JANET M. HEROLD, Regional Solicitor
BRUCE L. BROWN, WSBA #18844
Associate Regional Solicitor
brown.bruce.l@dol.gov
GRACE A. KIM, Trial Attorney, CSBN #247456
kim.grace@dol.gov
JEREMIAH MILLER, Trial Attorney, WSBA #40949
miller.jeremiah@dol.gov
U.S. Department of Labor, Office of the Solicitor
300 Fifth Avenue, Suite 1120
Seattle, Washington 98104
Phone (206) 757-6762
Fax (206) 757-6761
Attorneys for Plaintiff Thomas E. Perez

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
EUGENE DIVISION

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

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

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

B&G DITCHEN, LLC, an Oregon limited liability company; ROBERT A. DITCHEN, an individual; and GREGG DITCHEN, an individual,
Defendants.

CASE NO. 6:12-cv-1474-TC (Lead Case)
CASE NO. 6:12-cv-1566-TC (Trailing Case)
CASE NO. 6:13-cv-1439-TC (Trailing Case)

MOTION TO CERTIFY THE APRIL 24, 2014 ORDER ADOPTING MAGISTRATE JUDGE THOMAS M. COFFIN'S FINDINGS AND RECOMMENDATIONS AS IMMEDIATELY APPEALABLE PURSUANT TO 28 U.S.C. § 1292(b)

LR 7.1 Certifications

Plaintiff Thomas E. Perez, Secretary of Labor ("Secretary"), through the undersigned counsel, hereby certifies that he has conferred with all Defendants through their counsel of record. As a result Plaintiff presents this Motion to Certify the April 24, 2014 Order adopting Magistrate Judge Thomas M. Coffin's Findings and Recommendations as Immediately Appealable pursuant to 28 U.S.C. § 1292(b) and Local Rule 7; Defendants oppose this Motion.

Motion

Plaintiff moves the Court to enter an Order Certifying that its April 24, 2014 Order adopting Magistrate Judge Thomas M. Coffin's Findings and Recommendations is Immediately Appealable pursuant to 28 U.S.C. § 1292(b).

I. Facts

On or before July 28, 2012, Plaintiff commenced an investigation of Defendants' berry growing operations. As a result of the investigations, Plaintiff determined that there were extensive violations of the minimum wage and recordkeeping provisions of the Fair Labor Standards Act of 1938, as amended ("the Act;" 29 U.S.C. §§ 201 et seq.) Because multiple workers picked on the same ticket, Defendants' records failed to properly identify all of its employees and the wages they were due. Plaintiff therefore made a reasonable estimation of the compensation due Defendants' employees.

As a result, on or about August 2, 2012, Plaintiff contacted Defendants to apprise them of the results of the investigation. Plaintiff also requested that Defendants voluntarily agree not to ship berries harvested by workers paid in violation of the Act, pursuant to the "hot goods" provision of the Act. 29 U.S.C. § 215(a)(1). Plaintiff further contacted downstream purchasers of the berries and asked those purchasers to cease moving berries from Defendants in interstate commerce.

Ultimately, Defendants negotiated and signed Consent Judgments resolving the violations discovered by Plaintiff in early August, 2012. Upon receiving signed Consent Judgments from Defendants, Plaintiff immediately lifted his hot goods objection. The Consent Judgments were subsequently filed with this Court.

Just slightly less than one year after the entry of the Consent Judgments, Defendants brought Motions to Vacate the Consent Judgments pursuant to Federal Rule of Civil Procedure 60(b). On January 15, 2014, Magistrate Judge Thomas M. Coffin issued Findings and Recommendations granting Defendants' Motions. Plaintiff filed objections to the Findings and Recommendations, and on April 24, 2014, this Court issued an Order adopting the Findings and Recommendations.

II. Argument

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.

The Ninth Circuit has set forth a three prong test for § 1292(b) orders that must be met for entry of an order pursuant to this statutory provision: (1) that there be a controlling question of law, (2) that there be substantial grounds for difference of opinion, and (3) that an immediate appeal may materially advance the ultimate termination of the litigation. In re Cement Antitrust Litigation, 673 F.2d 1020, 1026 (9th Cir.1982).

1. There is a controlling question of law.

Although the term "controlling question of law" has not been interpreted so narrowly as to require that the question of law be dispositive, resulting in termination of the litigation if the district court order were reversed, it is clear that "at the very least, a controlling question of law must encompass 'every order which, if erroneous, would be reversible error on final appeal.'" Id. (quoting Katz v. Carte Blanche Corp., 496 F.2d 747, 755 (3rd Cir. 1974)). "[A]ll that must be shown in order for a question to be 'controlling' is that resolution of the issue on appeal could materially affect the outcome of litigation in the district court." Id.

Plaintiff submits that the following question of law is controlling in this instance:

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 consent judgment.

If the Ninth Circuit Court of Appeals were to rule on appeal that the Plaintiff's use of his authority under the Act to enforce the hot goods provisions of the statute with respect to perishable agricultural goods did not constitute fraud or misconduct for purposes of Rule 60(b)(3), this Court's order would be reversed and the Consent Judgments reinstated. Thus, it is a controlling question of law that would not only materially affect the outcome of the litigation but would effectively terminate the litigation.

2. There are substantial grounds for difference of opinion.

Whether there is substantial ground for difference of opinion under 28 U.S.C. § 1292(b) depends on the extent to which the controlling law is unclear. See Couch v. Telescope Inc., 611 F.3d 629, 633 (9th Cir. 2010). "Courts traditionally will find that a substantial ground for difference of opinion exists where . . . novel and difficult questions of first impression are presented.'" Id. (quoting 3 Fed. Proc., Lawyers Ed. § 3:212 (2010)). The Ninth Circuit has clarified that "when novel legal issues are presented, on which fair-minded jurists might reach contradictory conclusions, a novel issue may be certified for interlocutory appeal without first awaiting development of contradictory precedent." Reese v. BP Exploration (Alaska) Inc., 643 F.3d 681, 688 (9th Cir. 2011). Requiring adverse authority to develop around an issue before reviewing it on interlocutory appeal "could lead to unnecessary, protracted litigation and a considerable waste of judicial resources." Id. at 688 n.5.

The legal issue here is whether Plaintiff's use of his hot goods statutory authority with respect to perishable agricultural goods constituted fraud or misconduct under Rule 60(b)(3) warranting the extraordinary relief of vacating a consent judgment. This is a novel question that has never been addressed by any other court at any level of the judiciary, let alone by the Ninth Circuit.

While there is established case law upholding the statutory hot goods authority in general, this case law does not answer the precise controlling question of law presented here. In United States v. Darby, 312 U.S. 100, 105 (1941), the Supreme Court addressed the question whether

Congress had the constitutional power to prohibit the shipment in interstate commerce of goods produced by employees who were not paid in conformance with the minimum wage and overtime requirements of the Act. The Court reasoned that Congress was "free to exclude from the commerce articles whose use in the states for which they are destined it may conceive to be injurious to the public health, morals or welfare," and that it was plainly the purpose of the "hot goods" provision of the Act to "make effective the Congressional conception of public policy that interstate commerce should not be made the instrument of competition in the distribution of goods produced under substandard labor conditions, which competition is injurious to the commerce and to the states from and to which the commerce flows"; the Court held, therefore, that "the prohibition of the shipment interstate of goods produced under the forbidden substandard labor conditions is within the constitutional authority of Congress." 312 U.S. at 114-15. And in Citicorp Indus. Credit Inc. v. Brock, 483 U.S. 27 (1987), the Court further held that applying the "hot goods" provision to secured creditors who took possession of goods that had been produced under conditions that violated the Act furthered the statutory goal to exclude from interstate commerce goods produced under substandard conditions. 483 U.S. at 37 & n.8. These cases do not, however, address any potential economic coercion or duress purportedly experienced by employers or other persons who are prohibited under the "hot goods" provision from introducing goods produced in violation of the Act into interstate commerce that would justify relief under Rule 60(b)(3).[1]

Given the lack of authority on this particular question involving the Plaintiff's hot goods authority and the entry of Consent Judgments with respect to perishable agricultural goods, this is a question of first impression. See Reese, 643 F.3d at 688; see also, e.g., Ditullio v. Boehm,

---

[1] Magistrate Judge Coffin cited Comcast of Oregon II, Inc. v. City of Eugene, 211 Or. App. 573 (2007), for the proposition that a threat to take action that is within a party's legal power can constitute duress if that power is used to induce another party to pay an "invalid fee." *See* slip op. at 10. In Comcast, however, the court held that the City of Eugene had charged Comcast permit fees that were invalidly enacted. See 211 Or. App. at 586-87. Here, there is no suggestion, nor can there be, that the Act's hot goods provision was invalidly enacted. Therefore, this case and others like it are also not controlling on the question whether the Plaintiff's use of his "hot goods" statutory authority with respect to perishable agricultural goods constituted fraud or misconduct for purposes of the extraordinary relief in Rule 60(b)(3).

662 F.3d 1091, 1095 (9th Cir. 2011) (interlocutory appeal certified and accepted by the Ninth Circuit based on issues of first impression under the Trafficking Victims Protection Act). As such, it may be certified for interlocutory appeal "without first awaiting development of contradictory precedent." Reese, 643 F.3d at 688.[2]

Moreover, this novel question involves the balancing of important and conflicting policy concerns, such as the important interest in respecting the finality of judgments and Plaintiff's ongoing obligation to enforce the Act. See, e.g., Yoshimoto v. O'Reilly Auto., Inc., C 10-05438 LB, 2011 WL 2669604 (N.D. Cal. July 7, 2011) (accepting argument that an "order raises novel and difficult questions of first impression because neither the parties nor the court were able to uncover a Ninth Circuit precedent squarely on point and the resolution of the issue requires a balancing of important and conflicting policy concerns").

3. Immediately appeal would materially advance the ultimate conclusion of litigation.

If the Ninth Circuit reverses this Court and upholds the underlying Consent Judgments, those judgments would be considered final judgments, thereby terminating the case. See Rufo v. Inmates of Suffolk Cnty. Jail, 502 U.S. 367, 391 (1992) ("[A] consent decree is a final judgment."); Xerox Fin. Servs. Life Ins. Co. v. High Plains Ltd. Partnership, 44 F.3d 1033, 1037 (1st Cir.1995) (consent judgments are final judgments from which Rule 60(b) relief may be sought), cited in In re Hunter, 66 F.3d 1002, 1005 (9th Cir. 1995). Furthermore, interlocutory

---

[2] There can be no dispute, however, that the Act does not contain any exception to the "hot goods" provision for agricultural goods. The provision was intended to apply expansively to all goods for the purpose of removing those tainted goods from the stream of interstate commerce. See 29 U.S.C. § 203(i) (definition of "goods" includes "wares, products, commodities . . . or subjects of commerce of any character"), § 203(j) (definition of "produced" includes "handled, or in any other manner worked on in any State"); see also Powell, 339 U.S. at 517. ("Where exceptions were made" to the FLSA's provisions, "they were narrow and specific."); 81 Cong. Rec. 4960, 4961 (1937) ("Goods produced under conditions which do not meet rudimentary standards of decency should be regarded as contraband and ought not to be allowed to pollute the channels of interstate trade.") (quoted with approval in Powell, 339 U.S. at 516). There is nothing in the statutory language to suggest any type of exception for agricultural or perishable goods to the hot goods provision. See 29 U.S.C. § 215(a)(1). In light of the clear case law approving of Plaintiff's hot goods authority generally, and the fact there is no exception for agricultural goods to that authority, the specific issue raised here is one "where reasonable jurists might disagree." Reese, 643 F.3d at 688.

appeal is particularly warranted because protracted litigation regarding the significant underlying violations of the Act could ensue, taking up both the parties' and the Court's time, which would be unnecessary if the Ninth Circuit ultimately reverses the order vacating the Consent Judgments on appeal from an eventual final order in this case. See Helman v. Alcoa Global Fasteners, Inc., No. 09-cv-1353, 2009 WL 2058541, at *5-6 (C.D. Cal. June 16, 2009), aff'd, 637 F.3d 986 (9th Cir. 2011) (certifying an order based on an issue of first impression in the Ninth Circuit, noting that "[i]t would be preferable . . . to address the issue now, rather than to require the parties . . . to expend significant time and resources, which might ultimately be wasted" if the Ninth Circuit disagreed with the district court).

III. Conclusion

For the forgoing reasons, this Court should Certify the April 24, 2014 Order adopting Magistrate Judge Thomas M. Coffin's Findings and Recommendations as immediately appealable pursuant to 28 U.S.C. § 1292(b).

Respectfully submitted this 23rd day of June, 2014.

M. PATRICIA SMITH
Solicitor of Labor

JANET M. HEROLD
Regional Solicitor

BRUCE L. BROWN
Associate Regional Solicitor

GRACE A. KIM
Trial Attorney

By: /s/ Jeremiah Miller
JEREMIAH MILLER, WSBA #40949
Trial Attorney
Attorneys for Plaintiff Thomas E. Perez,
Secretary of Labor
United States Department of Labor
Office of the Solicitor
300 Fifth Avenue, Suite 1120
Seattle, Washington 98104
Phone (206) 757-6762; Fax (206) 757-6761
E-mail: miller.jeremiah@dol.gov