

Case No. 09-17210

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MIGUEL CASTANEDA, KATHERINE CORBETT, AND JOSEPH WELLNER,
ON BEHALF OF THEMSELVES
AND ALL OTHERS SIMILARLY SITUATED,

Plaintiffs - Appellees,

v.

BURGER KING CORPORATION,

Defendant - Appellant.

Appeal from the United States District Court
for the Northern District of California, San Francisco Division
Civil Action No. C 08-4262 WHA

MOTION TO DISMISS APPEAL

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Pursuant to Federal Rule of Appellate Procedure 27(a) and based on the reasons discussed below, Plaintiffs-Appellees respectfully move to dismiss the instant appeal.

Three days ago, on December 8, 2009, the Supreme Court decided *Mohawk Industries, Inc. v. Carpenter*, 2009 WL 4573276 (2009), holding that “the collateral order doctrine does not extend to disclosure orders adverse to the attorney-client privilege.” *Id.* at *9. Because Defendant-Appellant Burger King Corporation (“BKC”) brings this appeal from a disclosure order adverse to the attorney-client and work-product privileges under the collateral order doctrine, *see* Motion for Stay Pending Appeal (“Motion for Stay”) at 1, the present appeal is now barred under the ruling in *Mohawk Industries*.

The fact that BKC asserts both attorney-client and work-product privileges as to the materials at issue does not bring the appeal out from under *Mohawk’s* holding. Indeed, the case on which BKC relies for its appeal relating to both privileges -- *In re Napster, Inc. Copyright Litigation*, 479 F.3d 1078, 1087-88 (9th Cir. 2007), *cited in* Motion for Stay at 1-2 -- was expressly abrogated by the Supreme Court. *See Mohawk Industries*, 2009 WL 4573276 at *4 n.1. Another of the cases the Court noted as having ruled contrary to its holding addressed both the attorney-client and the work-product privileges, and addressed the two together

under the *Cohen* factors. See *In re Ford Motor Co.*, 110 F.3d 954, 957-64 (3d Cir. 1997), cited in *Mohawk Industries*, 2009 WL 4573276 at *4 n.1.

In *Mohawk Industries*, the Court focused on the third of the three-part test for collateral review originally set forth in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949): whether collateral appeal is necessary to ensure effective review. *Mohawk Indus.*, 2009 WL 4573276 at *6. The Court discussed the interests at stake in an order adverse to the attorney-client privilege, and concluded that “postjudgment appeals generally suffice to protect the rights of litigants and assure the vitality of the attorney-client privilege.” *Id.* The Court made clear that it was addressing not merely the interests at issue in the case before it, but “whether deferring review until final judgment so imperils the interest as to justify the cost of allowing immediate appeal of the entire class of relevant orders.” *Id.* The interests at stake in an appeal from a ruling adverse to a work-product privilege are the same as those at considered in *Mohawk Industries*. The Court held that these interests did not justify extending the collateral order doctrine to orders requiring production of privileged material. *Id.* at *8.

Immediately following the Supreme Court’s ruling in *Mohawk Industries* three days ago, Plaintiffs-Appellees inquired whether BKC would be withdrawing its appeal. BKC indicated that it would not be able to respond within the next few

days, and yesterday caused one of its attorneys to enter an appearance in the present appeal, indicating that it likely does not intend to withdraw its appeal.

Plaintiffs inquired again yesterday but have not received a response.

For the reasons set forth above, Plaintiffs-Appellees respectfully request that this Court dismiss the pending appeal.

Respectfully submitted,

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Date: December 11, 2009

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on December 11, 2009. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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