IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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LOREN L. LEISER,

Plaintiff, ORDER

v. 11-cv-328-bbc

JEANNIE ANN VOEKS R.N., DR. BRIAN J. BOHLMAN,
DR. KENNETH ADLER, DR. BRUCE GERLINGER,
DR. BRAUNSTEIN, DR. JOAN M. HANNULA,
BRADLEY HOMPE, JAMES GREER, REED RICHARDSON,
HOLLY GUNDERSON, TIMOTHY HAINES,
JODI DOUGERTY, CHERYL WEBSTER,
KENNETH MILBECK, MATTHEW GERBER,
JEROME SWEENEY, PATRICK LYNCH, JUDY BENTLEY,
PATRICIA SCHERREIKS, RENE ANDERSON, DAVID BURNETT,
DR. JOHN SPENCER ARCHINIHU AND JAMES LABELLE,

Defendants.

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On October, 18, 2012, I granted summary judgment in favor of all but two of the defendants in this case, Dr. Braunstein and Dr. John Spencer Archinihu. Defendant Braunstein has not filed an answer and plaintiff has a pending motion for entry of default against defendant Braunstein. The other defendant, Dr. Archinhu, who was identified and served much later in the case, filed his motion for summary judgment on November 15 and it is currently being briefed. Now before the court is plaintiff's notice of appeal to the court of appeals from the

October 18 order. I understand plaintiff to be asking the court to certify that he can take an interlocutory appeal under 28 U.S.C. § 1292(b) from the October 18, 2012 order. Plaintiff's notice of appeal is not accompanied by the $455 fee for filing an appeal, and he has filed a motion for leave to proceed in forma pauperis on appeal.

The first obstacle plaintiff faces is that the court's October 18 order is not a final order. In rare instances, a party may appeal a non-final decision. 28 U.S.C. § 1292 states in relevant part,

> 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.

I purposely did not include in the October 18 order a finding that an interlocutory appeal would be proper. A prompt appeal from the order will not materially advance the ultimate termination of this litigation. Indeed, it may serve only to delay it.

Even if I were to construe plaintiff's motion as including a motion for entry of final judgment with respect to the defendants in the October 18 order, the motion would not be granted. Rule 54(b) of the Federal Rules of Civil Procedure provides in pertinent part that:

> when multiple parties are involved [in a lawsuit], the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence

> of such determination and direction, any order or other form of decision, however, designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

The purpose of Rule 54(b) is to avoid "piecemeal disposal of litigation." Advisory Comm. Notes. Under this rule, a judge has the power to enter final judgment whenever there are multiple parties following an order that finally resolves a party's liability even though the case continues in the district court between the other parties.

As a general rule, however, the court of appeals frowns on the entry of partial final judgments, Doe v. City of Chicago, 360 F.3d 667, 673 (7th Cir. 2004) (judge has power to enter final judgment under Rule 54(b), but not duty), unless the order to be appealed from finally resolves a party's entire liability. Entering a partial final judgment requires a court to determine that no just reason for delay exists. Fed. R. Civ. P. 54(b). One "just reason" can be the need to develop a factual basis for disputed questions of law, id.; another may be to relieve the court of appeals of the need to familiarize itself with the factual and legal issues of a case more than once. Although the October 18 order resolved the merits of the case with respect to defendants Brian Bohlmann, Jeannie Ann Voeks, Kenneth Adler, Bruce Gerlinger, Joan Hannula, James Greer, Reed Richardson, Bradley Hompe, Holly Gunderson, Timothy Haines, Jodi Dougerty, Cheryl Webster, Kenneth Milbeck, Matthew Gerber,

Jerome Sweeney, Patrick Lynch, Judy Bentley, Patricia Scherreiks, Rene Anderson, David Burnett and James LaBelle, the related claims remain unresolved with respect to defendants Braunstein and Dr. John Spencer Archinihu. Under such circumstances, it is more efficient to resolve the case as a whole than to do so through piecemeal appeals.

Unfortunately, this means that plaintiff's submission of his notice of appeal is both futile and costly. As plaintiff should be aware, because he is a prisoner, he must pay the full cost of filing a notice of appeal. He owes the money whether his appeal is meritorious, procedurally defective or lacking in legal merit. If he were to qualify for indigent status, he would be allowed to pay the fee in monthly installments, beginning with an initial partial payment. However, if his appeal is certified as not having been taken in good faith, he may not proceed in forma pauperis and instead, he must pay the full amount of the fee immediately. I will deny plaintiff's request to proceed in forma pauperis because I certify that his appeal from a non-final order is not taken in good faith.

Because I am certifying plaintiff's appeal as not having been taken in good faith, plaintiff cannot proceed with his appeal without prepaying the $455 filing fee unless the court of appeals gives him permission to do so. Under Fed. R. App. P. 24, plaintiff has 30 days from the date of this order in which to ask the court of appeals to review this court's denial of leave to proceed in forma pauperis on appeal. His motion must be accompanied by an affidavit as described in the first paragraph of Fed. R. App. P. 24(a) and a copy of this

order. Plaintiff should be aware that if the court of appeals agrees with this court that the appeal is not taken in good faith, it will send him an order requiring him to pay all of the filing fee by a set deadline. Ordinarily, if a plaintiff fails to pay the fee within the deadline set, the court of appeals will dismiss the appeal and order this court to arrange for collection of the fee from his prison account.

ORDER

IT IS ORDERED that

1. Plaintiff Loren Leiser's motion for the court to certify that an interlocutory appeal may be taken from the October 18, 2012 order in this case, dkt. #133 is DENIED.

2. Plaintiff's request for leave to proceed in forma pauperis on appeal, dkt. #134, is DENIED. I certify that plaintiff's appeal is not taken in good faith. The clerk of court is directed to insure that plaintiff's obligation to pay the $455 fee for filing his appeal is reflected in the court's financial record.

Entered this 6th day of December, 2012.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge