UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

UNITED STATES of AMERICA *ex rel.* TRACY CONROY, PAMELA SCHENK and LISA WILSON,	)	
Plaintiffs/Relators,	)	Case No. 3:12-cv-00051 RLY-DML
v.	)	
SELECT MEDICAL CORPORATION, SELECT SPECIALTY HOSPITAL - EVANSVILLE, and DR. RICHARD SLOAN,	)	
Defendants.	)	

UNITED STATES' OPPOSITION AS AMICUS TO DEFENDANTS' JOINT MOTION FOR CERTIFICATION (DOC. 165)

Pursuant to 28 U.S.C. § 517, the United States respectfully submits this Statement of Interest as a real party in interest under the False Claims Act, 31 U.S.C. §§ 3729-3733,[1] opposing defendants' Joint Motion for Interlocutory Certification (Doc. 165). Interlocutory appeal certifications are intended to be rare exceptions within a legal system that in general is rooted in the final judgment rule.[2] Such certifications allow district courts to conclude, only in exceptional circumstances, that the balance of hardship to a defendant from continuation of litigation in the normal course substantially outweighs the costs that such a certification would

[1] Although the United States is not a party to this litigation in which it has declined to intervene, *United States ex rel. Eisenstein v. City of New York*, 556 U.S. 928, 933 (2009), it remains a real party in interest. *United States ex rel. Lusby v. Rolls- Royce Corp.*, 570 F.3d 849, 852 (7th Cir. 2009); *United States ex rel. Hyatt v. Northrop Corp.*, 91 F.3d 1211, 1215 (9th Cir. 1996) (citing cases).

[2] *Coopers and Lybrand v. Livesay*, 437 U.S. 463, 475 (1978) (burden on movant to show "exceptional" circumstances justifying departure from final judgment rule); *Camacho v. P.R. Ports Auth.*, 369 F.3d 570, 573 (1st Cir. 2004) (grant of certification should be "hen's teeth rare"); Report of the Committee on Appeals from Interlocutory Orders of the District Courts (Sept. 23, 1953), *reprinted in* 1958 U.S.C.C.A.N. 5258, 5260-5261 (1958) (same).

entail, including the costs to the system from piecemeal litigation and the delay costs to the plaintiff. A defendant attempting to establish such extraordinary circumstances has a high burden to bear, one embodied in several statutorily-based prerequisites, each of which must be separately met. The defendants in this case have not met the prerequisites, and for this reason, their motion for certification should be denied.

ARGUMENT

The governing statute, 28 U.S.C. § 1292(b), provides as follows:

> 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. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however*, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

The elements that thus permit (but do not require) a district judge to certify a question for an interlocutory appeal are a "substantial ground" for "difference of opinion" as to a "controlling question of law," in a case where the movant demonstrates that an immediate appeal will also "materially advance the ultimate termination of the litigation." These elements are "conjunctive, not disjunctive," and therefore a motion for certification is defective and should not be granted if the movant does not meet its burden as to any one of these elements. *Ahrenholz v. Board of Trustees of Univ. of Ill.*, 219 F.3d 674, 676 (7th Cir. 2000); *see also Couch v. Telescope Inc.*, 611 F.3d 629, 633 (9th Cir. 2010). These requirements must be "strictly construed." *Myles v. Laffitte*, 881 F.2d 125, 127 (4th Cir. 1989).

I. NO "SUBSTANTIAL GROUND" HAS BEEN DEMONSTRATED FOR ANY REAL DIFFERENCE OF OPINION AS TO THIS COURT'S ORDER

The defendants' legal argument is an attack on a provision of the False Claims Act as amended in 2010 that creates a condition precedent for courts that would otherwise dismiss cases based on the bar on parasitical suits found in the Act. The Act allows private citizens to bring actions seeking damages accruing to the United States for false claims, subject to a variety of control mechanisms exercised over the private party litigation by the Attorney General. A new control enacted by Congress in 2010 is that the defendants cannot pursue dismissal of an action as ostensibly parasitical over the objection of the Attorney General. In other words, as a condition precedent to any motion to dismiss, the Attorney General must implicitly agree that the action is or may be parasitical by failing to object to that motion. 31 U.S.C. 3730(e)(4)(A).

The defendants seek to read this control out of the statute by maintaining that the bar on parasitical actions remains "jurisdictional," as it was prior to 2010. If jurisdictional, then in their view, the Attorney General cannot prevent the case from being dismissed.

As a second legal attack on the new provision, the defendants argue that this condition precedent so unduly interferes with the independence of the courts that it should be struck down on separation of powers grounds.

Neither issue presents any "substantial ground" for a difference of opinion and therefore the defendants have not met their burden to justify an interlocutory appeal as to these issues.

A. <u>There Is No Substantial Ground For A Difference Of Opinion As To Whether The Public Disclosure Bar Is No Longer Jurisdictional</u>

As to the first prong of the attack, this Court correctly concluded that the defendants' argument about the continuing jurisdictional nature of section 3730(e)(4)(A) "makes little sense"

within the context of the 2010 amendment. If the parasitical bar in section 3730(e)(4) had actually remained jurisdictional, there is no situation in which the Attorney General could exercise the right conveyed by the statute to prevent defendants from seeking to dismiss these cases on parasitism grounds, nor could the Attorney General have any input at all into the merits of the parasitism issue since as this Court correctly states, subject matter jurisdiction can neither be conferred by the parties nor waived by the Court. Doc. 163, at 26.

The defense argument about jurisdiction, had it been accepted, would have mandated that this Court read the new veto provision out of the False Claims Act and simply disregard it. The defendants have provided no rationale that could lead any court to mutilate the statute in this way. All authority is in fact to the contrary.

The plain language of the 2010 amendment eliminates the prior language relating to "jurisdiction." All Circuit Courts to actually consider the issue – the Third,[3] Fourth,[4] Sixth[5] and Eleventh[6] -- have concluded that the public disclosure bar is therefore no longer jurisdictional. The majority opinion among district courts in the Second Circuit is that the bar is no longer jurisdictional.[7] The First Circuit has stated that even though it has not yet formally decided the issue "of whether Congress has stripped the public disclosure bar of its jurisdictional character,

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[3] *United States ex rel. Moore & Co. PA v. Majestic Blue Fisheries, LLC*, 812 F.3d 294, 299-300 (3d Cir. 2016).
[4] *United States ex rel. May v. Purdue Pharma LP*, 737 F.3d 908, 916-17 (4th Cir. 2013), *cert. denied*, 135 S. Ct. 2376 (2015).
[5] *United States ex rel. Harper v. Muskingum Watershed Conservancy District*, __ F.3d __, 2016 WL 6832974 *3 (6th Cir. Nov. 21, 2016); *United States ex rel. Advocates for Basic Legal Equality, Inc. v. US Bank NA*, 816 F.3d 428, 433 (6th Cir. 2016), *petition for cert. pending*, No. 16-130 (filed July 25, 2016).
[6] *United States ex rel. Osheroff v. Humana, Inc.*, 776 F.3d 805, 810-11 (11th Cir. 2015).
[7] The latest such decision is *New York ex rel. Khurana v. Spherion Corp.*, 2016 WL 6652735 *11 (S.D.N.Y. Nov. 10, 2016).

the arguments for that proposition are strong."[8] The Seventh Circuit has noted that "the circuits that have had to determine whether the new statutory language is jurisdictional have held that it is not jurisdictional." *Cause of Action v. Chicago Transit* Authority, 815 F.3d 267, 271 n.5 (7th Cir.), *cert. denied*, 137 S. Ct. 205 (2016). There is no governing Seventh or any other Circuit precedent concluding, after considering the issue, that the statute remains jurisdictional.

All the relevant opinions set forth above thus simply state the obvious: the jurisdictional language was removed from the statute for a reason, which was in part to make room for the amendment allowing for an Attorney General veto of a public disclosure parasitism argument by defendants. The two go hand in hand: if the jurisdiction language had remained, the veto provision would have made no sense.

In the face of this unanimity of opinion, the defendants cite to *United States ex rel. Sheet Metal Workers Int'l Ass'n v. Hornung Inv LLC*, 828 F.3d 587, 591-92 (7th Cir. 2016), where the Seventh Circuit had before it a case where there was no public disclosure and thus the Court did not need to reach the question of whether the statute as amended continued to be jurisdictional. The Court specifically held that section 3730(e)(4)(A), the public disclosure bar, "does not apply to the case," and there was no consideration of the 2010 amendment to the statute that removed the jurisdiction language. This Court evaluated defendants' argument relating to *Sheet Metal Workers* previously and properly said that any language relating to this issue in that case is pure dicta.

Defendants' only other precedent within this Circuit are two non-binding unpublished decisions from the Northern District of Illinois. The first one actually says there are "compelling reasons" to think that the statute is no longer jurisdictional, *Carmel v. CVS Caremark*, 2015 WL

[8] *United States ex rel. Winkelman v. CVS Caremark Corp.*, 827 F.3d 201, 207 n.3 (1st Cir. 2016).

3962532 at *4 (N.D. Ill. June 26, 2015), *appeal dism'd*, No. 15-2594 (7th Cir. Sept. 17, 2015). Its rationale for not actually so holding has been obviated. The second unpublished Northern District of Illinois opinion is *United States ex rel. Frawley v. McMahon*, 2016 WL 5404598 at *7 n.2 (N.D. Ill. Sept. 28, 2016), where the court, in our view erroneously and inexplicably, decided to quote and rely on the *Sheet Metal Workers* dicta to conclude that it would continue to consider the post-2010 public disclosure bar to be jurisdictional until directed otherwise. In the face of holdings in published court of appeals decisions from four circuits, along with strong hints from two others including the Seventh Circuit that this is the way they will rule when they are actually faced with the issue, *Frawley* -- an unpublished district court opinion from a different district relying entirely on dicta – is a slim reed upon which to construct an argument that there is "substantial" ground here for any difference of opinion.

As noted above, the question presented must actually be "difficult." An issue does not present a "substantial ground" just because there is no decision from this Circuit that squarely addresses the issue, *Carabello-Seda v. Municipality of Hormigueros*, 395 F.3d 7, 9 (1st Cir. 2005), especially where, as here, all of the decided court of appeals case law that does address the issue is unanimous. None of the defendants' cited authorities to the contrary (Doc. 166, at 20) are on point. In *Boim v. Quranic Literacy Inst. & Holy Land Found. For Relief and Dev.*, 291 F.3d 1000, 1008 (7th Cir. 2002), the court was evaluating two statutory provisions, and noted that "[n]o court has yet considered the meaning or scope of [the two statutes at issue], and so we write upon a tabula rasa." In marked contrast here, every circuit court to actually consider the issue has concluded that the statute is not jurisdictional; we have a full slate here, not a clean slate.

In *Ormond v. Anthem, Inc.*, 2011 WL 3881042 at **4-6 (S.D. Ind. Sept. 2, 2011), also

cited by defendants, the court made clear that (1) it had been forced to decide an issue a certain way based on law of the case, and believed that it would be advantageous for the court of appeals, not bound by law of the case, to take a fresh look at the issue; (2) there was "strong support" for and a "good argument" to be made for movant's legal arguments, and (3) a "principled argument" as to "sensible policy" could lead "reasonable minds" to disagree on the issue presented. None of these factors is present here. And in *Valbruna Slater Steel Corp. v. Joslyn Mf'g Co.*, 2016 WL 1593232 at *3 (N.D. Ind. Apr. 21, 2016), the court said that the issue where certification was sought was actually a "tough question," in part because its decision directly conflicted with other courts of appeal decisions, which once again is not the case here.

In a final case cited by defendants, *In re Miedzianowski*, 735 F.3d 383, 384 (6th Cir. 2013), the court rejected an interlocutory appeal on the grounds, *inter alia,* that there was controlling precedent in the Circuit. Even though there was an inter- circuit conflict as to the issue presented in *Miedzianowski,* this did not warrant an interlocutory appeal in the view of the Sixth Circuit, so it vacated the district court's certification. The Court certainly did not say that where, as here, there is no controlling precedent in the Circuit – but unanimous views elsewhere -- that an interlocutory appeal is warranted.

In sum, defendants' attack on the 2010 amendment that added an Attorney General veto provision to the public disclosure bar based on the alleged continuing jurisdictional nature of the bar does not present any substantial ground for difference of opinion, and the motion to certify on this ground should be rejected.

B. There Is No Substantial Ground for Difference of Opinion As To The Argument That The Statutory Condition Precedent Found in Section 3730(e)(4)(A) Violates Separation of Powers

As to the second attack on the veto provision, based on separation-of-powers arguments, the authority that defendants cite is both sparse and inapplicable. In *Salmeron v. Enter Recovery Sys Inc.*, 579 F.3d 787, 797 n.5 (7th Cir. 2009), a private party relator tried to argue that the Court could not involuntarily dismiss her case on the merits because the Attorney General had not consented to that dismissal. While there is a "consent to dismissal" provision within the False Claims Act as one of several control mechanisms over *qui tam* litigants, 31 U.S.C. 3730(b)(1),[9] the Attorney General has always interpreted this as a way to ensure that meritorious cases are not voluntarily dismissed by relators because of, for example, some collusive private payment made directly to a relator by a defendant. The court in *Salmeron* noted that the Attorney General had never made an argument that the government could interpose itself into a merits-based dismissal of a *qui tam* case, and so declined to adopt a requirement for consent in the case of an involuntary dismissal. Nor has the Attorney General made any such argument here. As in the case of the parasitism veto, the Attorney General's role in vetoing collusive settlements and dismissals does not interfere in any judicial function but instead serves as a needed check to ensure that the statute is working as Congress intended. In each case Congress has created a condition precedent to judicial action no different from scores of other conditions precedent that courts enforce every day: in the case of the parasitical suit veto, to require that defendants filing dismissal actions based on parasitism have implied consent from

[9] That section provides as follows: "The [*qui tam*] action may be dismissed only if … the Attorney General give[s] written consent to the dismissal and [his or her] reasons for consenting."

the Attorney General, and in the case of the collusive dismissal, to require that the plaintiff-relators seeking to voluntarily dismiss suits actively obtain Attorney General consent.[10]

Cases like this one ostensibly "presenting constitutional questions" are treated no differently than other cases for purposes of section 1292(b): interlocutory appeals in such instances are still "reserved for 'extraordinary cases.'" *Judicial Watch, Inc. v. National Energy Policy Development Group*, 233 F. Supp. 2d 16, 24 (D.D.C. 2002) (citing *Clinton v. Jones*, 520 U.S. 681, 702, 705 (1997); *In re Executive Office of the President*, 215 F.3d 20, 23 (D.C. Cir. 2000)). "If an argument, even one that invokes separation of powers doctrine, is without support in existing case law, then the question of law raised thereby are neither substantial nor controlling for the purposes of § 1292(b)." *Judicial Watch, Inc., supra*, 233 F. Supp. 2d at 23-24. Thus, in *Lucas v. 'Brinknes'' Schiffahrts Ges. Franz Lange G.m.B.H. & Co., K.G.*, 387 F. Supp. 440, 445 (E.D. Pa. 1974), the district court refused to certify a constitutional question for interlocutory appeal because the provision in question was "clearly constitutional," and concluded instead that "the best hope for 'materially advanc(ing) the ultimate termination of the litigation' is to proceed with it in the district court." So too here. This Court correctly found that the constitutional argument advanced by the defendants here is "without support." Doc. 163, at 30-31. An argument that has no legal support cannot by definition present any "substantial ground" for a difference of opinion,[11] and defendants' argument to the contrary should be rejected.

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[10] Defendants also argue that the Attorney General veto is "administrative action" that should be reviewable judicially. The only authority cited is *Kucana v. Holder*, 558 U.S. 233, 250, 252 (2010), where the Court found that quasi-judicial administrative action by a federal agency denying applications to reopen asylum petitions could in fact have been shielded from judicial review as long as it is a statute that creates the shield as opposed to a regulation. This case is not on point for multiple reasons, including the fact that here it **is** a statute at issue, not a regulation.

[11] Defendants' further implication that interlocutory appeal is warranted because of "the absence of legislative history shedding any light on what Congress intended" by the veto provision, Doc.

II. AN INTERLOCUTORY APPEAL WOULD NOT MATERIALLY ADVANCE A SPEEDIER RESOLUTION TO THE LITIGATION

In addition to failing to demonstrate that any issue raised presents a "substantial ground" for a difference of opinion, the defendants fail to show that an appeal would "materially advance" the ultimate termination of the litigation, *i.e.* they have failed to put forth anything other than pure speculation to show that an interlocutory appeal would substantially shorten and "speed up" the litigation. *Ahrenholz, supra,* 219 F.3d at 675. This 1292(b) requirement, like the others, must be "strictly construed." *Myles v. Laffitte, supra,* 881 F.2d at 127.

Regardless of any appeal or its outcome, the relators in this case have retaliation claims pending under 31 U.S.C. § 3730(h) (Counts II-IV of the Second Amended Complaint, Doc. 128), which are claims that will go forward regardless, and which will require proof of substantially the same underlying facts as the False Claims Act claim. Defendants have thus failed to show that, even if their motion for certification were granted and the court of appeals accepted this interlocutory appeal, and even if the court of appeals reversed and required the False Claims Act counts to be entirely dismissed, that the litigation would be substantially shortened.

Section 3730(h) requires proof by the plaintiffs of "acts done… in furtherance of an action" under the False Claims Act, or "efforts to stop" violations of that Act. [12] Necessarily

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166, at 24, is entirely mistaken. As set forth at great length in the United States' original brief, Doc. 157, the legislative history in fact shows that Congress wanted to limit the efforts being made by defendants in large numbers of these cases to dismiss the actions based on the public disclosure bar where such dismissals were not warranted. Congress wanted to limit such dismissals to arguably parasitic actions and furthered that goal by permitting the Attorney General to ensure that, in appropriate situations, these cases were not being unduly limited.

[12] Section 3730(h) as amended provides as follows:

(h) Relief From Retaliatory Actions.—

(1) In general.—

Any employee, contractor, or agent shall be entitled to all relief necessary to make that employee, contractor, or agent whole, if that employee, contractor, or agent is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment because of lawful acts done by the employee, contractor,

included in any claim for retaliation under section 3730(h) is some proof of the underlying False Claims Act violation, whether or not an action to redress that violation was ever filed. The plaintiff must both prove "potential FCA violations" and that s/he made "efforts to stop" them. *Halasa v. ITT Educational Services, Inc.*, 690 F.3d 844, 847-48 (7th Cir. 2012); *see United States ex rel. Rockey v. Eat Institute of Chicago, LLC*, 92 F. Supp. 3d 804, 828 (N.D. Ill. 2015) (defendant's proper defense to a retaliation claim is that the plaintiff "has not adequately alleged an FCA" violation). Thus in *McCrary v. Knox County, Indiana*, 2016 WL 4140982 ** 5-8 (S.D. Ind. Aug. 4, 2016), the court made clear that the plaintiff claiming retaliation would have to show the normal elements of a False Claims Act violation: a source of federal funds, claims on those funds, and loss to the federal government, and the court evaluated all of those elements in order to determine whether the plaintiff had stated a claim. Similarly, in *Mann v. Heckler & Koch Defense, Inc.*, 630 F.3d 338, 345-47 (4th Cir. 2010), the court resolved the section 3730(h) claim by evaluating whether there was indeed any underlying fraud redressable by the False Claims Act. It also made clear that absent such proof, a 3730(h) claim could not proceed, *id.* at 344 (citing *Neal v. Honeywell*, 33 F.3d 860, 864 (7th Cir. 1994), *abrogated on other grounds*, *Graham County Soil & Conservation District v. United States ex rel. Wilson*, 545 U.S. 409, 416-17 (2005)).[13]

Defendants state as an *ipse dixit* that the retaliation claim will require "less discovery." Doc. 166, at 15. "[T]he moving party," however, is obligated to "come forward with something

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agent or associated others in furtherance of an action under this section or other efforts to stop 1 or more violations of this subchapter.

[13] *See also Eberhardt v. Integrated Design & Constr., Inc.*, 167 F.3d 861, 869 (4th Cir. 1999) (3730(h) plaintiff must show "conduct [that] 'reasonably could lead to a viable FCA [False Claims Act] action'"); *United States ex rel. Yesudian v. Howard University*, 153 F.3d 731, 740 (D.C. Cir. 1998) (same); *United States ex rel. Hopper v. Anton*, 91 F.3d 1261, 1269 (9th Cir. 1996), *cert. denied*, 519 U.S. 1115 (1997) (rejecting as insufficient a 3730(h) claim based solely on noncompliance with regulations, with no "nexus to the FCA").

more than mere conjecture in support of his claim that certification may save the court and the parties substantial time and expense." *Bank of New York v. Hoyt*, 108 F.R.D. 184, 189 (D.R.I. 1985) (citation omitted); *Cummins v. EG&G Sealol, Inc.*, 697 F. Supp. 64, 72 (D.R.I. 1998) ("[C]onjecture cannot support a conclusion that the desired interlocutory appeal might materially advance the termination of this litigation.") (quoting *In re Magic Marker Securities Litigation*, 472 F. Supp. 436, 438-39 (E.D. Pa. 1979)); *see also Barreras Ruiz v. American Tobacco Co.*, 977 F. Supp. 545, 549 (D.P.R. 1997) (interlocutory appeal should not be certified where appellate review would do nothing other than "delay the ultimate termination of the litigation").

Defendants acknowledge that any reversal would leave the retaliation claims (along with the subsumed requirement that the plaintiffs show an FCA violation) remaining to be decided, Doc. 166, at 9, but claim that the litigation would be substantially shortened because one out of the four defendants could be dismissed from the lawsuit. *Id.* The mere possibility of dismissal of one among several defendants if an interlocutory appeal is successful is insufficient, however, to establish that such an appeal would materially advance the litigation as a whole. *Park v. Trican Well Service, LP*, 2015 WL 6160272 *4 (W.D. Okla. Oct. 20, 2015); *Grimes v. Cirrus Indus., Inc.*, 2010 WL 2541664 *4 (W.D. Okla. June 18, 2010); *Oliner v. McBride's Indus., Inc.*, 412 F. Supp. 490, 491 n.1 (S.D.N.Y. 1975); *Lemelson v. Ampex Corp.*, 372 F. Supp. 708, 715 (N.D. Ill. 1974); *Chas. Pfizer & Co. v. Laboratori Pro-Ter Prodotti Therapeutici SpA*, 278 F. Supp. 148, 154 (S.D.N.Y. 1967); *Speir v. Robert C. Herd & Co.*, 189 F. Supp. 436, 439 (D. Md. 1960). Thus, in *Speir*, the court found that the policy against piecemeal appeals outweighs avoidance of some expense by a defendant. And in *In re NASDAQ Market Makers Antitrust Litigation*, 938 F. Supp. 232, 234 (S.D.N.Y. 1996), the court noted that where the "litigation will continue" whether or not these particular litigants succeed, a 1292(b) certification would not be

appropriate. If the "core of the disagreement" between the parties is going to have to be "resolved regardless," there is no advantage to certification and it does not "materially advance the litigation." *In re Bridgestone/Firestone, Inc. Tires Product Liability Litigation*, 212 F. Supp. 2d 903, 907-08 (S.D. Ind. 2002).

Even if, contrary to fact, defendants had shown some substantial ground for difference of opinion, because the defendants have failed to show that termination of the litigation would be materially advanced through an interlocutory appeal, their motion for certification should be denied.

III. EVEN IF, CONTRARY TO FACT, ALL REQUIREMENTS OF SECTION 1292(b) HAD BEEN MET, THIS COURT STILL SHOULD EXERCISE ITS DISCRETION TO DENY THE MOTION FOR CERTIFICATION

Even if defendants had met the requirements of 1292(b), this Court continues to have discretion to deny certification and should do so here. *See In re Facebook, IPO Securities & Derivative Litigation*, 986 F. Supp. 2d 524, 530 (S.D.N.Y. 2014); *National Asbestos Workers Med. Fund v. Philip Morris, Inc.*, 71 F. Supp. 2d 139, 146 (E.D.N.Y. 1999) (per curiam) ("district courts...have independent and 'unreviewable' authority to deny certification even where the three statutory criteria are met"); *Manion v. Spectrum Healthcare Resources*, 966 F. Supp. 2d 561, 567 (E.D.N.C. 2013). This Court is in the best position to consider the multitude of factors peculiar to any given case including factors beyond those laid out in the statute, including the system-wide costs of allowing this appeal, delay costs to the plaintiff, cluttering of an already crowded appellate docket, and "prudential concerns about mootness, ripeness, and lengthy appellate proceedings." *Carabello-Seda v. Municipality of Hormigueros*, 395 F.3d 7, 9 (1st Cir. 2005).

CONCLUSION

For all of the above reasons, this Court should deny the motion for certification for interlocutory appeal.

Dated: December 5, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I have served a copy of the foregoing upon the Parties herein, by filing a copy through the Court's CM/ECF system, which will deliver a copy to the following counsel of record on this 5th day of December, 2016.

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