

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF
CALIFORNIA

Biederman v. FCA US LLC

Biederman · No. 23-cv-06640-JSC · Decided May 1, 2025

SUMMARY

The Northern District of California denied plaintiffs’ motion for reconsideration of the dismissal of their civil RICO claim against Cummins. The court held that the Supreme Court’s decision in *Medical Marijuana, Inc. v. Horn* did not alter its prior conclusion that Illinois Brick bars indirect purchasers from bringing civil RICO claims under 18 U.S.C. § 1964(c). The court granted certification for an interlocutory appeal under 28 U.S.C. § 1292(b), finding a controlling legal question, substantial grounds for difference of opinion, and potential material advancement of the litigation.

OPINION

1 2 3 4 UNITED STATES DISTRICT COURT 5 NORTHERN DISTRICT OF CALIFORNIA 6 7
FRANK BIEDERMAN, et al., Case No. 23-cv-06640-JSC 8 Plaintiffs, ORDER RE
PLAINTIFFS’ MOTION 9 v. FOR RECONSIDERATION AND MOTION FOR
CERTIFICATION OF 10 FCA US LLC, et al., INTERLOCUTORY APPEAL 11 Defendants. Re:
Dkt. Nos. 102, 109 12 13 Plaintiffs purchased RAM 2500 and 3500 pickup trucks (“Class
Trucks”) installed with 14 alleged “defeat devices” that affected the emissions and performance of
their diesel engines.

In 15 this putative class action, Plaintiffs advanced 11 causes of action against Defendants FCA
US 16 LLC and Cummins Inc. Defendants then moved to dismiss the Consolidated Amended
Class 17 Action Complaint (“CAC”) in its entirety, and on February 11, 2025, the Court issued an
order 18 granting in part and denying in part those motions. (Dkt. No. 95.) 19 Relevant to the
instant motions, the Court granted Cummins’ Rule 12(b)(6) motion to 20 dismiss Plaintiffs’ civil
RICO claim, without leave to amend.

(See *id.*) The Court based its ruling 21 on *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), when
the Supreme Court held indirect 22 purchasers are barred from advancing claims under the
Clayton Act. See *Biederman v. FCA US* 23 LLC, No. 23-CV-06640-JSC, 2025 WL 458831, at *2
-*4 (N.D. Cal. Feb. 11, 2025). RICO’s civil 24 enforcement provision, 18 U.S.C. § 1964(c), is
nearly identical to that of the Clayton Act, so this 25 Court held Illinois Brick similarly bars civil
RICO claims by indirect purchasers.

Id. at *2. Since 26 Plaintiffs purchased their vehicles from third-party dealerships, rather than
from Defendants, the 27 claim could not advance. *Id.* 1 Order as well as their motion for

certification of an interlocutory appeal under 28 U.S.C. § 1292(b). (Dkt. Nos. 102, 109.)

Having carefully considered the parties' submissions, and with the benefit of oral argument on May 1, 2025, the Court DENIES the motion for reconsideration and GRANTS the motion for certification of an interlocutory appeal. DISCUSSION I. MOTION FOR RECONSIDERATION Civil Local Rule 7-9(b) provides that a party seeking leave to file a motion for reconsideration must show one of the following circumstances: (1) That at the time of the motion for leave, a material difference in fact or law exists from that which was presented to the Court before entry of the interlocutory order for which reconsideration is sought.

The party also must show that in the exercise of reasonable diligence the party applying for reconsideration did not know such fact or law at the time of the interlocutory order; or (2) The emergence of new material facts or a change of law occurring after the time of such order; or (3) A manifest failure by the Court to consider material facts or dispositive legal arguments which were presented to the Court before such interlocutory order.

Civil L. R. 7-9(b). The Local Rule cross-references Federal Rule of Civil Procedure 54(b), which states in relevant part: "... any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.

Fed. R. Civ. P. 54(b). These rules reflect a court's inherent authority to reconsider interlocutory orders. See *City of Los Angeles, Harbor Div. v. Santa Monica Baykeeper*, 254 F.3d 882, 886 (9th Cir. 2001) ("A district court's power to rescind, reconsider, or modify an interlocutory order is derived from the common law, not from the Federal Rules of Civil Procedure.").

Indeed, "[a]s long as a district court has jurisdiction over the case, then it possesses the inherent procedural power to reconsider, rescind, or modify an interlocutory order for cause seen by it to be sufficient." *Id.* at 885 (quoting *Melancon v. Texaco, Inc.*, 659 F.2d 551, 553 (5th Cir.1981)). *1* decision in *Med. Marijuana, Inc. v. Horn*, 145 S. Ct.

931 (2025), contravenes this Court's February 11, 2025 Order. (Dkt. No. 95.) The Court disagrees. *3* In *Horn*, the appellee was a commercial truck driver who had been injured in an accident. *4* 145 S. Ct. at 936. For pain relief, he then purchased and used Medical Marijuana's CBD tincture *5* product, which was advertised to contain 0% THC. *Id.* at 937. During a routine drug screening by *6* his employer, Horn tested positive for THC and was subsequently fired.

Id. He then sued under a *7* civil RICO theory, alleging fraud by Medical Marijuana as to the THC content of its products. *Id.* *8* at 937-38. The Court considered whether the civil RICO statute, 18 U.S.C. § 1964(c), permitted a *9* cause of action for business and property losses derived from a personal injury—there, the *10* trucking accident that prompted Horn to purchase the tincture.

Holding Section 1964(c) permits 11 such an action, the Court noted that antitrust precedent did not aid Medical Marijuana’s position, 12 and “the Clayton Act and § 1964(c) are not ‘interchangeable.’” Id. at 943. Plaintiffs grasp at this 13 language to argue Illinois Brick does not apply in the civil RICO context. (Dkt. No. 109 at 3.) 14 The Court is unpersuaded.

15 Medical Marijuana argued antitrust law foreclosed recovery for certain economic harms, 16 and therefore, civil RICO should be read the same. Horn, 145 S. Ct. at 942. But the Supreme 17 Court observed that harm theory was already considered and rejected in *Sedima, S.P.R.L. v. Imrex* 18 Co., 473 U.S. 479, 497 (1985), when the Court declined to import the concept of a “racketeering 19 injury” into Section 1964(c).

The Supreme Court’s inquiry was specific: does antitrust precedent 20 requiring an “injury of the type the antitrust laws were intended to prevent” suggest civil RICO 21 prohibits claims of injury to business or property derived from a personal injury? Horn, 145 S. Ct. 22 at 942.

The Court answered no. But in holding Illinois Brick applies to civil RICO claims, this 23 Court considered *Sedima* and determined it did not control the analysis here. See *Biederman v. 24 FCA US LLC*, No. 23-CV-06640-JSC, 2025 WL 458831, at *3 (N.D. Cal. Feb. 11, 2025) 25 (“Plaintiffs read *Sedima* to establish a presumption against applying principles from the antitrust 26 context to RICO.

But this reading fails to account for the later-decided *Holmes*, which 27 emphasized the identical language in both the Clayton Act and 18 U.S.C. § 1964(c) as well as 1 the *Sedima* precedent the Court already considered. 2 Plaintiffs also argue Illinois Brick should not apply to Section 1964(c) because that case 3 was decided seven years after enactment of the civil RICO provision.

(Dkt. No. 109 at 3.) So, 4 they reason, if the Horn Court rejected application of antitrust principles that pre-dated civil 5 RICO, then Illinois Brick surely cannot apply since it post-dates the provision. Again, the Court is 6 not persuaded.

The Illinois Brick rule is about judicial economy and considers “the risk of 7 duplicate recoveries on the one hand, or the danger of complex apportionment of damages on the 8 other.” *Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters*, 9 459 U.S. 519, 544 (1983).

As the Supreme Court observed, these case management concerns 10 originated in the congressional debates about the Sherman Act—legislative history that surely was 11 available when Congress enacted Section 1964(c). See id. at 543 n.50. Indeed, in *Associated 12 General Contractors*, the Supreme Court pointed to the decision in *Hanover Shoe, Inc. v. United 13 Shoe Machinery Corp.*, 392 U.S. 481 (1968), as similarly grounded in such concerns.

Id. at 544. 14 *Hanover Shoe* was itself decided prior to 1970—the year Section 1964(c) was enacted. So, the 15 fact that *Illinois Brick* was decided after Section 1964(c)’s enactment does not mean the judicial 16 economy concerns underlying that decision were not available to Congress in 1970. Ultimately, 17 *Horn* does not address any of these concerns; nor should it, because it is a different case about a 18 different issue.

So, *Horn* does not suffice as a basis for reconsideration. 19 Accordingly, the Court DENIES Plaintiffs’ motion for reconsideration. 20 II. MOTION FOR INTERLOCUTORY APPEAL UNDER 28 U.S.C. § 1292(b) 21 Pursuant to 28 U.S.C. § 1292(b), Plaintiffs request the Court certify an interlocutory appeal 22 of the February 11 Order, specifically as to whether *Illinois Brick* applies to claims brought under 23 18 U.S.C. § 1964(c).

(Dkt. No. 102.) A court may certify such an appeal when an order: (1) 24 “involves a controlling question of law,” (2) “as to which there is substantial ground for difference 25 of opinion,” and (3) if “an immediate appeal from the order may materially advance the ultimate 26 termination of the litigation....” 28 U.S.C. § 1292(b). An interlocutory appeal is a “departure 27 from the basic policy of postponing appellate review until after the entry of a final judgment,” and 1 *Warehouse Union*, 22 F.4th 1125, 1130 (9th Cir.

2022). “As to the timing of certification, the 2 district court may certify the order for interlocutory appeal in the text of that order or in a separate 3 order, known as the certification order.” Id. at 1131 (citation omitted).

The Court proceeds by the 4 latter approach and now addresses each of Section 1292(b)’s three prongs. 5 A. Controlling Question of Law 6 Under the first prong, Plaintiffs must establish the February 11 Order presents “[a] 7 controlling question of law” and not a question of fact. *ICTSI Oregon, Inc.*, 22 F.4th at 1130. 8 Moreover, a “controlling question of law” need not terminate the litigation should the district court 9 order be reversed.

See *In re Cement Antitrust Litig.* (MDL No. 296), 673 F.2d 1020, 1026 (9th 10 Cir. 1981) (subsequent history omitted). Rather, “all that must be shown in order for a question to 11 be ‘controlling’ is that resolution of the issue on appeal could materially affect the outcome of 12 litigation in the district court.” Id. The parties do not dispute the Order presents a pure question 13 of law regarding the applicability of *Illinois Brick* to 18 U.S.C. § 1964(c).

Instead, they disagree 14 as to whether that question is “controlling” in this litigation. The Court concludes that it is. 15 The February 11 Order granted Cummins’ motion to dismiss the civil RICO claim— 16 the only claim providing a basis for a nationwide class. Absent the federal claim, the putative 17 nationwide class narrowed to a single-state class for the remaining claims.

A reversal by the Ninth 18 Circuit would potentially expand this case from a one-state class to a fifty-state class as well as 19 introduce the possibility of treble damages. These potential changes

to the scope of the litigation 20 and remedy available to Plaintiffs could drastically reshape subsequent proceedings, including 21 class certification and trial.

So, the Ninth Circuit's resolution of this question could materially 22 affect the outcome of this litigation. 23 Cummins insists resolution of this issue would not "materially affect the outcome of 24 litigation" because an appeal of the Court's civil RICO ruling would not affect Plaintiffs' 25 remaining six causes of action. (Dkt. No. 104 at 15.) This argument fails to persuade as the cases 26 upon which Cummins relies are readily distinguishable.

In *Friedman v. 24 Hour Fitness USA, 27 Inc.*, No. CV 06-6282 AHM CTX, 2009 WL 545783 (C.D. Cal. Mar. 3, 2009), the defendant 1 claim. 2009 WL 545783, at *1. The court reasoned that even if the defendant prevailed on 2 appeal, and the civil RICO claim were dismissed, that would not materially affect the litigation 3 since there were state law claims—and proposed classes—that would "reach as far back in time as 4 would the federal class if the RICO claim remained." *Id.* So, the Friedman court did not need to 5 consider the potential consequence of greatly expanding the class, since there were state law 6 claims that overlapped significantly with the federal claim.

See *id.* (noting overlap such that "[t]he 7 Court previously suggested to the parties that the state law claims need not be litigated if a federal 8 class were certified and the federal claims survived summary judgment"). 9 In *Johnson v. Serenity Transportation, Inc.*, No. 15-CV-02004-JSC, 2017 WL 3168491 10 (N.D. Cal. July 26, 2027), this Court previously considered a motion for interlocutory appeal 11 following denial of the defendants' motion for summary judgment.

2017 WL 3168491, at *1. 12 There, the Court determined the first prong of Section 1292(b) had not been met because 13 defendants sought appeal of a mixed question of law and fact. *Id.* That is not the case here. 14 Cummins also relies on *Johnson* to argue the remaining state law claims subject to litigation 15 preclude interlocutory appeal. (Dkt. No. 104 at 15.)

But in *Johnson*, the defendants' only reason 16 for why an appeal would "materially affect the outcome" was that it would streamline the claims 17 for trial. *Id.* at *2. As the Court noted, that argument would apply to every order on a motion for 18 summary judgment and did not establish the "exceptional situation[]" required for interlocutory 19 review. *Id.* 20 Consequently, the Court determines the February 11 Order implicates a "controlling 21 question of law." 22 B. Substantial Ground for Difference of Opinion 23 Next, "[t]o determine if a 'substantial ground for difference of opinion' exists under 24 § 1292(b), courts must examine to what extent the controlling law is unclear.

Courts traditionally 25 will find that a substantial ground for difference of opinion exists where 'the circuits are in dispute 26 on the question and the court of appeals of the circuit has not spoken on the point, if complicated 27 questions arise under foreign law, or if novel and difficult questions of first impression are 1 substantial ground for difference of opinion exists where

reasonable jurists might disagree on an issue's resolution, not merely where they have already disagreed." *Reese v. BP Expl.*

(*Alaska*) 3 Inc., 643 F.3d 681, 688 (9th Cir. 2011). Here, the Court recognizes substantial ground exists for a difference of opinion as to whether *Illinois Brick* applies to Section 1964(c). In the February 11 Order, the Court observed that the Ninth Circuit had not directly addressed this issue. See *Biederman*, 2025 WL 458831, at *2. Looking outside the circuit, the Court noted "every federal court of appeals to have considered whether *Illinois Brick* applies to civil RICO has held that it does." *Id.* Though the circuit courts have been unanimous, they were not without equivocation.

For instance, in *Fenner v. Gen. Motors, LLC*, the Sixth Circuit held *Illinois Brick* barred an indirect purchaser from asserting a civil RICO claim based on passed-through overcharges. 113 F.4th 585, 604 (6th Cir. 2024). But, the court also expressed concern regarding the ruling: We would be remiss not to note the consequences of such a bright-line rule that mixes law and economics but does not necessarily reflect economic reality today.

Under this rule, major manufacturers can insulate themselves from all antitrust and RICO liability, simply by selling their products through intermediaries. Because the business and success of intermediary car dealerships is dependent on car manufacturers, for example, consumers cannot rely on the intermediary car dealerships to vindicate their interests.

See *id.* at 605 n.6. And the Fourth Circuit more recently observed that "this is a complicated question on which courts have taken diverging views." *MSP Recovery Claims, Series LLC v. Lundbeck LLC*, 130 F.4th 91, 111 n.11 (4th Cir. 2025) (collecting cases). Even though the court did not ultimately reach the question, it recognized "varying degrees of hesitancy" among the courts to consider whether *Illinois Brick* applies to Section 1964(c) and cited to opinions going both ways.¹ *Id.* While this Court ultimately concluded the *Illinois Brick* indirect-purchaser rule applies to civil RICO, reasonable jurists might disagree on the issue's resolution.

Cummins' counterargument relies on the unanimity among federal circuit courts that have 26 27 1 In support of their motion, Plaintiffs cite to district court cases holding *Illinois Brick* does not 1 confronted this question. There is no substantive ground for disagreement, it argues, because no 2 one has disagreed. Though *Cummins* correctly observes this unanimity, it does not preclude 3 interlocutory appeal.

As the Court noted above, there does not need to be a circuit split, or clear 4 disagreement already crystallized among the courts to warrant interlocutory review. "Stated 5 another way, when novel legal issues are presented, on which fair-minded jurists might reach 6 contradictory conclusions, a novel issue may be certified for interlocutory appeal without first 7 awaiting development of contradictory precedent." *Reese*, 643 F.3d at 688.

But even so, despite 8 the consistency among the circuit courts, Plaintiffs have highlighted at least some disagreement 9 among the district courts. See *Lundbeck LLC*, 130 F.4th at 111 n.11 (identifying cases). Such 10 circumstances satisfy the second prong of Section 1292(b). 11 For these reasons, the Court finds the February 11 Order presents a controlling question of 12 law as to which substantial ground for difference of opinion exists.

13 C. *Materially Advances the Ultimate Termination of Litigation* 14 The final prong under Section 1292(b) requires that an appeal “may materially advance the 15 ultimate termination of the litigation.” “[T]he ‘materially advance’ prong is satisfied when the 16 resolution of the question ‘may appreciably shorten the time, effort, or expense of conducting’ the 17 district court proceedings.” *ICTSI Oregon, Inc.*, 22 F.4th at 1131 (quoting *In re Cement*, 673 F.2d 18 at 1027).

Moreover, “neither § 1292(b)’s literal text nor controlling precedent requires that the 19 interlocutory appeal have a final, dispositive effect on the litigation, only that it ‘may materially 20 advance’ the litigation.” *Reese*, 643 F.3d at 688. Some district courts analyze this prong in 21 conjunction with the first prong. See, e.g., *Lovett v. Omni Hotels Mgmt.*

Corp., No. 14-CV-02844- 22 RS, 2016 WL 7732622, at *3 (N.D. Cal. Apr. 18, 2016). And this makes sense, considering both 23 prongs look to the materiality of the interlocutory appeal’s impact on the case. Compare *In re 24 Cement Antitrust Litig.* (MDL No. 296), 673 F.2d at 1026 (“[A]ll that must be shown in order for a 25 question to be ‘controlling’ is that resolution of the issue on appeal could materially affect the 26 outcome of litigation in the district court.”) with *Reese*, 643 F.3d at 688 (holding the third prong 27 only requires the interlocutory appeal “‘may materially advance’ the litigation”).

For the reasons 1 materially advance” this litigation. 2 Additionally, the appeal “may materially advance” the litigation by circumventing the need 3 for a new trial in the event of reversal. If the Ninth Circuit reversed this Court following a final 4 judgment, on remand the case might require certification of a new nationwide class. Further, 5 reversal would likely require a new trial of the civil RICO claim because its elements differ from 6 the current state law claims.

However, since the civil RICO claim is based on the same facts as 7 the state law claims, the most efficient course would be to adjudicate them together. An additional 8 trial would require significant time, effort, and expense beyond those already invested in reaching 9 a final judgment on the state law claims. Indeed, the Court is not alone in recognizing this case 10 management concern as support for the “materially advance” prong.

See, e.g., *Elorreaga v. 11 Rockwell Automation, Inc.*, No. 21-CV-05696-HSG, 2023 WL 4116623, at *2 (N.D. Cal. June 16, 12 2023) (“Accordingly, if the Ninth Circuit later finds that the government contractor defense is 13 available in this context, the Court and the parties may have

to re-try this case. An interlocutory appeal would thus ‘materially advance’ this litigation by eliminating a potentially substantial and needless waste of Court and party resources.”).

Here too, an interlocutory appeal would conserve judicial resources, conserve party resources, and simplify case management. Cummins raises additional counterarguments with respect to this prong; none persuades the Court.

First, Cummins argues the appeal would not materially advance the case because even if the Ninth Circuit reversed the February 11 Order, there are potential alternate grounds for dismissal of the civil RICO claim. (Dkt. No. 104 at 15-16.)

The Court did not reach those arguments as to whether Plaintiffs plausibly alleged a RICO enterprise and offers no opinion on their merit. In the event the Ninth Circuit takes up the appeal and reverses, the Court can consider those arguments then. But ultimately, all this conjecture is beside the point since Section 1292(b) only requires that the interlocutory appeal “may materially advance” the litigation.

28 U.S.C. § 1292(b) (emphasis added). It very well may do so here. Second, Cummins argues it is “conjectural” to suggest reversal by the Ninth Circuit following a final judgment in this case would require a retrial for the civil RICO claim. (Dkt. No. 1 effect of a verdict on the state law claims for the elements of the civil RICO claim. But the Court 2 || finds it difficult to imagine Cummins taking such a position—an indicator of the argument’s 3 faults.

Though the fraudulent scheme alleged by Plaintiffs is common to all their claims, the 4 elements of those claims differ. Further, as the Court noted previously, the federal civil RICO 5 claim implicates a nationwide class as opposed to the one-state class for the currently viable 6 || claims. A reversal would likely require additional class discovery and certification, all of which 7 Cummins would surely wish to challenge.

8 And so, the Court determines an interlocutory appeal of the February 11 Order may 9 || materially advance this litigation. 10 * OK 11 Therefore, the Court finds the February 11 Order meets the three requirements for 12 || interlocutory appeal pursuant to 28 U.S.C. § 1292(b). 13 CONCLUSION 14 For the reasons stated above, the Court DENIES the motion for reconsideration of the 3 15 || February 11, 2025 Order granting in part and denying in part Defendants’ motions to dismiss.

16 || (Dkt. No. 109.) Further, the Court GRANTS the motion to certify an interlocutory appeal under 3 17 28 U.S.C. § 1292(b). (Dkt. No. 102.) In addition, the Court sets the next case management 18 conference for June 11, 2025, at 2:00 p.m. via Zoom videoconference. A joint case management 19 conference statement shall be filed no later than June 4, 2025. 20 This Order disposes of Docket Nos. 102, 109.

21 IT IS SO ORDERED. 22 Dated: May 1, 2025 24 25 JACQUELINE SCOTT CORLEY United
States District Judge 26 27 28

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