

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

THOMAS E. PEREZ, SECRETARY OF
LABOR, UNITED STATES
DEPARTMENT OF LABOR,

Plaintiff,

v.

PAN-AMERICAN BERRY GROWERS,
LLC, an Oregon limited liability company,

Defendant.

6:12-cv-1474-TC (Lead Case)
6:12-cv-1566-TC (Trailing Case)
6:13-cv-1439-TC (Trailing Case)

ORDER

MCSHANE, Judge:

Plaintiff moves to stay the proceedings and certify the order adopting Judge Coffin's Findings and Recommendations as immediately appealable under 28 U.S.C. § 1292(b). *See* ECF

No. 72. Section 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.

The party seeking certification bears the burden of demonstrating the certification requirements of section 1292(b) have been met. *Couch v. Telescope, Inc.*, 611 F.3d 629, 633 (9th Cir. 2010).

Plaintiff states the controlling question of law in this instance is “Whether the Department of Labor’s use of its hot goods statutory authority with respect to perishable agricultural goods constituted fraud or misconduct under Federal Rule of Civil Procedure (“Rule) 60(b)(3) warranting the extraordinary relief of vacating a consenting judgment.” That question, however, was not before the court. Rather, the question involved plaintiff’s specific use of “hot goods objections” in this instance.

As I noted in my order adopting the Findings and Recommendation, “the unique circumstances in this case warrant granting” the motions to vacate the judgment. April 24, 2014 Order, 2. Then, as now, “[p]laintiff appears to believe Judge Coffin took issue with the Department of Labor’s general practices regarding ‘hot goods objections.’” *Id.* Then, as now, plaintiff is mistaken. Judge Coffin’s findings, and my order adopting those findings, made clear that the critical issue in this case was not plaintiff’s general use of the “hot goods objections,” but rather the “unique situation” present here where defendants “had no choice but to agree to the consent judgments.” *Id.* In fact, plaintiff’s use of the hot goods authority here effectively prevented defendants from having their day in court. It was the specific manner in which the plaintiff used the “hot goods objection” in this instance, as opposed to the general use of the “hot goods objection” as to perishable goods, that constituted fraud under rule 60(b)(3).

Section 1292(b) is not appropriate in this instance. This case revolves not around a question of law on which reasonable jurists could differ, but rather on factual findings unique to this case. As plaintiff cannot meet the first requirement of section 1292(b), I need not inquire as to the other requirements. The motion to certify, ECF No. 72, is DENIED.

IT IS SO ORDERED.

DATED this 25th day of August, 2014.

/s/ Michael McShane
Michael J. McShane
United States District Judge