

United States District Court  
Northern District of California

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

CHRISTINE DIAZ, et al.,  
Plaintiffs,  
v.  
INTUIT, INC.,  
Defendant.

Case No. [5:15-cv-01778-EJD](#)

**ORDER DENYING PLAINTIFFS'  
MOTION TO CERTIFY ORDER FOR  
INTERLOCUTORY APPEAL UNDER 28  
U.S.C. SECTION 1292(B) OR,  
ALTERNATIVELY, FOR LEAVE TO  
FILE MOTION FOR  
RECONSIDERATION**

Re: Dkt. No. 127

I. INTRODUCTION

Pursuant to 28 U.S.C. §1292(b), Plaintiffs Carol Knoch, James Lebinski, David Stock and Marilyn Williams (“Plaintiffs”) move for an order certifying for interlocutory appeal the Court’s September 29, 2017 Order Granting Motion to Compel Arbitration (Dkt. 123). In the alternative, Plaintiffs move for leave to file a motion for reconsideration. The motion is scheduled for hearing on February 15, 2018. The Court finds it appropriate to take the matter under submission for decision without oral argument pursuant to Civil Local Rule 7-1(b). Accordingly, the hearing date is vacated. For the reasons set forth below, Plaintiffs’ motion is denied.

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**ORDER DENYING PLAINTIFFS' MOTION TO CERTIFY ORDER FOR INTERLOCUTORY  
APPEAL UNDER 28 U.S.C. SECTION 1292(B) OR, ALTERNATIVELY, FOR LEAVE TO  
FILE MOTION FOR RECONSIDERATION**

1 II. DISCUSSION

2 A. Motion for Interlocutory Review

3 Plaintiffs seek to appeal, on an interlocutory basis, the Court’s ruling that Plaintiffs agreed  
4 to arbitrate the arbitrability of their claims when they agreed to Defendant Intuit, Inc.’s TurboTax  
5 Online Terms of Service or the TurboTax End User License Agreement, which provide in  
6 pertinent part: “ANY DISPUTE OR CLAIM RELATING IN ANY WAY TO THE SERVICES  
7 OR THIS AGREEMENT WILL BE RESOLVED BY BINDING ARBITRATION, RATHER  
8 THAN IN COURT.” Dkt. 76-2 (emphasis in original). The Court assumes familiarity with the  
9 facts of this case and the Court’s September 29, 2017 Order Granting Motion to Compel  
10 Arbitration (Dkt. 123).

11 A district court may certify a non-dispositive order for interlocutory appeal pursuant to 28  
12 U.S.C. §1292(b) if: (1) a controlling question of law is at issue; (2) there are substantial grounds  
13 for a difference of opinion on the issue; and (3) an immediate appeal may materially advance the  
14 ultimate termination of the litigation. Couch v. Telescope Inc., 611 F.3d 629, 633 (9th Cir. 2010).  
15 Certification is inappropriate unless all three Section 1292(b) requirements are met. Id. In  
16 seeking interlocutory appeal, the movant bears a heavy burden to show that “exceptional  
17 circumstances justify a departure from the basic policy of postponing appellate review until after  
18 the entry of a final judgment.” Coopers & Lybrand v. Livesay, 437 U.S. 463, 475 (1978); see also  
19 Johnson v. Consumerinfo.com, Inc., 745 F.3d 1019, 1021 (9th Cir. 2014) (“Certification for  
20 interlocutory appeal should be applied sparingly and only in exceptional situations in which  
21 allowing an interlocutory appeal would avoid protracted and expensive litigation.”).

22 Plaintiffs contend that there are two controlling questions of law upon which there are  
23 substantial grounds for differences of opinion: whether Intuit’s assertion of arbitrability is “wholly  
24 groundless”<sup>1</sup> and whether the reference to the AAA rules in the parties’ arbitration agreements

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26 <sup>1</sup> See Qualcomm Inc. v. Nokia Corp., 466 F.3d 1366, 1371 (Fed. Cir. 2006) (where parties agree to  
27 arbitrate arbitrability, a court’s inquiry is limited to whether the assertion of arbitrability is  
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1 constitutes “clear and unmistakable evidence of the intent to arbitrate arbitrability.”<sup>2</sup> With respect  
 2 to the “wholly groundless” issue, Plaintiffs argue that their claims fall decidedly outside Intuit’s  
 3 arbitration clause because the claims do not relate to their TurboTax accounts with Intuit, but  
 4 instead relate to fraudsters’ entirely separate use of TurboTax accounts that were fraudulently  
 5 opened in Plaintiffs’ names. With respect to the “intent to arbitrate arbitrability” issue, Plaintiffs  
 6 contend that the law is unsettled regarding whether incorporation of the AAA rules is clear and  
 7 unmistakable evidence of intent to arbitrate arbitrability when the parties to the agreement are  
 8 unsophisticated consumers (as compared to sophisticated parties). Plaintiffs contend that an  
 9 interlocutory appeal will materially advance the ultimate termination of the litigation regardless of  
 10 the outcome in the Ninth Circuit. Plaintiffs reason that if the Ninth Circuit rules in their favor, the  
 11 case will be remanded to the Court for further prosecution of Plaintiffs’ claims, which would  
 12 avoid individual and unnecessary arbitrations, and alternatively if the Ninth Circuit rules against  
 13 Plaintiffs, Plaintiffs would be able to seek further appellate review or proceed to individual  
 14 arbitrations. Plaintiffs propose that while the requested interlocutory appeal is pending, the  
 15 remaining putative class claims of Plaintiffs Brown and Diaz can continue to proceed without  
 16 delay.

17 The Court acknowledges that one of the issues identified by Plaintiffs may present a  
 18 controlling question of law on which there is a substantial ground for a difference of opinion,  
 19 namely whether the reference to the AAA rules in the parties’ arbitration agreements constitutes  
 20 clear and unmistakable evidence of intent to arbitrate arbitrability when the parties to the  
 21 agreement are arguably unsophisticated consumers. An interlocutory appeal on either of the issues  
 22 identified by Plaintiffs, however, will not materially advance the ultimate termination of the  
 23 litigation. Rather, an interlocutory appeal at this stage in the proceedings is likely to delay the  
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26 “wholly groundless”).

27 <sup>2</sup> See e.g. Brennan v. Opus Bank, 796 F.3d 1125, 1130 (9th Cir. 2015).

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1 case even more than it already has been.<sup>3</sup> Even if Plaintiffs were granted leave to pursue an  
 2 interlocutory appeal and prevailed, the only practical difference would be that the Court, and not  
 3 an arbitrator, would decide whether Plaintiffs' claims are subject to arbitration. Further, allowing  
 4 Plaintiffs to pursue an interlocutory appeal of the Court's order is not endorsed by binding  
 5 precedent. See Bushley v. Credit Suisse First Boston, 360 F.3d 1149, 1153 n.1 (9th Cir. 2004)  
 6 ("Unnecessary delay of the arbitral process through appellate review is disfavored.").

7 B. Motion for Leave to File Motion for Reconsideration

8 Plaintiffs seek leave to move for reconsideration in light of the Ninth Circuit's recent  
 9 September 11, 2017 decision in Welch v. My Left Foot Children's Therapy, LLC, 871 F.3d 791  
 10 (9th Cir. 2017), which Plaintiffs characterize as a material development in the law.

11 Under Civil Local Rule 7-9(b)(1), the Court may grant leave to move for reconsideration if  
 12 (1) at the time of the motion for leave, a material difference in fact or law exists from that which  
 13 was presented to the Court before entry of the interlocutory order for which reconsideration is  
 14 sought, and in the exercise of reasonable diligence the party applying for reconsideration did not  
 15 know such fact or law; or (2) the emergence of new material facts or a change of law occurring  
 16 after the time of such order; or (3) a manifest failure by the Court to consider material facts or  
 17 dispositive legal arguments which were presented to the Court before such interlocutory order.

18 The recent Welch decision does not constitute a material change or development in the law  
 19 warranting reconsideration. Rather, the Welch decision is only an additional citation in support of  
 20 an argument Plaintiffs already made in opposition to the underlying motion to compel arbitration.  
 21 Furthermore, Welch is distinguishable insofar as the arbitration provision in that case is narrower  
 22 than the arbitration provision at issue here.

23 III. CONCLUSION

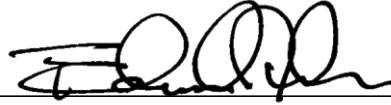
24 For the reasons set forth above, Plaintiffs' motion to certify the Court's September 29,

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 26 <sup>3</sup> The case was filed on April 20, 2015 and remains at the pleading stage.

1 2017 Order Granting Motion to Compel Arbitration (Dkt. 123) for interlocutory appeal pursuant to  
2 28 U.S.C. §1292(b) is DENIED. Plaintiffs' alternative motion for leave to file a motion for  
3 reconsideration is DENIED.

4 **IT IS SO ORDERED.**

5 Dated: February 16, 2018



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EDWARD J. DAVILA  
United States District Judge

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