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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

RACHEL CONDRY, JANCE HOY, CHRISTINE ENDICOTT, LAURA BISHOP, FELICITY BARBER, and RACHEL CARROLL on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

UnitedHealth Group Inc.; UnitedHealthcare, Inc.; UnitedHealthcare Insurance Company; UnitedHealthcare Services, Inc.; and UMR, Inc.,

Defendants.

Case No.: 3:17-cv-00183-VC

PLAINTIFFS' OPPOSITION TO DEFENDANTS UNITEDHEALTH GROUP INC., UNITEDHEALTHCARE, INC. , UNITEDHEALTHCARE INSURANCE COMPANY, UNITED HEALTHCARE SERVICES, INC., AND UMR, INC.'S MOTION TO CERTIFY ORDER FOR IMMEDIATE APPEAL PURSUANT TO 28 U.S.C. § 1292(b)

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Plaintiffs, Rachel Condry, Jance Hoy, Christine Endicott, Laura Bishop, Felicity Barber, and Rachel Carroll (collectively, the "Plaintiffs"), on behalf of themselves and all others similarly situated, submit this Opposition to Defendants' Motion to Certify Order for Immediate Appeal Pursuant to 28 U.S.C. § 1292(b) and Memorandum of Points and Authorities in Support Thereof, Doc. No. 81 ("1292(b) Motion").[1]

I. PRELIMINARY STATEMENT.

Defendants' 1292(b) Motion is based on fundamental misstatements concerning the nature of the Action, the ACA,[2] this Court's Order on Defendants' Motion to Dismiss,[3] the *Wellmark* Court's motion to dismiss order,[4] and 28 U.S.C. §1292(b) ("1292(b)"). Defendants have not met their burden of demonstrating that they are entitled to the extraordinary relief sought, and thus their 1292(b) Motion must be denied.

First, Defendants have not demonstrated a controlling pure question of law. The Court did not make nor rely on any novel interpretation of the ACA, and the Court's use of the term "meaningful access" is not, by any measure, a "broad interpretation" of the ACA, nor, actually, inconsistent with Defendants' (unsupported) claim that the ACA is limited to "financial access." (*See* 1292(b) Motion at 1, l.11-10; 7-8). Rather, the Court's Order soundly pointed to and relied on the unambiguous provisions of the ACA that require "coverage" and applied the facts as pled and argued. In contrast, Defendants' argument distorts the Court's holding, ignores the actual language of the ACA, interjects their own words into the ACA ("financial access"), and misconstrues the word "meaningful access", to

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[1] Defendants comprise UnitedHealth Group Inc., UnitedHealthcare, Inc., UnitedHealthcare Insurance Company, United Healthcare Services, Inc. and UMR, Inc. (collectively, "UnitedHealth" or "Defendants").

[2] Capitalized terms used herein have the same meaning as in Plaintiffs' Second Amended Complaint, Doc. No. 78 ("SAC"). On September 19, 2017, Defendants filed their Answer and Affirmative Defenses to the SAC, Doc. No. 82.

[3] The Court's August 15, 2017 Order Granting in Part and Denying in Part Motion to Dismiss, filed as Doc. No. 68, is referred to herein as the "Court's Order."

[4] The Order Re: [Wellmark] Defendants' Motion to Dismiss, entered on September 6, 2017 in *York, et al, v. Wellmark, Inc., d/b/a/ Wellmark Blue Cross and Blue Shield of Iowa, and Wellmark Health Plan of Iowa, Inc.*, Case No. 4:16-cv-00627-RGE (USDC S.D. Iowa), and attached as Exhibit A to Defendants' 1292(b) Motion, is referred to herein as the "*Wellmark* Order".

contrive a controlling question of law when none exists. As discussed in Section II. A, *infra*, Defendants fail to demonstrate that the Court's Order evokes a controlling question of law subject to interlocutory review.

Second, the 1292(b) Motion is wanting in any demonstration of substantial grounds for differences of opinion with respect to any controlling question of law. (*See* 1292(b) Motion at 1, l.20 - 2, l.16; and 8-12). For this element, the 1292(b) Motion relies heavily on arguments about why Defendants disagree with the Court's Order, *id.* at 8-11. However, a party's disagreement with a court order does not amount to substantial grounds for differences of opinion under 1292(b). Further, Defendants' scant reliance on the *Wellmark* Order (*id.* at 11, l.16 - 12, l.5) is also unpersuasive. As discussed in Section II. B, *infra*, the 1292(b) Motion fails to demonstrate that the *Wellmark* Order, which held that plaintiffs sufficiently stated a claim that *Wellmark* had improperly imposed cost-sharing on the plaintiffs, is substantial grounds for differences of opinion with respect to any controlling question of law.

Third, failing to demonstrate that the Court's Order meets the first and second elements of 1292(b), Defendants cannot satisfy the third element of 1292(b). (*See* 1292(b) Motion at 12-13). It is incontrovertible that, even if one were to assume a controlling question of law has been identified on which Defendants are permitted to appeal, and that the appellate court reversed the Court's Order, this Action would not terminate. As discussed in Section II. C, *infra*, the 1292(b) Motion fails to demonstrate that there is a controlling question of law at issue whose resolution will materially advance the termination of the litigation.

In sum, Defendants do not meet their burden to identify a pure controlling question of law about which there is a substantial ground for difference of opinion, the resolution of which will materially advance the litigation. Accordingly, Defendants fail to demonstrate each element of 1292(b) and their 1292(b) Motion must be denied.

II. DEFENDANTS FAIL TO MEET THEIR BURDEN OF DEMONSTRATING EACH ELEMENT OF 1292(b).

Title 28 U.S.C. § 1292(b) "provides for interlocutory appeals from otherwise not immediately appealable orders, if conditions specified in the section are met, the district court so certifies, and the court of appeals exercises its discretion to take up the request for review." *City of Los Angeles, Harbor Div. v. Santa Monica Baykeeper*, 254 F.3d 882, 885 (9th Cir. 2001) (citation omitted). Defendants, as the parties seeking review of the Court's Order, bear the burden of showing that "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 U.S. 463, 475 (1978).

Defendants fail to meet their burden in demonstrating the three requirements for a 28 U.S.C. § 1292(b) interlocutory appeal, namely, that: (1) the Order involves a controlling question of law; (2) there is substantial ground for difference of opinion on the controlling question of law; and (3) an immediate appeal would materially advance the litigation. *See In re Cement Antitrust Litigation* (MDL No. 296), 673 F.2d 1020, 1026 (9th Cir. 1981). "The decision to certify an order for interlocutory appeal is committed to the sound discretion of the district court." *United States v. Tenet Healthcare Corp.*, 2004 U.S. Dist. LEXIS 26420, 2004 WL 3030121, at *1 (C.D. Cal. Dec. 27, 2004) (*citing Swint v. Chambers Cnty. Comm'n*, 514 U.S. 35, 47 (1995)).

Defendants rewrite the ACA and the Court's Order in their quest to try to demonstrate "rare" and "exceptional" circumstances warranting 1292(b) treatment, *James v. Price Stern Sloan, Inc.*, 283 F.3d 1064, 1067 n.6 (9th Cir. 2002), but those circumstances just do not exist here.

A. Defendants Do Not Demonstrate A Controlling Question of Law.

Defendants have not demonstrated a controlling question of law. *See* 1292(b) Motion at 1, l.11-10; 7-8. "A question of law under § 1292(b) means a 'pure question of law' rather than a mixed question of law and fact or the application of law to a particular set of facts." *United States ex rel. Atlas Copco Compressors LLC v. RWT LLC*, 2017 U.S. Dist. LEXIS 109035 *21 (D. Haw. July 13, 2017) (citations omitted).

For 1292(b), in addition to demonstrating a "pure question of law," Defendants also must prove that the question of law is controlling, which requires that the resolution of the question on

appeal could "materially affect the outcome of litigation" in the district court. *In re Cement Antitrust Litig.*, 673 F.2d at 1027. A "mixed question of law and fact[,] or the application of law to a particular set of facts" by itself is not appropriate for permissive interlocutory review. *Chehalem Physical Therapy, Inc. v. Coventry Health Care, Inc.*, 2010 U.S. Dist. LEXIS 22647, *6 (D. Or. March 10, 2010); *see also Allen v. Conagra Foods, Inc.*, 2013 U.S. Dist. LEXIS 161231, *9 (N.D. Cal. Nov. 12, 2013) (denying section 1292(b) certification because proposed appeal involved application of the relevant facts to a regulation).

Defendants frame their supposed controlling question of law in two ways:

> whether the ACA should be construed expansively to require "meaningful access" to lactation counseling services (as this Court held) or more narrowly to prohibit only financial barriers to such services in the form of cost-shares, which includes deductibles, coinsurance, and copayments (as the ACA's text provides)
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> whether ACA's preventive services provision requiring coverage of lactation services and allocating an insurer's financial responsibility for those services (*i.e.* no cost-sharing) should be interpreted broadly to require "meaningful access" to lactation counseling services (beyond just financial access

See 1292(b) Motion at 1, l.14-19, and 7, l.13-17 (no citation to the Court's Order included). That is neither a controlling, nor a pure, question of law. It is argument. And, it mischaracterizes the record and the Court's Order.

The Court's Order logically begins with a discussion of the pertinent provisions of the ACA, to which the facts as pled and argued were then applied by the Court. (*See* Court's Order at 1-2). Specifically, the Court cites to 42 U.S.C. § 300gg-13(a), which states that "(a)… A group health plan and a health insurance issuer offering group or individual health insurance coverage **shall, at a minimum provide coverage for and** shall not impose any cost sharing requirements for — (1) evidence-based items or services that have in effect a rating of "A" or "B" in the current recommendations of the United States Preventive Services Task Force [USPSTF]; ……[and] (4) with respect to women, such additional preventive care and screenings not described in paragraph (1) as

provided for in comprehensive guidelines supported by the Health Resources and Services Administration [HRSA] for purposes of this paragraph." (Emphasis added).

The Court's Order (at page 1) then references the HRSA's 2011 *Women's Preventive Service Guidelines,* which states that: "The Affordable Care Act…***helps make prevention affordable and accessible*** for all Americans by requiring health plans ***to cover preventive services*** and by eliminating cost sharing for those services. …Non-grandfathered plans …generally ***are required to provide coverage*** without cost sharing consistent with these guidelines in the first plan year (in the individual market, policy year) that begins on or after August 1, 2012. …**Breastfeeding support, supplies, and counseling.** Comprehensive lactation support and counseling, by a trained provider during pregnancy and/or in the postpartum period, and costs for renting breastfeeding equipment. In conjunction with each birth." (Italicized emphasis added).[5]

Upon consideration of the First Amended Complaint, the claims asserted, the parties' arguments, and the foregoing provisions of the ACA, the Court concluded that (page 3):

> The Affordable Care Act requires plans to provide "coverage". [ ] There is no "coverage" for a service if a patient can't find the service or isn't told that the service is available. Certainly there is no "coverage" if a patient is told that a service is *not* covered, which is a reasonable inference about what allegedly happened to at least some of the plaintiffs in this case. Nor is there "coverage" for a service like lactation counseling if a woman and her child live hundreds of miles from the nearest in-network provider. The service must be available in a meaningful was for the plan to comply with the Affordable Care Act.

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[5] On December 20, 2016, HRSA updated the HRSA-supported Women's Preventive Services Guidelines, which state as follows (emphasis added):

> Under section 2713 of the Public Health Services Act, non-grandfathered group health plans and issuers of non-grandfathered group and individual health insurance coverage are **required to cover** specified preventive services without a copayment, coinsurance, deductible, or other cost sharing, **including preventive care and screenings for women as provided for in comprehensive guidelines supported by HRSA for this purpose**.
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> * * *
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> The Women's Preventive Services Initiative recommends comprehensive lactation support services (including counseling, education, and breastfeeding equipment and supplies) during the antenatal, perinatal, and the postpartum period to ensure the successful initiation and maintenance of breastfeeding.

That holding does not come close to embodying what Defendants now seek to have this Court certify as a controlling pure question of law. The Court neither made nor relied on any novel interpretation of the ACA, and the Court's use of the term "meaningful access" is not a "broad" interpretation of the ACA, nor does it deviate from the statute's plain language that plans must provide coverage. (*See* 1292(b) Motion at 7-8). Defendants' arguments do not give rise to a 1292(b) controlling issue of law, and are belied by the Court's holdings tethered to the plain language of the ACA which "requires plans to provide 'coverage'" (Court's Order at 3).

The dearth of argument and support in the 1292(b) Motion on this issue is telling and particularly unpersuasive in contrast to the foregoing. *See* 1292(b) Motion at 7-8. It is not something that Defendants can cure in a reply brief. *See Avendano-Ruiz v. City of Sebastopol*, No. 15-cv-03371-RS, 2016 U.S. Dist. LEXIS 69368, at *30 (N.D. Cal. May 26, 2016) ("Parties may not raise new arguments in reply briefs, and consideration of such arguments is improper."); *see also United States ex rel. Giles v. Sardie*, 191 F. Supp. 2d 1117, 1127 (C.D. Cal. 2000) ("It is improper for a moving party to introduce new facts or different legal arguments in the reply brief than those presented in the moving papers."). Defendants' boilerplate and conclusory statements, coupled with no explanation of how such purported controlling issue of law can be extracted from the actual language of the Court's Order, does not meet Defendants' heavy burden. Defendants' purported question of law does not equate to controlling question of law that have been held appropriate for 1292(b) certification, such as a "determination of who are necessary and proper parties, whether a court to which a cause has been transferred has jurisdiction, or whether state or federal law should be applied.'" *In re Cement Antitrust Litig.*, 673 F.2d at 1026 (*quoting United States v. Woodbury*, 263 F.2d 784, 787 (9th Cir. 1959)).

There is also no abstract legal issue presented by Defendants. This case is about insurance coverage, how the Defendants covered or did not cover a benefit that was set forth in the insureds' plan documents, and it evokes principles of ERISA, fiduciary law and contract law. Section 1292(b) "was not intended to open the floodgates to a vast number of appeals from interlocutory orders in ordinary litigation, or to be a vehicle to provide early review of difficult rulings in hard cases." *Martens v. Smith Barney, Inc.*, 238 F. Supp. 2d 596, 600 (S.D.N.Y. 2002). *Cf. In re*

Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig., 212 F. Supp. 2d 903, 907 (S.D. Ind. 2002) ("A question of law in this situation is one that presents 'an abstract legal issue' that can be 'decide[d] quickly and cleanly without having to study the record.'").

Also, the Court's Order and record are clear that the questions at issue in this Action are to be decided on the basis of facts to be established through discovery and at trial, thereby completely undermining Defendants' contention that this involves a pure issue of controlling law. Indeed, it is not even appropriate to permit interlocutory appeal of a "controlling question of law" that involves a mixed question of law and fact. *See Oliner v. Kontrabecki*, 305 B.R. 510, 529 (N.D. Cal. 2004)("Because the alleged 'controlling question of law' raised by Kontrabecki are inextricably intertwined with the bankruptcy court's factual findings, an interlocutory appeal is not appropriate."); *Keystone Tobacco Co., Inc. v. United States Tobacco Co.*, 217 F.R.D. 235, 239 (D.D.C. 2003) (When "the crux of an issue decided by the court is fact-dependent, the court has not decided a 'controlling question of law' justifying immediate appeal."); *In re St. Johnsbury Trucking Co.*, 186 B.R. 53, 55 (D. Vt. 1995) (court found no "controlling question of law" existed because the issue required resolution of fact questions); *North Carolina ex rel. Long v. Alexander & Alexander Servs., Inc.*, 685 F. Supp. 114, 115-16 (E.D.N.C. 1988) ("Decisions that are 'fact specific' may not be appealed under § 1292(b)."); *Sec. & Exch. Comm'n v. First Jersey Sec., Inc.*, 587 F. Supp. 535 (S.D.N.Y. 1984) ("The Court's decision . . . was predicated at least in part on specific factual findings. . . . Therefore, an appeal would necessarily present a mixed question of law and fact, not a controlling issue of pure law. Such an order is not appropriate for certification pursuant to 28 U.S.C. 1292(b).").

Defendants, in fact, moved to dismiss the complaint by making a factual contention that they could apply cost-sharing to Plaintiffs' claims for lactation benefits under the ACA by arguing that they had ***in-network lactation providers.*** *See* 1292(b) Motion at 4, l.12-18, and fn. 3; and, Court's Order at 3. The Court considered the facts advanced and disagreed with Defendants' contention that such conduct evidenced "coverage." *See, e.g.,* Order at 3. It is the discovery and establishment of the *facts* and circumstances of what Defendants did or did not do to provide coverage for Comprehensive

Lactation Benefits, and Defendants' undisputed application of cost-sharing to the Plaintiffs' claims, that are at the crux of the Court's Order (page 3) and, ultimately, the Action.

Also, it is fatal that the 1292(b) Motion ignores that the Action asserts claims for ERISA and breach of contract. Defendants' conduct with respect to providing (or failing to provide) insureds with coverage for Comprehensive Lactation Benefits will be adjudicated by applying to the facts the well-established, long-standing ERISA and ERISA fiduciary principles, and contract and common law principles for the non-ERISA plaintiffs. These are not novel, unresolved controlling issues of law.

In sum, Defendants' misstatements about the ACA, the nature of and the claims asserted in Plaintiffs' Action, and the plain language and import of the Court's Order, are unpersuasive in their attempt to contrive a basis for their 1292(b) Motion. Defendants have failed to meet their burden in demonstrating the first necessary element of 1292(b), and therefore, on this basis alone, their 1292(b) Motion must be denied.

B. Defendants Do Not Demonstrate A Substantial Ground for a Difference of Opinion.

Defendants also fail to satisfy 1292(b)'s requirement that they demonstrate the existence of a substantial ground for difference of opinion as to a controlling question of law.

Section 1292(b) requires more than just a party's disagreement with a court's ruling. Yet, the 1292(b) Motion at 9, l.12-11, l.1 rests on such footing. Even "a party's strong disagreement with the Court's ruling is not sufficient for there to be a 'substantial ground for difference'"; the proponent of an appeal must make some greater showing. *Couch v. Telescope Inc.*, 611 F.3d 629, 633 (9th Cir. 2010); *Kowalski v. Anova Food, LLC*, 958 F. Supp. 2d 1147, 1154 (D. Haw. 2013). The mere belief that a district court reached the wrong result – which is the crux of Defendants' argument here –is insufficient because a "substantial ground for a difference of opinion must arise out of a genuine doubt ***as to the correct legal standard***." *Baumgarten v. Cnty. of Suffolk*, No. 07–CV–0539, 2010 WL 4177283, at * 1 (E.D.N.Y. Oct. 15, 2010) (emphasis added).

Similarly, a "belie[f] that the Ninth Circuit may see things differently" – which is Defendants' argument here (1292(b) Motion at 9, l.13-14; 10, l.17-18) – does not equate to a dispute among circuit courts on the controlling question of law, or the identification of any complicated questions that arise

under foreign law warranting interlocutory review. *See, e.g., Couch*, 611 F.3d at 633. Even "[t]he mere presence of a disputed issue that is a question of first impression, without more, is insufficient to satisfy this [1292(b)] prerequisite." *In re Flor*, 79 F.3d at 284); *see First Am. Corp. v. Al-Nahyan*, 948 F.Supp. 1107, 1116 (D.D.C. 1996) ("Mere disagreement, even if vehement, with a court's ruling on a motion to dismiss does not establish a 'substantial ground for difference of opinion' sufficient to satisfy the statutory requirements for an interlocutory appeal.").

And, contrary to Defendants' contention (*see* 1292(b) Motion at 9, l.5-7), a "dearth of precedent" is not a sufficient basis to grant interlocutory review under 1292(b). *See Couch*, 611 F.3d at 633, *citing Union County v. Piper Jaffray & Co.*, 525 F.3d 643, 647 (8th Cir.2008) (per curiam) ("'While identification of a sufficient number of conflicting and contradictory opinions would provide substantial ground for disagreement,' the County offered no such Iowa opinions, statutes or rules, and 'a dearth of cases' does not constitute 'substantial ground for difference of opinion.'" (*quoting White v. Nix*, 43 F.3d 374, 378 (8th Cir. 1994))).

Defendants' argument that the Court "declined to abide by the definition of 'coverage' used in the ACA itself" is not grounded in the record, the Court's Order and the plain text of the ACA. *See* 1292(b) Motion at 9, l.18-23 (citing to 42 U.S.C. § 300gg-91(b)(1), which defines the term "health insurance coverage" as "benefits consisting of medical care"). As an initial matter, that argument and 42 U.S.C. § 300gg-91(b)(1) were not raised by Defendants in connection with their motion to dismiss. Regardless, even if 42 U.S.C. § 300gg-91(b)(1) is now considered by the Court, it does not render the Court's Order to be the proper subject of an interlocutory appeal. Defendants' argument that such definition is, as they see it, purportedly a "narrower definition of 'coverage' the [sic] one embodied in the statutory language, but it is also sensible…" (*see* 1292(b) Motion at 9, l.23-28), makes no sense. It is beyond comprehension how the Court's use of the term "coverage," as outlined and discussed *supra*, could be deemed to be at odds with the coverage definition now provided by Defendants. The Court's Order is wholly consistent with such definition, as the rendering of "health insurance coverage," even if defined as providing "benefits consisting of medical care," would not be

accomplished if, for example, "a patient can't find the [medical care] or isn't told that the [medical care] is available." *See* Court's Order at 3.

Furthermore, Defendants' argument that the terms "financial access" and "meaningful access" are at odds is illogical. *See* 1292(b) Motion at 10, l.7-15. Contrary to Defendants' argument, the ACA provisions at issue do not include the words "financial access" or state that coverage is limited to only what is necessary to "remove financial barriers." *Id*. Moreover, contrary to Defendants' characterization, the term "meaningful access" is entirely consistent with the ACA, as well as Defendants' contrived "financial access" interpretation. Defendants are trying to create the notion out of whole cloth that "financial access" somehow limits the ACA's "coverage" requirement. And, that it limits it in a way to prohibit the concept of "access" or "meaningful access." Aside from there being no basis for such limitation, what Defendants miss is that inherent in an insurer's financial responsibility with respect to preventive care coverage, is the insured's ability to access the insurance coverage for such preventive care. In other words, assuming *arguendo* that Defendants can interject the term "financial access" as the supposed "law", the determination of whether Defendants are giving insureds so-called "financial access" to coverage for Comprehensive Lactation Benefits evokes the same factual determinations considered in the Court's Order (*see* Court's Order at 3). Defendants' "financial access" argument does not, as they contend, demonstrate that the Court's Order was novel, inconsistent with the ACA's plain language or that it added any "requirement to the text of the statute that goes well beyond the financial access Congress expressly provided for…" *See* 1292(b) Motion at 10, l. 16-18.

Finally, Defendants' scant reliance on the *Wellmark* Order does not amount to a demonstration of a substantial ground for difference of opinion. (*See* 1292(b) Motion at 11, l.16-12, l.5). First, that two district judges, presiding in different districts, differ on the application of facts, does not amount to a substantial ground for difference of opinion; this is not even the circumstance where district judges within the same district are split on an issue. "[J]ust because counsel contends that one precedent rather than another is controlling does not mean there is such a substantial difference of opinion as will support an interlocutory appeal." *Couch*, 611 F.3d at 633; *see also Campania Sudamerica de Vapores*

S.A. v. Sinochem Tianjin, 2007 WL 1002265, at *5 (S.D.N.Y. 2007) ("defendant's argument that a substantial ground for difference of opinion exists is belied by the fact that only one district court opinion...supports its position").

Furthermore, the limited discussion by Defendants of the *Wellmark* Order is indicative of the reality that the Court's Order and the *Wellmark* Order are not diametrically opposed on the controlling pure question of law as proffered here by Defendants. In fact, the *Wellmark* Court acknowledged Plaintiffs' contentions that "Wellmark failed 'to establish policies, procedures[,] and infrastructure to provide Comprehensive Lactation Benefits in accordance with the ACA" and that "Wellmark specifically denied coverage and imposed cost-sharing on both Plaintiffs", in holding that "Plaintiffs state a plausible claim that Wellmark violated the ACA by improperly imposing cost sharing on Plaintiffs." *Wellmark* Order at 10. The *Wellmark* Order, from pages 10 through 17, then proceeds to reject the *Wellmark* defendants' various contentions that they had in-network providers of lactation services, and concludes, again, that the *Wellmark* plaintiffs sufficiently stated a claim that *Wellmark* had improperly imposed cost-sharing on the plaintiffs under the ACA. *See Wellmark* Order at 16-17 (upholding plaintiffs' ERISA and contract claim for such misconduct). The *Wellmark* Order (in a discussion, reasoning and holding with which the *Wellmark* plaintiffs disagree) grants the *Wellmark* defendants' motion with respect to the issue it frames as "information and disclosure requirements" under the ACA (*id.* at 17-25), holding that the court was not aware of any "***ACA*** provisions addressing 'misleading and wrong guidance through [a health plan]'s customer care representatives and online provider search…[etc.]". (Wellmark Order at 18-19, emphasis added). Such specific part of the *Wellmark* holding is of no moment to the crux of the Court's Order and what Defendants proffer as the controlling pure question of law at issue here. Defendants' use of the *Wellmark* Order is limited to the unremarkable contention that it "[a]dher[ed] to the settled rules of statutory interpretation" on this issue. (1292(b) Motion at 11, l. 24-25). For the reasons discussed *supra*, the Court's Order is grounded in the plain language of the ACA as applied to the facts alleged, presents no controlling issue of law, and the *Wellmark* Order does not otherwise establish that there exists any substantial

ground for difference of opinion, as between the *Wellmark* Order and the Court's Order, with respect to the controlling question of law as proffered by Defendants.

Accordingly, the 1292(b) Motion fails to demonstrate that there exists a substantial ground for a difference of opinion on Defendants' so-called controlling issue of law and must be denied.

C. Defendants Do Not Demonstrate That The Proposed Interlocutory Appeal Will Materially Advance the Ultimate Termination of the Litigation.

Necessarily, this factor, as to whether the proposed interlocutory appeal will materially advance the ultimate termination of the litigation, is closely related to the question of whether there is a controlling issue of law. *S.E.C. v. Credit Bancorp, Ltd.*, 103 F. Supp. 2d 223, 227 (S.D.N.Y. 2000) (citations omitted). Here, there is no controlling pure issue of law, and therefore, there is also no "reversal," dismissal, or other dispositive action to be accomplished through Defendants' proposed interlocutory appeal. *See Asis Internet Servs. v. Active Response Grp.*, No. C07 6211 TEH, 2008 WL 4279695, at *3 (N.D. Cal. Sept. 16, 2008) (finding a controlling question of law existed where reversal on the issue would end the litigation).

Further, courts typically "apply pragmatic considerations to determine whether certifying non-final orders will materially advance the ultimate termination of the litigation." *Beeman v. Anthem Prescription Mgmt., Inc.*, No. EDCV 04-407-VAP(SGLx), 2007 WL 8433884 (C.D. Cal. Aug. 2, 2007). Indeed, "[w]hen litigation will be conducted in substantially the same manner regardless of [the court's] decision," as the Action here will be, "the appeal cannot be said to materially advance the ultimate termination of the litigation." *XTO Energy, Inc. v. ATD, LLC*, 189 F. Supp. 3d 1174, 1195 (D.N.M. 2016) (citations omitted).

Without explanation or support, Defendants make the conclusory arguments that there would be some unexplained narrowing of the scope of the relief available to Plaintiffs, and that "at least most" discovery, class certification and trial "will have been unnecessary," if their interlocutory appeal is successful. (*See* 1292(b) Motion at 12, l.20-27). Those contentions are patently unfounded. First, the Court's Order was neither an "expansive view of the ACA" (*id.* at 12, l.23-25), nor presented a controlling question of law, as discussed *supra*. Second, because Defendants have not identified a

controlling question of law, one cannot fathom what result they believe that they will achieve in the Ninth Circuit that in any way materially alters or eliminates the Plaintiffs' claims and this case. Defendants' reliance on the *Wellmark* Order (*id.* at 13) actually makes this point well: even if Defendants believe that the *Wellmark* Order represents their narrow, unequivocal interpretation of the ACA (which it in no way does), and even if it was somehow applied here by the Ninth Circuit or on remand, the litigation would not end, and Plaintiffs will have (as in *Wellmark*) "state[d] a plausible claim that [defendants] violated the ACA by improperly imposing cost sharing on Plaintiffs," for which they will be entitled to discovery to prove such claims and oppose Defendants' defenses, and will fully litigate such claims through trial.[6]

Certification for interlocutory appeal should be applied sparingly and only granted in exceptional situations in which allowing an interlocutory appeal would avoid protracted and expensive litigation. Defendants, having failing to demonstrate that the proposed interlocutory appeal will materially advance the ultimate termination of the litigation, have not satisfied the requirements of 1292(b).

III. CONCLUSION.

For all the foregoing reasons, Defendants' Motion to Certify Order for Immediate Appeal Pursuant to 28 U.S.C. § 1292(b) must be denied.

Dated: September 28, 2017

CHIMICLES & TIKELLIS LLP

By: */s/ Kimberly Donaldson Smith*
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[6] Plaintiffs disagree with Defendants' pronouncement as to how the *Wellmark* Order will impact the scope of discovery in the *Wellmark* action (*see* 1292(b) Motion at 13). The parties and their counsel (who also represent the parties here) have yet to hold a Rule 16 conference with the Court, file a proposed scheduling order and discovery plan, or confer with the Court concerning discovery, but the *Wellmark* plaintiffs are confident that given the *Wellmark* Court's sound rejection of the *Wellmark* defendants' motion to dismiss critical elements of that complaint, the scope of discovery will be broad and comprehensive.

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