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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

DAVID PAZ, an individual and on
behalf of all others similarly situated,

Plaintiff,

vs.

AG ADRIANO GOLDSCHMEID,
INC., a California corporation, et al.,

Defendants.

CASE NO. 14cv1372 DMS (DHB)

**ORDER DENYING DEFENDANTS'
MOTION TO AMEND AND
CERTIFY ORDER FOR
INTERLOCUTORY REVIEW AND
TO STAY PROCEEDING
PENDING APPEAL**

This case comes before the Court on Defendants' motion to amend and certify order for interlocutory review and to stay proceedings pending appeal. The order at issue is the Court's October 27, 2014 Order denying Defendants' motion to dismiss this case on the ground of preemption. Plaintiff filed an opposition to the motion, and Defendants filed a reply.

Title 28 U.S.C. § 1292(b) states:

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). According to the Ninth Circuit, this statute is "to be used only in exceptional situations in which allowing an interlocutory appeal would avoid protracted

1 and expensive litigation.” *In re Cement Antitrust Litig.*, 673 F.2d 1020, 1026 (9th Cir.
2 1982) (citations omitted).

3 As set out in the statute, there are three requirements for certification pursuant to
4 § 1292(b). The first is that the order involve “a controlling question of law.” To satisfy
5 this requirement, the moving party must show “that resolution of the issue on appeal
6 could materially affect the outcome of the litigation in the district court.” *Id.*
7 Defendants argue this requirement is met here, while Plaintiff contends there are factual
8 issues underlying the preemption determination.

9 Contrary to Plaintiff’s suggestion, there are no factual issues underlying the
10 Court’s preemption decision. That decision was made on a motion to dismiss, based
11 on the Court’s interpretation of the law and the application of that law to the facts
12 alleged in the Complaint. The motion did not raise any factual issues, and the Court did
13 not resolve any factual issues in deciding the motion.

14 The Court agrees with Defendants that the preemption issue involves a
15 controlling question of law in that it could materially affect the outcome of this case.
16 If the Court of Appeals were to find Plaintiff’s claims preempted, then the case would
17 be dismissed. On the other hand, if the Court of Appeals agreed with this Court that
18 Plaintiff’s claims were not preempted, then the case would proceed through the
19 litigation process. Thus, the first requirement for certification is met.

20 The second requirement for certification is that there be “substantial ground for
21 difference of opinion” on the controlling legal question.

22 To determine if a “substantial ground for difference of opinion” exists
23 under § 1292(b), courts must examine to what extent the controlling law
24 is unclear. Courts traditionally will find that a substantial ground for
25 difference of opinion exists where “the circuits are in dispute on the
question and the court of appeals of the circuit has not spoken on the point,
if complicated questions arise under foreign law, or if novel and difficult
questions of first impression are presented.”

26 *Couch v. Telescope Inc.*, 611 F.3d 629, 633 (9th Cir. 2010) (quoting 3 Federal
27 Procedure, Lawyers Edition § 3:212 (2010)). “However, ‘just because a court is the
28 first to rule on a particular question or just because counsel contends that one precedent

1 rather than another is controlling does not mean there is such a substantial difference
2 of opinion as will support an interlocutory appeal.” *Id.* (quoting 3 Federal Procedure,
3 Lawyers Edition § 3:212 (2010)). “It is well settled that ‘the mere presence of a
4 disputed issue that is a question of first impression, standing alone, is insufficient to
5 demonstrate a substantial ground for difference of opinion.’” *Id.* at 634 (quoting *In re*
6 *Flor*, 79 F.3d 281, 284 (2d Cir. 1996)).

7 In this case, Defendants argue there is a substantial ground for difference of
8 opinion because the preemption issue is one of first impression and one on which
9 reasonable jurists might disagree. Defendants are correct that the issue is one of first
10 impression. However that is insufficient to warrant certification under § 1292(b). *Id.*
11 Defendants’ assertion that other jurists may disagree with this Court’s conclusion is also
12 insufficient. Indeed, it is pure speculation. Therefore, the second requirement for
13 certification is not met. *See DHR Int’l, Inc. v. Charlson*, No. C 14-1899 PJH, 2014 WL
14 5513718, at *4 (N.D. Cal. Oct. 31, 2014) (finding second requirement not met where
15 there was absence of case law on issue and only disagreement with the court’s ruling);
16 *Guidiville Rancheria of Cal. v. United States*, No. 12-cv-1326 YGR, 2014 WL
17 5020036, at *2 (N.D. Cal. Oct. 2, 2014) (same); *Bennett v. SimplexGrinnell LP*, No. 11-
18 cv-01854-JST. 2014 WL 4244045, at *2 (N.D. Cal. Aug. 25, 2014) (same).

19 The parties agree that the third requirement for § 1292(b) certification is met.
20 That requirement asks whether an immediate appeal will advance the ultimate
21 termination of the litigation. The Court notes the parties’ agreement on this issue, but
22 does not necessarily agree with it. As stated above, if the Court of Appeals disagreed
23 with this Court’s decision that Plaintiff’s claims were not preempted, Plaintiff’s claims
24 would be dismissed and the litigation would come to an end. However, if the Court of
25 Appeals agreed with this Court’s decision, then certification would not have advanced
26 the termination of this litigation. Rather it would have delayed the progress of the case
27 and its ultimate termination.

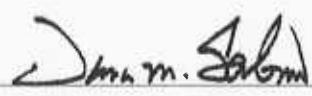
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For these reasons, Defendants' motion to amend and certify this Court's October 27, 2014 order on the preemption issue is denied.

IT IS SO ORDERED.

DATED: January 27, 2015



HON. DANA M. SABRAW
United States District Judge