



(the “Stipulation”), may have on Plaintiff’s standing in this action.<sup>2</sup> Plaintiff now moves for a certification of interlocutory appeal pursuant to 28 U.S.C. § 1292(b).

Section 1292(b) sets forth the requirements the Court must consider when deciding whether to allow an appeal of an interlocutory order such as the Order:

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 a 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.<sup>3</sup>

The decision to grant a section 1292(b) certificate is within the sound discretion of the Court.

One of the main purposes of section 1292(b) is to prevent wasteful litigation.<sup>4</sup> With this principle in mind, the Court applies these factors to the Order.

Plaintiff represents that the Order made two rulings. First, that “certain ‘identical’ issues had been ‘fully litigated’ by the Delaware Courts,” and second, that “the Delaware Supreme Court ‘appeared’ to consider and rule that plaintiff [sic] signature on a Stipulation and Order dated 11/22/00 was valid.” Plaintiff’s overarching argument is that the Order incorrectly applied the doctrine of issue preclusion to Plaintiff’s claims because no claim or issue presently

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<sup>2</sup> Opinion at 10. The parties are referred to the complete text of the Opinion for a full definition and a detailed discussion of the Stipulation.

<sup>3</sup> 28 U.S.C. § 1292(b); see also Katz v. Carte Blanche Corp., 496 F.2d 747, 754 (3d Cir. 1974).

<sup>4</sup> For a discussion of the legislative history of § 1292(b), see Katz, 496 F.2d at 754-55 (“And on the practical level, saving of time of the district court and of expense to the litigants was deemed by the sponsors to be a highly relevant factor.”); see also Milbert v. Bison Labs., Inc., 260 F.2d 431, 433 (3d Cir. 1958) (“It is quite apparent from the legislative history . . . that 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.”)

before this Court was ever litigated in the Delaware Supreme Court.<sup>5</sup> Plaintiff represents that the only issue ever decided by the Delaware Supreme Court was whether Judge Conner violated the Delaware Code of Judicial Conduct.

Plaintiff's Motion must be denied on two separate grounds. First, the Motion is premature. The Order was a protective one, staying discovery by Plaintiff against Judge Conner in this matter. As discussed in the Opinion, Plaintiff alleged that Judge Conner had a financial interest in Lavender Hill, a Defendant in this matter. The Court, after a thorough review of the child support contempt of court proceedings between Plaintiff and his ex-wife Marjorie Lamb in the Delaware state courts (the "Delaware proceedings"), found that this specific issue had been fully litigated by the parties and was decided by the Delaware courts, including the Delaware Supreme Court.

The Court did not rule on the preclusive effect of any other issues, but did invite parties to submit legal authority regarding the possible preclusive effect of the Stipulation on Plaintiff's standing in this action. In fact, the Court has not made any specific rulings on that issue, and Plaintiff's Motion is premature as far as it concerns any preclusive effect of the Stipulation - or any issue other than that of Judge Conner's interest in Lavender Hill.

Second, the Motion fails to satisfy requirements of section 1292(b). Plaintiff's argument that the Order's rulings involve a controlling question of law because the Court indicated that "the issue might affect plaintiff's standing to maintain this action" and that "several of Plaintiff's claims have been resolved" under the doctrine of *res judicata* appears to

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<sup>5</sup> Plaintiff's main concern appears to be the Court's statement that Plaintiff's challenges to the validity of his signature on the Stipulation "appear to have been denied by the Delaware Supreme Court as lacking any factual basis."

refer to the issue of Plaintiff's standing. As stated above, the Order denied Plaintiff discovery against Judge Conner. That discovery issue does not "truly implicate[] the policies favoring interlocutory appeal" and is not a controlling question of law here.<sup>6</sup> Plaintiff does not articulate any harm resulting from a possibly erroneous protective order, and Plaintiff's argument that an immediate appeal would avoid possibly wasted trial time is meritless.

Plaintiff's argument that a substantial ground for difference of opinion exists with regard to the Court's rulings on issue preclusion is nothing but Plaintiff's personal disagreement with the Court's application of the issue preclusion doctrine to the facts of record. The history and record of the Delaware proceedings, as set forth in more detail in the February 2, 2005 Opinion, directly contradict Plaintiff's bare allegations that no issues "identical" to those presently before the Court were "fully litigated" in Delaware state courts. Plaintiff's disagreement with the Court's logic, without citation to contrary authority, does not create a legally sufficient difference of opinion.

The third requirement of section 1292(b) presents yet another ground to deny Plaintiff's Motion. An immediate appeal, instead of advancing the ultimate termination of this litigation, would only result in further delays. Plaintiff represents that "[r]egardless of the outcome of the trial," at its conclusion he "intends to appeal" the Order "precluding certain issue [sic] from being litigated," and that a successful appeal would necessitate a remand for a second trial, which would be "highly duplicative" of the first trial.<sup>7</sup> First, common sense provides that if the Court were to preclude certain issues from being litigated, such issues would not be presented

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<sup>6</sup> See Katz, 496 F.2d at 755.

<sup>7</sup> Pl's Memorandum in support of the Motion.

at the first trial at all. Second, Plaintiff's efficiency argument, aside from being premised on the erroneous assumption that the Court has ruled against him on the issue of standing, depends on a number of future occurrences: that the Court will not dispose of the parties' claims on summary judgment motions; that Plaintiff will lose at trial and then successfully appeal; and that on remand the case will proceed to a second trial. Accordingly, granting the Motion would not advance the ultimate termination of this action but instead create piecemeal litigation that section 1292(b) desires to avoid.

The Court also notes Plaintiff's allegations that "so far in this litigation the District Court has not required any Defendant to produce any documentation or provide the name of any witnesses that support any defense" while requiring the Plaintiff "to produce tens of thousands of documents at great expense." Plaintiff alleges he was "forced to serve discovery on one of defendants business partners Jay H. Conner" "as a direct result of none of the defendants making any meaningful response to discover[y]" [sic]. These allegations do not warrant a substantive discussion since they are directly contradicted by the record in this litigation, including Plaintiff's own pleadings.

The Court therefore declines to amend its February 2, 2005 Order to certify it for immediate appeal. An appropriate Order follows.

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

**THOMAS J. BURNS,**  
**Plaintiff**

v.

**LAVENDER HILL HERB FARM, INC.,  
PENNSYLVANIA CERTIFIED ORGANIC,  
MARJORIE S. LAMB, KATHRYN  
ELIZABETH LAMB, HELEN NICHOLSON,  
and LESLIE ZUCK,**  
**Defendants**

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**CIVIL ACTION  
NO. 01-7019**

**ORDER**

**AND NOW**, this 2nd day of March, 2005, upon consideration of Plaintiff's Motion to Certify Memorandum and Opinion Order Entered February 2, 2005 for Immediate Appeal and for Stay Pending Appeal [Doc. # 173], and upon review of the record, it is hereby **ORDERED** that the Motion is **DENIED**.

It is so **ORDERED**.

**BY THE COURT:**

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**CYNTHIA M. RUFÉ, J.**