UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

THE ROMAN CATHOLIC ARCHDIOCESE OF NEW YORK; CATHOLIC HEALTH CARE SYSTEM; THE ROMAN CATHOLIC DIOCESE OF ROCKVILLE CENTRE, NEW YORK; CATHOLIC CHARITIES OF THE DIOCESE OF ROCKVILLE CENTRE; and CATHOLIC HEALTH SERVICES OF LONG ISLAND,

Plaintiffs,

-against-

KATHLEEN SEBELIUS, in her official capacity as Secretary of the U.S. Department of Health and Human Services; HILDA SOLIS, in her official capacity as Secretary of the U.S. Department of Labor; TIMOTHY GEITHNER, in his official capacity as Secretary of the U.S. Department of Treasury; U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES; U.S. DEPARTMENT OF LABOR; and U.S. DEPARTMENT OF TREASURY,

Defendants.

No.: 1:12-cv-2542 (BMC)

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION FOR RECONSIDERATION OR FOR CERTIFICATION TO PERMIT AN INTERLOCUTORY APPEAL

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INTRODUCTION

In a thorough, 41-page Memorandum Decision and Order issued on December 5, 2012 (the "Order"), this Court granted in part and denied in part defendants' motion to dismiss. The Order addressed fully the arguments and supporting materials presented by the parties, and its reasoning has been followed by the Northern District of Texas in denying a motion to dismiss brought by these same defendants in a case challenging the lawfulness of the Coverage Mandate. *See Roman Catholic Diocese of Forth Worth v. Sebelius*, No. 4:12-CV-314-Y, slip op. at 11 (N.D. Tex. Jan. 31, 2013) (attached as Ex. A hereto). In its Order, this Court discussed the case law that the parties cited or that the Court raised *sua sponte* and, in particular, addressed a number of non-controlling decisions on motions to dismiss in other actions challenging the Coverage Mandate. The Court did not overlook any controlling authority or controlling facts in its Order. Defendants do not seriously contend otherwise. Instead, their motion is predicated on the notion that the Court "failed to properly credit" (Defs.' Br. at 3) a fact that the Court acknowledged in its Order: that "the Departments have stated an intent to finalize amended regulations so that they are effective prior to the end of the safe harbor." Order at 6; *see also id.* at 26.

The Court did not "overlook" this fact—indeed, much of the Order is devoted to addressing it. For this reason alone, the Court should deny defendants' motion for reconsideration. In any event, as the Court has explained in its Order, the assertion on which this motion for reconsideration is based does not deprive plaintiffs of standing or make their claims unripe. "The Coverage Mandate is a final rule, *see* 77 Fed. Reg. 8,730 (adopting the Interim Final Rules 'as a final rule without change'), and the ANPRM has not made the Coverage Mandate any less binding on plaintiffs." Order at 29. That remains the case after HHS' release on February 1, 2013 of a Notice of Proposed Rulemaking soliciting public comment with respect

to certain proposed changes to the Coverage Mandate and the religious employer exemption. *See* http://www.ofr.gov/OFRUpload/OFRData/2013-02420_PI.pdf. Like the ANPRM, this Notice does not supersede or repeal the Coverage Mandate. It is not law. *See* Order at 29; *see also Roman Catholic Diocese of Forth Worth*, No. 4:12-CV-314-Y, slip op. at 9 ("The Mandate, moreover, is a final rule with a definitive effective date, and neither the ANPRM nor Defendants' related announcements change this."). Meanwhile, as defendants themselves acknowledge, changes to plaintiffs' health care plans require "significant lead time to implement," Order at 33 (quoting 75 Fed. Reg. 41,730), and "the practical realities of administering health care coverage for large numbers of employees . . . require plaintiffs to incur these costs in advance of the impending effectiveness of the Coverage Mandate." Order at 34-35. These plaintiffs, in particular, have also already begun planning and have incurred costs due to the Coverage Mandate. *See id.* 31, 34-35. They thus have standing and their claims are ripe, as the Court properly held. *See also Roman Catholic Diocese of Forth Worth*, No. 4:12-CV-314-Y, slip op. at 7-11. Defendants have presented no cognizable basis for reconsidering the Order.

Defendants alternatively seek permission to take an interlocutory appeal from the Order pursuant to 28 U.S.C. § 1292(b). That procedure is reserved for "exceptional circumstances," *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 475 (1978), which are not met here. Not one of the three prerequisites in § 1292(b) has been satisfied. First, defendants' motion itself shows that their proposed interlocutory appeal would focus on the application of settled law to facts, which as many cases have held does not present the requisite "controlling question of law." Second, defendants have not carried their burden to show a "substantial ground for difference of opinion," because the Court's Order distinguished decisions that have granted motions to dismiss in other cases challenging the Coverage Mandate. Third, an immediate appeal would not

necessarily "materially advance the ultimate termination of this litigation," because if plaintiffs were to prevail on the appeal the case would of course continue.

An interlocutory appeal would also not avoid "protracted litigation," as defendants contend, because much of the discovery here—including defendants' production of documents—should be completed well before resolution of an interlocutory appeal from the Order. Moreover, even on defendants' view of this case, a ruling in their favor on an interlocutory appeal would not be an event that ultimately ends this dispute. Defendants rely heavily on their purportedly "overlooked" representation that a new regulation is likely to materially alter the Coverage Mandate before the safe harbor expires. But, even if that happens as defendants claim, plaintiffs will either assert claims against the revised Coverage Mandate or they will not challenge it. In either case, an interlocutory appeal will not be the event that materially advances the ultimate termination of this dispute. The posture of this case underscores the wisdom of the final judgment rule. The Court should not make an exception to it here.

ARGUMENT

I. DEFENDANTS' MOTION FOR RECONSIDERATION SHOULD BE DENIED

"A motion for reconsideration under Local Rule 6.3 is ordinarily granted only when the moving party has shown that the Court overlooked controlling law or facts that were put before it, which, had they been considered, would have altered the disposition of the underlying motion." *Nisanov v. Black & Decker (U.S.) Inc.*, No. 05-cv-5911 (BMC), 2008 WL 2185910, at *1 (E.D.N.Y. May 23, 2008) (citing *Shrader v. CSX Transp., Inc.*, 70 F.3d 255 (2d Cir. 1995)). "The standard for granting [a motion for reconsideration] is strict," *see Shrader*, 70 F.3d at 257, and "a party may not advance new facts, issues, or arguments not previously presented to the Court." *Nat'l Union Fire Ins. Co. of Pittsburgh v. Stroh Cos., Inc.*, 265 F.3d 97, 115 (2d Cir. 2001) (quoting *Polsby v. St. Martin's Press*, No. 97 Civ. 690 (MBM), 2000 WL 98057, at *1

(S.D.N.Y. Jan. 18, 2000)). Thus, "facts that were known or discoverable and presentable on the original motion, but were not, are not appropriate support for a motion to reconsider." *Nisanov*, 2008 WL 2185910, at *1.[1]

Defendants have not met this strict standard. They cite no fact or controlling law from their motion to dismiss that the Court overlooked. Rather, their brief amounts to an extended complaint that defendants "do[] not like the way the original motion was resolved," which is not a ground for granting a motion for reconsideration. *In re Houbigant, Inc.*, 914 F. Supp. 997, 1001 (S.D.N.Y. 1996). The error, according to defendants, is not that the Court overlooked any controlling law or fact, but that the Court purportedly failed to sufficiently credit statements made by defendants principally in other forums—and, in many instances, after they submitted their moving papers here—relating to defendants' position on whether the challenged regulations will be enforced against plaintiffs. Even if this were an "overlooked" fact, which it was not, and even if it were appropriate to credit those statements now, which it is not, they have no bearing on the basis for the Order denying, in part, defendants' motion to dismiss. Defendants therefore have not met the onerous standard on a motion for reconsideration.

A. The Court Did Not Overlook Controlling Law

Defendants claim that "reconsideration is warranted because the Court erred both factually and legally when it concluded that there is a 'substantial possibility' that the challenged regulations, in their current form, will be enforced by defendants against plaintiffs." Defs.' Br. at 3. Despite this sweeping claim, defendants fail to cite to any *controlling* law that the Court

[1] *See also Scott v. N.Y. Health & Human Servs. Union*, No. 00-cv-9381 (JFK), 2003 WL 21047739, at *1 (S.D.N.Y. May 7, 2003) ("Although granting reconsideration is within its discretion, reconsideration of a previous order is an extraordinary remedy to be employed sparingly in the interests of finality and conservation of scarce judicial resources.") (quotation and citation omitted).

supposedly overlooked. *See Rivera v. Salomon Smith Barney, Inc.*, No. 01-cv-9282 (RWS), 2003 WL 222249, at *1 (S.D.N.Y. Jan. 30, 2003) (motion for reconsideration denied because movant "has not cited any controlling authority that this Court overlooked").[2] Instead, they cite to decisions from other district courts and the D.C. Circuit that have addressed jurisdictional challenges made by defendants in other cases challenging the Coverage Mandate, with different plaintiffs. *See* Defs.' Br. at 1-2. These decisions, which are not even from courts within this Circuit let alone from the Second Circuit, are not, of course, controlling. *See Christ the King Regional High School v. Culvert*, 644 F. Supp. 1490, 1496 (S.D.N.Y. 1986) ("A federal district court is bound by the rule of the circuit in which it is located . . . . The decisions of one circuit's court of appeals are not binding in another circuit." (citations omitted)); *cf. Richardson v. Selsky*, 5 F.3d 616, 623 (2d Cir. 1993) ("a district court decision does not 'clearly establish' the law, even in its own circuit").

In any event, the Court has already addressed—and thus did not overlook—most of these non-controlling decisions. The Court expressly acknowledged that it was "not writing on a blank slate" when addressing defendants' arguments in the Order. Order at 13. Indeed, the Order repeatedly references decisions on motions to dismiss other lawsuits challenging the Coverage Mandate. The Court either agreed with certain aspects of those decisions, *see id*. at 27 n.9, or reached a different, reasoned conclusion based on the facts and controlling law applicable here, *see id*. at 28-29 ("The Court appreciates that other courts have held otherwise. Nevertheless, I

[2] *See also U.S. v. James*, No. 02-cv-0778 (SJ), 2007 WL 914242, at *4 (E.D.N.Y. Mar. 21, 2007) (adopting magistrate judge's recommendation to deny motion for reconsideration; movant "has not pointed to any specific controlling authority which he claims this Court has overlooked. To the extent that defendant has cited additional case authority, the cases either stand for the same propositions as those cited in the earlier submissions and addressed in the Court's earlier [decision], or do not present controlling authority").

conclude that those courts overestimate the significance of the ANPRM and underestimate the finality of the Coverage Mandate.").

Defendants note that since the Order was issued "four additional district courts and one court of appeals" have granted motions to dismiss in actions challenging the Coverage Mandate. Defs.' Br. at 1.[3] But, again, none of those decisions is controlling on the Court here. *See, e.g.*, *Christ the King*, 644 F.Supp. at 1496; *Six W. Retail Acquisition, Inc. v. Sony Theatre Mgmt. Corp.*, No. 97-cv-5499 (DNE), 2000 WL 264295, at *28 (S.D.N.Y. Mar. 9, 2000) (opinions of other circuits are "not binding upon this Court"). In any event, any "new facts, issues, or arguments" in these non-controlling decisions would not be an appropriate ground for reconsidering the Court's Order. *See Nat'l Union Fire Ins. Co.*, 265 F.3d at 115. The reasoning underlying those decisions is also consonant with the reasoning in similar decisions that the Court expressly addressed in its Order. *See James*, 2007 WL 914242, at *4 (rejecting additional authority where they "stand for the same propositions as those cited in the earlier submissions and addressed in the Court's earlier [decision]").

B. The Court Did Not Overlook Controlling Facts

Because defendants' brief implicitly concedes that the Court did not overlook any controlling legal authority, defendants' argument, at bottom, is that the Court overlooked certain controlling facts in the Order. According to defendants, the Court "failed to properly credit defendants' consistent assurances that the challenged regulations will never be enforced by

[3] Notably, the case from the D.C. Circuit to which defendants repeatedly refer, *Wheaton Coll. v. Sebelius*, held that the plaintiffs in that case "clearly had standing," but found the case unripe for review "[b]ased expressly upon the understanding that the government will not deviate from its considered representations to [the] court" that it "would *never* enforce" the Coverage Mandate against those plaintiffs—a representation that the government did not make to this Court. *See* Defs.' Br. Ex. 1 at 2 (Order, *Wheaton Coll. v. Sebelius*, No. 12-5273 (D.C. Cir. filed Dec. 18, 2012)) (emphasis in original); *see also Roman Catholic Diocese of Forth Worth*, No. 4:12-CV-314-Y, slip op. at 11 n.6 (distinguishing the *Wheaton* decision on this ground).

defendants against plaintiffs in their current form." Defs.' Br. at 3. More specifically, defendants assert that, notwithstanding that (as defendants acknowledge) the Court assumed that defendants issued the ANPRM in good faith, the Order is "based entirely on the contrary view that the current version of the regulations may in fact be enforced against plaintiffs." *Id*. This, defendants claim, warrants reconsideration.

Defendants are wrong. Their argument is predicated on a fundamental misunderstanding of the Court's ruling. As the Court emphasized in its Order, plaintiffs' injuries—particularly for standing purposes—are not alleviated simply because defendants have represented they will amend the Coverage Mandate. Rather, plaintiffs' injuries are both present and impending precisely because defendants have promulgated regulations that, unlike the ANPRM or any promised revision to the Coverage Mandate, are *now in effect* and are forcing plaintiffs to alter their planning to comply with this law or else plan for the consequences of not complying with it. *See also Roman Catholic Diocese of Forth Worth v. Sebelius*, No. 4:12-CV-314-Y, slip op. at 9, 10 (N.D. Tex. Jan. 31, 2013) (holding that "[t]he Mandate . . . is a final rule with a definitive effective date" and "[t]he Diocese simply does not have the luxury of inaction").

1. As the Court has properly determined, plaintiffs' injuries stem directly from the "operative regulations at issue in this suit." Order at 5. Whether those "operative regulations" may take on some other form in the future—and regardless of whether the Court believes that they will—they currently exist in a form "that will become effective by operation of law." *Id*. at 27. For this reason, and not because of a failure to credit any of the representations made by defendants, the Court concluded that plaintiffs have standing and that their claims are ripe. *See id*. at 27-28.

Indeed, the Court repeatedly acknowledged and addressed at length defendants' argument that "plaintiffs' injuries are not certainly impending because, through the ANPRM, the Departments will change the requirements of the Coverage Mandate" before it will ever be enforced against Plaintiffs. Order at 24.[4] As the Order makes plain, however, the issue is not whether the Court, or even plaintiffs, believe defendants. Plaintiffs are suffering and will suffer an injury—as the Court recognized—because, regardless of whether the Coverage Mandate may later change, it is currently law and plaintiffs are preparing to deal with it. *See* Order at 29-32. Further, as defendants continue to acknowledge, the "ANPRM does not technically bind defendants to a change in policy." Defs.' Br. at 8 n.4. It is also unclear, and defendants have conspicuously not stated, what practical impact, if any, the promised amendments to the challenged regulations will have on plaintiffs' complaints about the Coverage Mandate. In light of all these factors, as the Court held, plaintiffs' future injuries are "certainly impending" irrespective of the ANPRM. Order at 24-27.

In sum, defendants have not shown, nor can they show, that the Court "overlooked" the representation on which this motion for reconsideration is based. Rather, they simply wish the Court had agreed with them about how the law should be applied here in light of their representation. That is not a ground for granting a motion for reconsideration. *See In re Houbigant*, 914 F. Supp. at 1001.

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[4] *See also* Order at 25-26 ("[D]efendants argue that because the ANPRM means that the plaintiffs are unlikely to face injury from the Coverage Mandate in the future, plaintiffs should not be able to 'transform the speculative possibility of future injury into a concrete current injury for standing purposes by asserting that they have to plan now for their future needs.'"); *id*. at 26 ("The key issue, therefore, is whether, despite the fact that plaintiffs are facing current and future harms in connection with the Coverage Mandate, constitutional standing is lacking because defendants have committed to amending the Coverage Mandate through the ANPRM.").

2. Defendants' motion may also be denied on the separate ground that it is largely predicated on statements that were not before the Court in connection with their motion to dismiss. A motion for reconsideration may not rely on new facts or arguments. *See Nat'l Union Fire Ins. Co.*, 265 F.3d at 115. Indeed, Local Civil Rule 6.3 specifically provides that "[n]o affidavits shall be filed by any party [on a motion for reconsideration] unless directed by the Court." In violation of this Rule—and without obtaining prior leave of the Court—defendants submitted in support of their motion for reconsideration a January 9, 2013 Declaration of Gary M. Cohen, which sets forth the factual basis for defendants' motion for reconsideration. This declaration should be stricken and not considered on defendants' motion. *See Ralph Oldsmobile Inc. v. Gen. Motors Corp.*, No. 99 Civ. 4567 (AGS), 2001 WL 55729, at *2 (S.D.N.Y. Jan. 23, 2001) ("When a party improperly submits an affidavit on a motion for reconsideration, the appropriate remedy is to strike the affidavit and disregard it."). Moreover, that defendants believed they needed to submit it underscores that their motion is improperly based on facts not previously put before the Court.

Defendants' motion relies prominently on how, at oral argument in the D.C. Circuit, "defendants stated [in response to a question] unequivocally that the regulations are certain to change before expiration of the safe harbor period, and that the current regulations would never be enforced against plaintiffs." Defs.' Br. at 2. But that oral argument was held on December 14, 2012, well *after* the motion to dismiss in this case was fully briefed and submitted to the Court.[5] Defendants further argue that they have stated on several other occasions that the Coverage Mandate as it currently exists "will *never* be enforced against entities like plaintiffs." *Id*. at 3-4 (emphasis in original). Notably, as with defendants' representation to the D.C. Circuit,

[5] Defendants' reply brief in support of their motion to dismiss was filed on September 24, 2012. *See* Doc. No. 30.

many of the statements offered by defendants as to the alleged certainty of the proposed changes to the Coverage Mandate were made in *other* cases and, in many instances, *after* the motion to dismiss in this case was already submitted to the Court. *See, e.g.*, Defs.' Br. at 4 n.2.

Defendants' representations in their motion to dismiss briefing to this Court, by contrast, were not quite so "unequivocal" as those that they have made in other forums "since the Court issued its Order." Defs.' Br. at 6. As an initial matter, defendants submitted no sworn statement on their motion to dismiss concerning their intent to modify the Coverage Mandate, *see* Doc. No. 16, as they seek to improperly do now on this motion for reconsideration. And, in their principal brief on the motion to dismiss, defendants went only so far as to make unsworn statements that: "Defendants intend to finalize the amendments to the regulations such that they are effective before the end of the temporary enforcement safe harbor." Doc. No. 16-1 at 10. Likewise: "Defendants, moreover, have indicated that they intend to finalize the amendments to the regulations before the rolling expiration of the temporary enforcement safe harbor starting on August 1, 2013." *Id.* at 15; *see also id.* at 16 ("anticipated changes to the preventive services coverage regulations"); *id.* at 15 ("The ANPRM published in the Federal Register confirms, and seeks comment on, defendants' intention to propose further amendments to the preventive services coverage regulations . . . .").

These are a far cry from the statements offered in support of this motion—which were made in other cases, in many instances after the motion to dismiss here was fully briefed—that "the regulations are certain to change" and "would never be enforced against plaintiffs." Defs.' Br. at 2; *see also Roman Catholic Diocese of Forth Worth*, No. 4:12-CV-314-Y, slip op. at 4 & 11 n.6 (noting that defendants represented to the Northern District of Dallas that "the Departments have announced their intention to further amend the Mandate" and that the D.C.

Circuit's decision in *Wheaton* is distinguishable because, there, the defendants made different representations). The Court of course could not have "overlooked" statements that were not brought to its attention in a timely fashion. Although, as shown above, none of those statements would have been controlling—or even material—in light of the reasoning in the Court's Order, defendants' motion for reconsideration may be denied on this separate ground as well.[6]

II. THE COURT SHOULD NOT CERTIFY ITS DISMISSAL ORDER FOR AN INTERLOCUTORY APPEAL

The Court should also deny defendants' alternative request that the Court certify its dismissal order for an interlocutory appeal pursuant to 28 U.S.C. § 1292(b).

Section 1292(b) was intended to be a "rare exception to the final judgment rule that generally prohibits interlocutory appeals." *Koehler v. Bank of Bermuda Ltd.*, 101 F.3d 863, 865 (2d Cir. 1996). The three minimum criteria that must be met are that that district court "be of the opinion that" (i) the order "involves a controlling question of law"; (ii) "as to which there is substantial ground for difference of opinion"; and (iii) "an intermediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). Then, only if the district court certifies that an interlocutory appeal is permissible because in its opinion all three of these criteria have been met, the would-be appellant must apply to the Court of Appeals for permission to take an interlocutory appeal. *See id.*

Only "exceptional circumstances justify a departure from the basic policy of postponing appellate review until after the entry of a final judgment." *Coopers & Lybrand v. Livesay*, 437

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[6] *See Nisanov*, 2008 WL 2185910, at *1 ("[F]acts that were known or discoverable and presentable on the original motion, but were not, are not appropriate support for a motion to reconsider."); *Allen v. Costello*, No. 03-CV-4957, 2008 WL 361191, at *2 (E.D.N.Y. Feb. 8, 2008) (on motion for reconsideration, "[t]he law in this Circuit is clear: a party is not permitted to put forth 'new facts, issues or arguments that were not presented to the court on [the original] motion'") (citation omitted); *In re Currency Conversion Fee Antitrust Litig.*, 229 F.R.D. 57, 60 (S.D.N.Y. 2005) ("[A] motion for reconsideration cannot assert new arguments or claims which were not before the court on the original motion.").

U.S. 463, 475 (1978) (quotation omitted); *see also Nat'l Asbestos Workers Med. Fund v. Philip Morris, Inc.*, 71 F. Supp. 2d 139, 161 (E.D.N.Y. 1999) (noting that from 1990 to 1999, the Second Circuit heard approximately 40,000 appeals, and only 93 of them, or 0.23%, had been interlocutory appeals pursuant to §1292(b)). For this reason, and in light of the general federal policy against piecemeal litigation embodied in the final judgment rule, a district court has the "unfettered discretion to deny certification of an order for interlocutory appeal even where the three legislative criteria of section 1292(b) appear to be met." *Nat'l Asbestos Workers*, 71 F. Supp. 2d at 162; *see also In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig.*, 399 F. Supp. 2d 320, 322 (S.D.N.Y. 2005) ("[E]ven where the criteria of section 1292(b) appear to be met, district courts have 'unfettered discretion to deny certification' if other factors counsel against it.") (citation omitted).

An interlocutory appeal is not proper here because defendants have not met any of the three prerequisites in § 1292(b), and in any event the Court should exercise its discretion to deny this motion. First, the issue that defendants posit for appeal is not a "controlling question of law." Defendants' own motion for reconsideration reflects that the challenge they would mount to the Court's Order on an interlocutory appeal is intensively *factual* in nature. This Court, in its Order, relied on well-established principles of standing and ripeness and applied them to the facts of this case. Critically, defendants do not challenge these well-established principles or the Court's articulation of them in the instant motion, but instead contend that the Court misapprehended defendants' representations concerning their intent in applying those principles here. While the Court made no such mistake, as plaintiffs have shown in Part I above, the very nature of the claimed error here shows that defendants would not present the requisite "controlling question of ***law***" for resolution by the Court of Appeals but an issue of fact—and not

one that is likely to recur in other cases in this Circuit, either. No matter how putatively "easily understood" that factual issue is, Defs.' Br. at 12, section 1292(b) is not appropriately invoked to ask the Court of Appeals to address a challenge to an application of established law to fact but only to resolve a "controlling question of law."[7] Because defendants' own motion reflects that their appeal would not present such an issue, their application for a certification pursuant to § 1292(b) should be denied on this ground alone.

Second, defendants have not shown that there is the requisite "substantial ground for difference of opinion." 28 U.S.C. § 1292(b). "The legislative history indicates that to satisfy this prerequisite there must be 'substantial doubt' that the district court's order was correct." *Ralph Oldsmobile Inc. v. Gen. Motors Corp.*, No. 99 Civ. 4567 (AGS), 2001 WL 55729, at *3 (S.D.N.Y. Jan. 23, 2001) (quoting *Moll v. U.S. Life Title Ins. Co.*, Nos. 85 Civ. 6866, 86 Civ. 4271, 1987 WL 10026 (S.D.N.Y. Apr. 21, 1987)). There is no such doubt here, as the Court's Order reflects. Defendants nevertheless contend that this requirement is "easily" satisfied

[7] *See Harriscom Svenska AB v. Harris Corp.*, 947 F.2d 627, 631 (2d Cir. 1991) (questions of fact rather than law will not be reviewed); *S.E.C. v. Gruss*, No. 11 Civ. 2420 (RWS), 2012 WL 3306166, at *4 (S.D.N.Y. Aug. 13, 2012) ("certification is not 'intended as a vehicle to provide early review of difficult rulings in hard cases[,]' '[n]or is it appropriate for securing early resolution of disputes concerning whether the trial court properly applied the law to the facts'") (quoting *Abortion Rights Mobilization, Inc. v. Regan,* 552 F. Supp. 364, 366 (S.D.N.Y. 1982)); *Bild v. Konig*, No. 09-CV-5576 (ARR), 2011 WL 4007895, at *1 (E.D.N.Y. Sept. 8, 2011) ("'The antithesis of a proper § 1292(b) appeal is one that turns on . . . whether the district court properly applied settled law to the facts or evidence of a particular case.'") (quoting *Mills v. Everest Reinsurance Co.*, 771 F. Supp. 2d 270, 276 (S.D.N.Y. 2009)); *Bank of N.Y. Trust, N.A. v. Franklin Advisers, Inc.*, 674 F. Supp. 2d 458, 473-73 (S.D.N.Y. 2009) (concluding first element of Section 1292(b) not met where "the matter before [the court] did not present any pure controlling question of law"); *Morris v. Flaig*, 511 F. Supp. 2d 282, 315 (E.D.N.Y. 2007) ("The 'question of law' certified for interlocutory appeal 'must refer to a 'pure' question of law'") (quoting *In re Worldcom, Inc.*, No. M-47 HB, 2003 WL 21498904, at *10 (S.D.N.Y. June 30, 2003)); *S.E.C. v. First Jersey Sec., Inc.*, 587 F. Supp. 535, 536 (S.D.N.Y. 1984) (holding that, where an appeal "would necessarily present a mixed question of law and fact, not a controlling issue of pure law," the district court's order was "not appropriate for certification pursuant to 28 U.S.C. § 1292(b)").

because the Court's Order purportedly conflicts with "the rulings of eleven other courts." Defs.' Br. at 12. But defendants do not come to grips with this Court's determination that "plaintiffs in this action have made a more concrete showing of present injury than plaintiffs in most of the other cases that have addressed defendants' jurisdiction argument." Order at 34. Indeed, by contrast to nearly all of the other cases cited by defendants, "plaintiffs here have demonstrated how the enormous changes to their plans required by the Coverage Mandate currently exacerbate their preparation costs" and "caused them to divert funds from their ministries." *Id.* at 35. Courts have repeatedly denied requests for § 1292(b) certification where, as here, the movant relies on factually distinguishable cases to demonstrate the requisite "substantial ground for difference of opinion."[8] On this ground as well, defendants have failed to show that an interlocutory appeal is appropriate.

Third, the Court should not agree with defendants that an interlocutory appeal may "materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). As an initial matter, the Court has the discretion to reject defendants' argument on this ground because an affirmance on an appeal from the Order would not end this case, but only impose the burden of a piecemeal interlocutory appeal. *See, e.g.*, *Babcock v. Computer Assocs. Int'l, Inc.*, No. 00-CV-1648 (JS), 2007 WL 526601, at *3 (E.D.N.Y. Feb. 9, 2007) (finding that interlocutory

[8] *See Bilello v. JPMorgan Chase Ret. Plan*, 603 F. Supp. 2d 590, 594-95 (S.D.N.Y. 2009) (finding no substantial ground for difference of opinion where the cases cited by movants were factually distinguishable); *In re MTBE Prods. Liab. Litig.*, 399 F. Supp. 2d at 324 (defendants failed to show substantial doubt regarding the correctness of the court's rulings sufficient to justify interlocutory appeal where "[t]he arguments and authorities cited in defendants' briefs were thoroughly considered and found to be inapposite. A party that offers only arguments rejected on the initial motion does not meet the second requirement of 1292(b).") (internal quotations omitted)); *Ralph Oldsmobile*, 2001 WL 55729, at *4 (offering cases that the court had already deemed distinguishable and unpersuasive did not establish a substantial ground for a difference of opinion); *accord Moll*, 1987 WL 10026, at *3 (no ground for substantial difference of opinion where movant merely reargued points already weighed by the court in its initial decision).

appeal may not materially advance litigation if the Second Circuit rules as the Eastern District, *i.e.*, that plaintiffs have standing; "[a]n interlocutory appeal would then materially delay this action"). Indeed, every reversal of an order denying a motion to dismiss would end a case, but that does not make all such orders appropriate for an interlocutory appeal. Defendants' position that this Order is appropriate for an interlocutory appeal "[q]uite simply" because reversal will end the case (Defs.' Br. at 13) is not consistent with the guiding principle that only "exceptional circumstances" warrant certification pursuant to § 1292(b). *Coopers & Lybrand*, 437 U.S. at 475.

The particular circumstances of this case further show why the Court should deny defendants' motion either on the ground that an appeal here would not "materially advance the ultimate termination of the litigation" or on related discretionary grounds. Defendants offer that an interlocutory appeal "may avoid protracted litigation," and in support of this notion they rely principally on the time and effort that they represent will be involved in producing documents in response to plaintiffs' discovery requests. *See* Defs.' Br. at 13. But defendants waited a total of five weeks after the Court issued its Order to submit this motion. And they have not asked for (nor is there any ground for granting them) a stay—indeed, the Court already denied the defendants' application for a stay of discovery at the outset of this case. *See* Aug. 12, 2012 Order Regarding Doc. No. 16. Meanwhile, the Court has ordered defendants to complete their document production by June 7, 2013 and that depositions may begin as early as March 25, 2013. *See* Jan. 8, 2013 Minute Entry.

Defendants have not shown that it is at all likely that, *in less than four months* (that is, between the time the Court decides this motion once it is fully submitted on February 8 and June 7), all of the following will occur: (i) the parties would complete briefing to the Second Circuit

on a request by defendants for permission to appeal; (ii) the Second Circuit would grant such an application; (iii) the parties would fully brief defendants' interlocutory appeal; and (iv) the Second Circuit would issue a decision. Defendants have ignored this issue entirely in their brief, but the most recently available statistics for the Second Circuit's docket show that it is quite unlikely that defendants' proposed appeal would be resolved within this truncated timeframe.[9] This is yet another reason why an interlocutory appeal is not appropriate here. *See Nat'l Asbestos Workers*, 71 F. Supp. 2d at 163 (in exercising discretion on a request for certification pursuant to § 1292(b), district court should "determine whether an interlocutory appeal is an efficient use of judicial resources" by considering, among other factors, "the time an appeal would likely take"); *accord In re Enron Corp.*, No. 01-16034 (SAS), 2007 WL 2780394, at *2 (S.D.N.Y. Sept. 24, 2007) (finding that "an interlocutory appeal to the Second Circuit would not advance the ultimate termination of the litigation" and, "[t]o the contrary, [ ] may significantly delay the proceedings" where the action was scheduled to go to trial seven months after the district court's decision denying permission for an interlocutory appeal).

Moreover, even if the Second Circuit were to reverse the Court's Order on appeal, it would not, as a practical matter, be dispositive of this dispute. If defendants in fact promulgate a revised Coverage Mandate before the safe harbor expires, as they represent they will, one of three things will happen: (i) the Coverage Mandate will not change materially in its application

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[9] According to the most recent statistics published by the Administrative Office of the United States Courts, the median interval in the Second Circuit from filing of a notice of appeal to a final disposition for all civil appeals excluding prisoner petitions is 11.2 months. That does not include the extra time that would be necessary here for the parties to brief, and the Second Circuit to decide, whether to allow defendants to take an interlocutory appeal. *See* 2011 ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS at 84 (Table B-4A, Median Time Intervals in Months for Merit Terminations of Appeals Arising From the U.S. District Courts, by Circuit, During the 12-Month Period Ending September 30, 2011), *available at* http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2011/JudicialBusiness2011.pdf.

to these plaintiffs; (ii) plaintiffs will be wholly satisfied with the revised Coverage Mandate or conclude that there are no grounds for challenging it; or (iii) plaintiffs will assert claims with respect to the Coverage Mandate as revised. In any case, an order by the Second Circuit would not, as a practical matter, end the parties' dispute over the Coverage Mandate. To the contrary, the very facts that defendants contend warrant an interlocutory appeal, if they occur as defendants represent, would effectively moot the standing and ripeness issues that defendants propose to present on that appeal. *See Nat'l Asbestos Workers*, 71 F. Supp. 2d at 163 (court should consider "the probability that other issues may moot the need for the interlocutory appeal"); *see also Mayers v. N.Y. Cmty. Bancorp, Inc.*, No. CV-03-5837 (CPS), 2006 WL 2013734, at *11 (E.D.N.Y. July 18, 2006) (denying motion pursuant to § 1292(b) on the ground, among others, that "it is possible that some of the questions that would be raised on interlocutory appeal will become moot on final judgment."); *In re Enron*, 2007 WL 2780394, at *2 ("[T]he fact that the proceedings below may moot Springfield's appeal altogether . . . also weighs against certification.").

Defendants have not, in short, carried their burden to show that, in the circumstances presented by this case, an interlocutory appeal would materially advance the ultimate termination of the parties' dispute. On this separate ground, defendants' application for a certification pursuant to § 1292(b) should be denied.

CONCLUSION

The Court should therefore deny defendants' motion for reconsideration and their alternative motion to certify the Court's Order for an interlocutory appeal pursuant to 28 U.S.C. § 1292(b).

Dated: February 1, 2013
New York, New York

Respectfully submitted,

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EXHIBIT A