

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

AMERISOURCEBERGEN DRUG CORPORATION	:	CIVIL ACTION
	:	NO. 03-CV-6769
v.	:	
	:	
RANDALL MEIER, and	:	
ADVANCED PHARMACY SOLUTIONS, LLC	:	

**SURRICK, J.**

**OCTOBER 14, 2005**

**MEMORANDUM & ORDER**

Presently before the Court is Plaintiff Amerisourcebergen Drug Corporation's ("ABDC") Motion For Entry Of Judgment (Doc. No. 31) and Defendants Randall Meier ("Meier") and Advanced Pharmacy Solutions, LLC's ("APS") Memorandum In Opposition To Plaintiff's Motion For Entry Of Judgment (Doc. No. 34). For the following reasons, we will deny Plaintiff's Motion For Entry Of Judgment and certify the Court's Orders of December 14, 2004 and May 19, 2005 for interlocutory appeal.

**I. BACKGROUND<sup>1</sup>**

APS was a specialty pharmacy company that sold psychotropic drugs to mental health clinics and managed their Patient Assist Programs. (Doc. No. 14 at Ex. A, pp. 18-19.) In 2003, Meier loaned APS \$2.6 million and became a 50.5% shareholder in the company. (*Id.* at 44-45;

---

<sup>1</sup> A more detailed statement of the factual background in this case may be found in the Court's Memorandum and Order of December 14, 2005, *Amerisourcebergen Drug Corp. v. Meier*, No. 03-CV-6769, 2004 WL 2900702 (E.D. Pa. Dec. 14, 2004).

Meier Decl. ¶¶ 2-3.) Meier also became the President of APS and signed documents on its behalf. (Doc. No. 14 at Ex. A, p. 23; Meier Decl. ¶ 3.) APS was looking for a wholesale distributor to stock its pharmacies with mental health-related drugs. (Doc. No. 15 at 4.) ABDC is a wholesaler of pharmaceuticals. (Chamberlain Decl. ¶ 2.) The parties executed a Prime Vendor Agreement (“PVA”) dated July 1, 2003 in which ABDC became a supplier to APS. (Doc. No. 14 at Exs. C, D.) The PVA provided the terms by which APS would compensate ABDC for the drugs. (*Id.*) A document styled “Agreement,” which was signed by Meier as president of APS on July 28, 2003, granted ABDC a security interest in all of the assets of APS. (Doc. No. 14 at Ex. F.) Section 2(d) of the Agreement also provided that “[i]n the event of default . . . Purchaser shall pay all of ABC’s collection costs and expenses . . . including, without limitation, all attorney fees in addition to any other sums due and owing.” (*Id.*) In September, 2003, Meier executed an unconditional Personal Guaranty of APS’s obligations. (Doc. No. 14 at Ex. G.) Three months later, on December 5, 2003, APS sold all of its assets to another company, RTIN Holdings, Inc. (“RTIN”). On March 19, 2004, RTIN, under its new name, Safescript Pharmacies, Inc., filed a Chapter 11 bankruptcy petition in the United States Bankruptcy Court for the Eastern District of Texas. *In re Safescript Pharm., Inc.*, No. 04-60600 (Bankr. E.D. Tex. filed Mar. 19, 2004).

Plaintiff and Defendants filed cross-motions for summary judgment for breach of contract. The parties’ cross-motions were based on their opposing interpretations of the Personal Guaranty executed by Meier on September 2, 2003. (Doc. No. 14 at Ex. G.) Defendants contended that Meier’s guarantor liability extended only to APS’s Opening Orders for its four pharmacy locations. Plaintiff contended that Meier’s guarantor liability extended to all APS

obligations to ABDC for a period of nine months from the date of the Personal Guaranty. On December 14, 2004, we granted Plaintiff's motion for partial summary judgment and denied Defendants' cross-motion for summary judgment. *Amerisourcebergen Drug Corp. v. Meier*, No. 03-6769, 2004 WL 2900702 (E.D. Pa. Dec. 14, 2004). We concluded that the Personal Guaranty clearly and unambiguously guaranteed payment of all of APS's obligations to ABDC incurred from the date of the signing of the Personal Guaranty for a period of nine months, and we awarded damages to Plaintiff in the amount of \$931,576.77. *Id.* at \*6. In addition, we concluded that Defendant Meier is liable for attorney's fees and costs arising from the collection of debts that were incurred prior to June 2, 2004.<sup>2</sup> *Id.* at \*12. In January 2005, the parties approached the Court regarding the issue of prejudgment interest. On May 19, 2005, we filed a Memorandum and Order finding that Plaintiff is entitled to prejudgment interest from Defendant at the rate of eighteen percent in accordance with the terms of their agreement. *Amerisourcebergen Drug Corp. v. Meier*, No. 03-CV-6769, 2004 WL 1213913 (E.D. Pa. May 19, 2004).

On June 13, 2005, Plaintiff filed the instant Motion for Entry of Judgment, requesting that

---

<sup>2</sup>Specifically, we found as follows:

The Agreement provides, in relevant part, that in the event of default, APS "shall pay all of [ABDC]'s collection costs and expenses whether or not suit is filed, including without limitation, all attorney's fees in addition to other sums due and owing." (Doc. No. 14 Ex. F ¶ 2). In Meier's Personal Guaranty, he agreed to unconditionally guarantee all of APS's "Obligations" which the Agreement defines as including "all of Purchaser's existing and future liabilities to [ABDC]." (*Id.* ¶ 3). Meier's Personal Guaranty covers all obligations of APS to ABDC. Consequently, Meier also guaranteed the attorney fee obligation.

the Court enter judgment in its favor pursuant to Rule 58(d) of the Federal Rules of Civil Procedure, which permits a party to request that judgment be set forth on a separate document. Fed. R. Civ. P. 58(d). Plaintiff requests that the Court enter judgment in its favor in the amount of \$1,194,545.23 plus \$465.79 per day from June 13, 2005 through the date of entry of judgment, a sum that includes the principal damages and prejudgment interest previously awarded. (Doc. No. 31.) Defendants oppose this Motion because Plaintiff's contract-based claim for attorney fees has not been quantified and thus remains pending. They argue that the Court's Orders of December 14, 2004 and May 19, 2005 do not constitute final orders from which an appeal lies and thus may not be entered as judgments. (Doc. No. 34.)

## **I. LEGAL ANALYSIS**

### **A. Motion for Entry of Judgment**

Plaintiff requests that the Court enter judgment in its favor pursuant to Rule 58(d). A "judgment," as used in the Federal Rules of Civil Procedure, is defined by Rule 54(a) to include "a decree and any order from which an appeal lies." Fed. R. Civ. P. 54(a). Under 28 U.S.C. § 1291, a judgment is final and appealable if the decision "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 275 (1988) (quoting *Catlin v. United States*, 324 U.S. 229, 233 (1945)).

Plaintiff suggests that our Orders of December 14, 2004 and May 19, 2005 are final and appealable, making entry of judgment appropriate in this case. Defendants, on the other hand, argue that Plaintiff's claim for attorney fees remains pending and, as such, precludes final judgment. While we decided the issue of attorney fees in our Memorandum and Order of

December 14, 2004, finding Defendant liable for attorney fees and costs incurred in the collection of debts, we did not quantify the amount of such fees in that Order. As such, Defendants are correct that the issue remains undecided.

There has been a great deal of litigation over the question whether a decision on the merits is final under 28 U.S.C. § 1291 when the recoverability or amount of attorney fees has not yet been determined. *See Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 199 (1988). The Supreme Court in *Budinich* attempted to answer this question by establishing a bright-line rule that “an unresolved issue of attorney’s fees for the litigation in question does not prevent judgment on the merits from being final.” *Id.* at 202.

While the Supreme Court sought to end a dispute among the circuits by establishing this bright-line rule, courts addressing the issue post-*Budinich* interpreted the decision to more narrowly apply only to attorney fees for the underlying litigation. *See Justine Realty Co. v. Am. Nat’l Can Co.*, 945 F.2d 1044, 1047-48 (8th Cir. 1991). The Third Circuit, prior to *Budinich*, made a similar distinction and held that when attorney fees are provided for in a contract and are an “integral part of the contractual relief sought,” they cannot be considered collateral and must be decided and quantified for the relevant order to constitute a final judgment. *Beckwith Mach. Co. v. Travelers Indem. Co.*, 815 F.2d 286, 287 (3d Cir. 1987). The Third Circuit has maintained this approach post-*Budinich*, understanding the bright-line rule introduced in that case to apply only to statutory grants of attorney fees and not to fees that are included in the contract at issue. *See Vargas v. Hudson County Bd. of Elections*, 949 F.2d 665, 669-70 (3d Cir. 1992) (holding that when attorney fees are an element of damages the *Budinich* rule does not apply and the court’s order is not final until the fees are quantified); *see also Ragan v. Tri-County Excavating*,

*Inc.*, 62 F.3d 501, 505 (3d Cir. 1995) (holding that because attorney fees were part of the contractual damages, the order was non-final until the fees were quantified). More recently, the Third Circuit affirmed this distinction in *Gleason v. Norwest Mortgage, Inc.*, 243 F.3d 130 (3d Cir. 2001), and found an exception to this rule only when the contractual provision for attorney fees is practically no different from a fee shifting statute that grants attorney fees to the prevailing party. *Id.* at 138. Thus, the Third Circuit has made it clear that “when an award of attorney fees is based on a contractual provision and is an ‘integral part of the contractual relief sought,’ the order does not become final and appealable until the attorney fees are quantified.” *Id.* at 137 (quoting *Ragan*, 62 F.3d at 505); *see also Equinox Software Sys., Inc. v. Airgas, Inc.*, 158 F. Supp. 2d 485, 491 (E.D. Pa. 2001) (denying entry of judgment where outstanding claim for attorney fees is based, in part, on contract at issue in the case).

In the dispute between ABDC, Meier, and APS, the attorney fees issue is based not on a statute but on a contractual provision in the “Agreement” signed by ABDC and Meier as president of APS. (Doc. No. 14 at Ex. F.) The provision states that should the Purchaser—in this case, APS—default on any of its obligations, it will be responsible to ABDC for costs and attorney fees associated with collection of the debts. (*Id.*) Thus, because the attorney fees provision is contractual and does not resemble a statutory fee shifting provision, we conclude that the attorney fees issue must be viewed as an integral part of the contractual relief sought. Accordingly, our Orders of December 14, 2004 and May 19, 2005 may not be considered final, and entry of judgment is precluded until we have quantified the attorney fees awarded to Plaintiff.

## **B. Certification for Interlocutory Appeal**

Under 28 U.S.C. § 1292(b) a district judge may certify an order, not otherwise appealable, for interlocutory appeal. Through such an interlocutory appeal, the Court of Appeals may, in its discretion, permit hearing of the issue despite the existence of pending claims in the litigation. 28 U.S.C. § 1292(b). While neither the Plaintiffs nor Defendants in this case have formally moved for certification of this Court's Orders for interlocutory appeal,<sup>3</sup> we have the authority under § 1292(b) to certify our orders sua sponte. See *United States v. Stanley*, 483 U.S. 669, 673 (1987); see also *Gen. Pub. Util. v. United States*, 745 F.2d 239, 240 (3d Cir. 1984); *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 494 F. Supp. 1190, 1243 (E.D. Pa. 1980). We will sua sponte certify for interlocutory appeal our Orders of December 14, 2004 and May 19, 2005, which respectively grant partial summary judgment to Plaintiff and award pre-judgment interest to Plaintiff.<sup>4</sup>

Under § 1292(b), we may certify an order for interlocutory appeal if “(1) it involves a ‘controlling question of law;’ (2) there is ‘substantial ground for difference of opinion’ with respect to that question; and (3) immediate appeal ‘may materially advance the ultimate termination of the litigation.’” *Zenith Radio Corp.*, 494 F. Supp. at 1243 (quoting 28 U.S.C. §

---

<sup>3</sup> Defendants have filed Notices of Appeal with respect to both the December 14, 2004 and May 19, 2005 Orders. We now certify the questions addressed in those Orders for interlocutory appeal because the pending claim for attorney fees would otherwise preclude appellate review of these matters. Under 28 U.S.C. § 1292(b), the parties have ten days to appeal following the entry of the order certifying it for interlocutory appeal. If the appeal is timely, the Court of Appeals may, in its discretion, permit the appeal to be taken from this Order.

<sup>4</sup> As required by 28 U.S.C. § 1292(b), the Order that follows this Memorandum will explicitly state the questions we certify for interlocutory appeal.

1292(b)). Applying this standard to the case before us, it is clear that interlocutory appeal is appropriate. A “controlling question of law” includes “every order which, if erroneous, would be reversible error on final appeal’ as well as other questions which are sufficiently ‘serious to the conduct of the litigation.’” *Id.* (quoting *Katz v. Carte Blanche Corp.*, 496 F.2d 747, 755 (3d Cir. 1974) (en banc), *cert. denied*, 419 U.S. 885 (1974)). The primary question addressed in the Memorandum and Order of December 14, 2004 was whether the Personal Guaranty, executed by Defendant Randall Meier, obligated him for the damages, fees, and costs to ABDC that arose as a result of APS’s acknowledged breach of contract. Plaintiff ABDC moved for partial summary judgment on this issue and Defendant Meier filed a cross motion for summary judgment, contesting his liability. In addition, while APS conceded that it had breached the contract, it disputed the amount of damages for which it was liable as well as liability for attorney fees and interest.

We held Defendants Meier and APS liable for damages in the amount of \$931,576.77 and found Defendants liable to ABDC for attorney fees and costs incurred in the collection of debts. In addition, we held in our Memorandum and Order of May 19, 2005 that Defendants were also responsible for prejudgment interest at a rate of eighteen percent. These Orders, based on our interpretation of three agreements—the Personal Guaranty signed by Meier, the Prime Vendor Agreement between APS and ABDC, and the Agreement signed by ABDC and Meier—present pure questions of law which would constitute reversible error if they are found, on appeal, to be erroneous. These holdings thus meet § 1292(b)’s requirement that a “controlling question of law” be involved.

The second requirement under § 1292(b) is that there must be “substantial ground for

difference of opinion.” This factor is also present in the questions addressed by our Orders of December 14, 2004 and May 19, 2005. While we are confident that our analysis of the Personal Guaranty and other contracts at issue is correct, we are aware that the parties submitted extensive briefs in support of their respective Motions for Summary Judgment. While we granted Plaintiff’s Motion for Partial Summary Judgment, Defendants presented colorable arguments for summary judgment based on an alternate construction of phrases in the Personal Guaranty and based on the notion that Meier’s obligations as a surety were discharged by virtue of material changes in the relationship between APS and ABDC. (Doc. No. 15.) These contrasting arguments compel us to recognize that our decision could be deemed erroneous by the Court of Appeals and “that there is accordingly a substantial ground for difference of opinion within the meaning of § 1292(b).” *Zenith Radio Corp.*, 494 F. Supp. at 1243.

Finally § 1292(b) requires that immediate appeal “materially advance the ultimate termination of the litigation,” a criterion that is certainly satisfied here. Counsel have informed the Court that the assessment of attorney fees in this matter will require extensive and time consuming hearings. At issue are claims for attorney fees in the instant litigation in addition to fees resulting from separate proceedings in state and bankruptcy courts in Texas and Oklahoma. (Doc. No. 34.) Should the Court of Appeals reverse this Court’s grant of partial summary judgment to Plaintiff, these hearings will be unnecessary. As such, “an immediate appeal has the potential to greatly conserve the resources of the judiciary and the parties,” *Chase Manhattan Bank v. Iridium Africa Corp.*, 324 F. Supp. 2d 540, 545-46 (D. Del. 2004), avoiding a possible waste of resources on an unnecessary trial on Plaintiff’s contractually-based attorney fees claim. As the Third Circuit has observed, such a use of the interlocutory appeal to avoid “the wasted

effort of a protracted litigation over damages where there might be no liability” was envisioned by the drafters of 28 U.S.C. § 1292(b) as evidenced by reference to such cases among examples given in support of the bill. *Katz*, 496 F.2d at 754 (citing *Hearings Before Subcommittee No. 3 of the House Committee on the Judiciary on H.R. 6238*, 85th Cong., 2d Sess., ser. 11 at 8, 9 (1958)).

In sum, we conclude that an interlocutory appeal is appropriate in this case and satisfies the requirements of 28 U.S.C. § 1292(b). *See Chase Manhattan Bank*, 324 F. Supp. at 546 (denying entry of judgment because of pending contract-based attorney fees claim and instead certifying question for interlocutory appeal). Accordingly, we will certify the following questions: (1) Are Defendants Meier, by virtue of the Personal Guaranty, and APS, by virtue of its agreements with ABDC, liable for damages in the amount of \$931,576.77 to ABDC? (2) Are Defendants Meier and APS liable for attorney fees and costs in the collection of debts? (3) Are Defendants Meier and APS liable to ABDC for prejudgment interest at the rate of eighteen percent?

An appropriate Order follows.

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

AMERISOURCEBERGEN DRUG :  
CORPORATION : CIVIL ACTION  
 : NO. 03-CV-6769  
v. :  
RANDALL MEIER, and :  
ADVANCED PHARMACY SOLUTIONS, :  
LLC :

**ORDER**

AND NOW, this 14th day of October, 2005, it is ORDERED that Plaintiff's Motion for Entry of Judgment (Doc. No. 31) is DENIED.

This Court's Memoranda and Orders of December 14, 2004 (Doc. No. 20) and May 19, 2005 (Doc. No. 30) are CERTIFIED for interlocutory appeal. The following controlling questions of law are hereby CERTIFIED to the United States Court of Appeals for the Third Circuit: (1) Are Defendants Randall Meier, by virtue of the Personal Guaranty, and Advanced Pharmacy Solution, LLC, by virtue of its agreements with Amerisourcebergen Drug Corporation, liable for damages in the amount of \$931,576.77? (2) Are Defendants Randall Meier and Advanced Pharmacy Solution, LLC liable for attorney fees and costs in the collection of debts? (3) Are Defendants Randall Meier and Advanced Pharmacy Solution, LLC liable for prejudgment interest at the rate of eighteen percent?

IT IS SO ORDERED.

BY THE COURT:

S:/R. Barclay Surrick, Judge