice of prior unsuccessful attempt to certify a class). CAPEEM's involvement in the *HAF* case is not a prerequisite for due process. (Recon. Opp. 9:1-4.)

CAPEEM's attempts to distinguish *Alvarez* are unavailing. *Alvarez* is a collateral estoppel case, and the issue before the court was whether absent putative class members could be bound by a prior decision refusing to certify a class. *Alvarez*, 143 Cal. App. 4th at 1228, 1230. The court found that

they could be bound despite a lack of notice or an opportunity to participate in the prior proceeding. *Id.* at 1238-39. The first case had no plaintiffs in common with the subsequent case and pursued different legal theories. *Id.* at 1230, 1237. However, the plaintiffs in the first action adequately represented the subsequent parties' interest in pursuing the same issue (i.e., class certification); thus, the *Alvarez* plaintiffs were bound by the prior decision's preclusive effect on that issue. *Id.* at 1236-37. To the extent that the plaintiffs in the subsequent suit sought to pursue *different issues*, collateral estoppel did not bar their subsequent action. *Id.* at 1233. Despite CAPEEM's attempts to distinguish it, *Alvarez* reaffirms that a party is bound by a prior proceeding's preclusive effect despite lack of notice or an opportunity to participate so long as there is adequate representation of the similar interests. *Id.* at 1237-38. Here, the state court order binds CAPEEM because the *HAF* plaintiffs adequately represented their same interests.

Notwithstanding CAPEEM's argument to the contrary, it is bound by the preclusive effect of the final trial court judgment regardless of the fact that an appeal was later dismissed by stipulation of the parties.[1/] (MSJ, RJN, Exh. D, *HAF* Order.) CAPEEM cites no authority to the contrary. While the stipulated dismissal affects the date that the trial court judgment became final, it does not implicate any due process concerns. *Franklin & Franklin v. 7-Eleven Owners for Fair Franchising*, 85 Cal. App. 4th 1168, 1174 (Cal. Ct. App. 2000) (decision is final for preclusion when appeal from trial court judgment has been exhausted or time to appeal has expired).

C. The Evidence Will Support the Court's Conclusion on Reconsideration that CAPEEM Seeks to Relitigate the Same Claims and Issues the *HAF* Plaintiffs Litigated

CAPEEM seeks to relitigate the same primary right that the *HAF* plaintiffs litigated, i.e., the right of Hindus to be equitably treated in the 2005-2006 history-social science textbook adoption process and to have their religion portrayed neutrally in the adopted textbooks. (See MSJ 17-19.) CAPEEM argues that res judicata cannot apply because the two cases allege different legal claims. (Recon. Opp. 5-7.) This argument must fail because a primary right is not the same as the legal theory pursued. *Mycogen Corp. v. Monsanto Co.*, 28 Cal. 4th 888, 904 (2002). Rather, a primary right is the right to

1. CAPEEM bemoans the alleged failure of Defendants to provide it with the details of the settlement agreement. However, settlements with state agencies are generally a matter of public record. CAPEEM does not indicate that it has requested such details and been refused them.

be free from a particular injury. *Id.* The violation of a primary right gives rise to *only one* cause of action even though there may be multiple theories upon which recovery might be predicated. *Id.* Here, CAPEEM cannot relitigate the same primary right regardless of whether it pursues constitutional claims and the *HAF* plaintiffs brought state law claims. *Scoggin v. Schrunk*, 522 F.2d 436, 437 (9th Cir.1975), *cert. denied*, 423 U.S. 1066, 96 S. Ct. 807 (1976) (res judicata will bar the federal constitutional claim whether it was asserted in state court or not when based on same asserted wrong). The parties may not split one primary right into two suits.

CAPEEM improperly conflates the elements of claim preclusion and issue preclusion in arguing that claims must be actually decided in a previous case in order for a subsequent party to be bound by its preclusive effect. This is a requirement of *issue* preclusion, but not *claim* preclusion.[2/] In fact, the very premise of claim preclusion is that it bars claims that were brought or *could have been brought* in the first litigation. *Clark v. Yosemite Cmty. Coll. Dist.*, 785 F.2d 781, 786-87 (9th Cir. 1980) ("[T]he doctrine of res judicata applies not only to those claims actually litigated in the first action but also to those which might have been litigated as part of that cause of action"). The *HAF* plaintiffs could have litigated the constitutional claims.

Moreover, the *HAF* plaintiffs did litigate the issues CAPEEM alleges in its lawsuit, raising challenges to both the textbook content and the adoption process. Defendants' motion for summary judgment identifies specific portions of the two complaints that compel the conclusion that both parties raised the same challenges to the textbook contents and the procedures by which the Defendants conducted the textbook adoption process. (MSJ 6-8.) The issues in the two cases are virtually identical because CAPEEM relies on the same factual allegations previously asserted in the *HAF* case regarding both the adoption process and the textbook content. *Lucido v. Superior Ct.*, 51

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2. Claim preclusion applies if 1) the decision in the prior proceeding is final and on the merits; 2) the present proceeding is on the same cause of action as the prior proceeding; and 3) the parties in the present proceeding, or parties in privity with them, were parties in the prior proceeding. *Fed'n of Hillside & Canyon Ass'ns v. City of L.A.*,126 Cal. App. 4th 1180, 1202 (Cal. Ct. App. 2004). Issue preclusion applies if (1) the issue is identical to that decided in a prior proceeding; (2) the issue was actually litigated in the prior proceeding; (3) the issue was necessarily decided in the prior proceeding; (4) the decision was final and on the merits, and (5) preclusion is sought against a person who was a party or in privity with a party in the prior proceeding. *Lucido v. Superior Ct.*, 51 Cal. 3d 335, 341 (1990).

Cal. 3d 335, 342 (1990) ("identical issue" requirement addresses whether "identical factual allegations" are at stake in the two proceedings). Furthermore, the state court considered the same principles of law now raised by CAPEEM. (MSJ 8-9.) As explained in the motion for summary judgment, *HAF*'s content and process allegations mirror the elements of an Equal Protection and Establishment Clause claim. (*Id.*) Similarly, the legal standard the state court applied in evaluating the textbook content mirrors the standard by which this Court would adjudicate the constitutional claims. (*Id.* at 10:17-23.)

CAPEEM's present attempt to distinguish its allegations from those of the *HAF* plaintiffs should be rejected. (Recon. Opp. 6:18-7:1-7.) Collateral estoppel bars issues that were raised, even though some factual matters or legal arguments that could have been presented were not. *Border Bus. Park, Inc. v. City of San Diego*, 142 Cal. App. 4th 1538, 1566 (Cal. Ct. App. 2006); *see also Evans v. Celotex*, 194 Cal. App. 3d 741, 746-47 (Cal. Ct. App. 1987) ("[T]here would be no end to litigation for injuries arising out of the same facts, as long as a party could offer another legal theory by which the same issue might be differently decided"). The factual matters and legal arguments that CAPEEM now raises in an effort to distinguish itself could have been raised when the state court adjudicated the issues of 1) whether the adoption process was procedurally deficient and 2) whether the adopted textbooks are substantively deficient. As such, CAPEEM's new arguments cannot save its action from the preclusive effect of the state court judgment.

D. The Court Could Not Rule Upon the Content Standards in Order To Avoid Inconsistent Judgments.

In evaluating the policy considerations that support preclusion, the Court found that it could avoid rendering an inconsistent judgment if it found the underlying content standards violate the Establishment Clause. (Order 16:15-19.) In so finding, the Court erred because the complaint explicitly does not challenge the content standards. (SAC 21-22, n.6.) Moreover, a conclusion by the Court that the *textbooks* violate the Establishment Clause would *not* necessarily result in a conclusion that the *standards* violate the Establishment Clause. (Recon. Opp. 7-8.) The Court could conclude that the textbooks' implementation of the standards is problematic, while the standards themselves are fine. Furthermore, a conclusion that the textbooks violate the Establishment Clause would certainly

be inconsistent with the state court's finding that the textbooks are neutral and do not portray Hinduism unfavorably compared with other religions. (MSJ, SUF ¶ 100.) Accordingly, policy reasons support the application of claim and issue preclusion because they will promote judicial economy, help curtail vexatious litigation, and avoid inconsistent judgments. *Lucido*, 51 Cal. 3d at 343; (MSJ 19-20).

E. Defendants Timely Filed Their Motion for Summary Judgment, and the Court Should Not Look upon It with Disfavor.

Defendants timely brought their motion for summary judgment, and CAPEEM does not cite to any legal authority for the proposition that the motion is belated. Pleading an affirmative defense provides notice to the opposing party of defenses that will defeat plaintiff's claims if accepted by the district court or jury. *Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 350, 91 S. Ct. 1434, 1453 (1971); 5 Wright, Miller & Cooper, *Fed. Practice and Procedure* § 1270, at 561 (3d ed. 2004). Here, CAPEEM has had notice of the preclusion defenses since Defendants filed their answer.

CAPEEM disingenuously argues that the parties engaged in extensive discovery after the state court judgment became final. (Recon. Opp. 10.) The litigation was stayed for most of the time between the time when the state court judgment became final in July 2007 and the filing of the motion for summary judgment in February 2008. (Motion Recon. 10:22-11:12.) When not stayed, Defendants had to conduct some discovery, in part to determine the textbook portions CAPEEM alleges are discriminatory, which CAPEEM provided shortly before Defendants brought their motion.

CAPEEM is not prejudiced by Defendants' motion for summary judgment. CAPEEM pursued this litigation knowing about the parallel state court case. Its own website addresses the question, "Why were there two cases." *See* http://www.capeem.org (last visited May 12, 2008)(see FAQ, question 5).[3/] It cannot complain that it has expended considerable resources in a case that could have been avoided had the parties brought one action to adjudicate the single primary right at issue here. *See Owens v. Kaiser Found. Health Plan*, 244 F.3d 708, 713 (9th Cir. 2001) (upholding district court's

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3. Defendants request the Court take judicial notice of CAPEEM's website. A court may take judicial notice of information publicly announced on a party's website, so long as the website's authenticity is not in dispute and it is capable of accurate and ready determination. *Doron Precision Systems, Inc. v. FAAC, Inc.*, 423 F. Supp. 2d 173 (S.D.N.Y. 2006)

decision permitting defendant to amend its answer to plead res judicata more than two years after action was filed and after discovery had commenced, noting that appellants could not demonstrate prejudice based solely on the untimely assertion of res judicata because the affirmative defense would have been dispositive had the defendant asserted it when the action was filed). Granting the summary judgment motion will avoid the needless expense of duplicative litigation.

II. DEFENDANTS SATISFIED THE REQUIREMENTS FOR INTERLOCUTORY APPEAL, WHICH WOULD SAVE THE PARTIES AND COURT SIGNIFICANT RESOURCES

Defendants have shown that interlocutory appeal is appropriate because 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. CAPEEM contends that these factors do not exist because virtual representation is a developing area of the law, interlocutory appeal will cause piecemeal litigation, and it will delay consideration of the merits. (Recon. Opp. 10-11.)

The motion for reconsideration itself demonstrates that substantial grounds exist for a difference of opinion. Privity is not susceptible to a neat definition, and CAPEEM has not disputed that the Court committed clear error in its privity analysis. The fact that virtual representation is an evolving concept in the law supports that substantial grounds exist for difference of opinion. Certifying this matter for of an interlocutory appeal will not result in piecemeal litigation because Defendants' motion for summary judgment seeks dismissal of this entire action on the ground that it is completely barred by claim and issue preclusion. (MSJ 1:22, 5:10-25, 20:13-15.) Not only does the motion for summary judgment specifically address the Equal Protection claims, all of the constitutional claims are barred by res judicata because they could have been brought in the state court proceeding. (MSJ 8:17-9:6, 17-19.) In addition, the issues underlying this action have already been litigated. (MSJ 6-9, Reply MSJ l:17-4:7.) As such, a finding of either res judicata or collateral estoppel will result in the action's dismissal in its entirety. Finally, far from delaying consideration on the merits, an interlocutory appeal will comport with the goals of res judicata and collateral estoppel and avoid relitigation of the claims and issues in this case. *See In re Cement Antitrust Litig.*, 673 F.2d 1020, 1026-27 (9th Cir. 1982) (district court should consider the effect of reversal by the Court of Appeals on the termination of the case). As such, interlocutory appeal is appropriate and will save considerable time and resources.

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

The Court granted a stay in the case pending its ruling on this motion, and Defendants have requested an extension of the stay pending resolution on appeal. CAPEEM's opposition does not oppose extension of the stay pending such appellate review. Accordingly, Defendants request that the Court stay the case pending reconsideration of the summary judgment motion or resolution on appeal.

CONCLUSION

Defendants respectfully submit that the Court committed clear error in denying Defendants' motion for summary judgment. CAPEEM does not dispute that the motion for reconsideration is warranted. Instead, it raises new arguments that it could have but failed to raise in its opposition to the motion for summary judgment. Thus, Defendants request the Court reconsider its prior order, grant the motion for summary judgment, and dismiss this case in its entirety. Alternatively, Defendants request the Court certify the order denying summary judgment for interlocutory appeal. All of the criteria for an interlocutory appeal have been satisfied, and an appeal will save time and resources and could dispose of the case in its entirety. Finally, Defendants request that the Court stay the proceedings pending reconsideration of its order or resolution of Defendants' appellate proceedings. Should the Court deny this motion in its entirety, Defendants request the Court stay all proceedings for 10 court days after service of its order to permit Defendants to exhaust its appellate options.

Dated: May 16, 2008

Respectfully submitted,

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