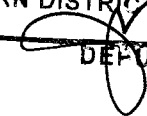


UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

FILED

OCT 01 2015
CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY  DEPUTY CLERK

UNITED STATES OF AMERICA, EX., §
REL. ESTHER SULLIVAN, RELATOR, et al., §
Plaintiffs, §

v. §

ATRIUM MEDICAL CORPORATION; §
MAQUET CARDIOVASCULAR LLC; AND §
MARQUET CARDIOVASCULAR US §
SALES, LLC; §
Defendants. §

Civil Action No.: SA-5:13-CV-244-OLG

ORDER ADOPTING IN PART REPORT AND RECOMMENDATION

On this date the Court considered the Report and Recommendation (docket no. 113) of United States Magistrate Judge Pamela A. Mathy, in which she recommends the Court GRANT Relator’s opposed motion for certification of an interlocutory appeal (docket no. 106) and GRANT Relator’s opposed motion for stay of proceedings pending disposition of that appeal.

Defendant Atrium Medical Corporation filed objections to the Magistrate Judge’s report and recommendation (docket no. 117). When a party objects to a Magistrate Judge’s ruling on non-dispositive matters, the Court reviews such ruling(s) under a “clearly erroneous or contrary to law” standard. *See* 28 U.S.C. § 636(b)(1)(A).

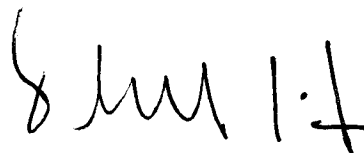
The Court has conducted a review of the record in this case and the applicable law. After reviewing the matters raised by Defendant’s objections, the Court concludes the objections are meritorious. Defendant asserts the Magistrate’s report contains a well-reasoned analysis of why Relator has failed to assert a valid statutory basis for the extraordinary remedy of certifying the requested interlocutory appeal. A party seeking an interlocutory appeal must show there is (a) a controlling question of law, (b) to which there is substantial ground for difference of opinion,

and (c) an immediate appeal from the order may materially advance the ultimate termination of the litigation. *See* 28 U.S.C. §1292(b). Indeed, the Court finds the Magistrate’s report is accurate in finding that Relator’s request to certify an interlocutory appeal fails to satisfy the latter two requirements for certification—Relator has not stated a substantial ground for difference of opinion exists on whether her fraud on the FDA claims are viable, or whether the determination of the viability of these claims would materially advance the ultimate termination of the litigation. *See id.*

However, in spite of finding that Relator failed to satisfy the statutory burden to show why an interlocutory appeal is proper, the Report recommends this Court grant Relator’s motion for certification of interlocutory appeal and stay the proceedings pending the outcome of the appeal “[g]iven the novelty of the question of law at issue.” *See* docket no. 113, p. 15. While the Court agrees with the Magistrate Judge’s assessment that Relator did not meet the statutory burden for certification of an interlocutory appeal, the Court disagrees with the Report’s conclusion that such certification should be granted given the novelty of the question at issue. The Court finds the novelty of a question of law is not an overriding consideration for the failure to meet the statutory burden for certification under §1292(b). Accordingly, it is ORDERED that the Magistrate Judge’s Report and Recommendation (docket no. 113) is ACCEPTED IN PART. The Court finds Relator has failed to meet the statutory requirements to certify an interlocutory appeal, and therefore, DENIES Relator’s motion for certification of interlocutory appeal and to stay the proceedings (docket no. 106).

It is so ORDERED.

SIGNED this 1st day of October, 2015.



United States District Judge Orlando L. Garcia