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United States District Court, S.D. New York.
 Thomas DENNEY, R. Thomas Weeks, Norman R. Kirisits, Kathryn M. Kirisits, TD Cody Investments, L.L.C., RTW Investments, L.L.C., NRK Syracuse Investments, L.L.C., DKW Partners, DKW Lockport Investors, Inc., Donald A. Destefano, Patricia J. Destefano, DD Tiffany Circle Investments L.L.C., Tiffany Circle Partners, Diamond Roofing Company, Inc., Jeff Blumin, JB Hilltop Investments L.L.C., Kyle Blumin, KB Hoag Lane Investments, L.L.C., L. Michael Blumin, MB St. Andrews Investments, L.L.C., Fayetteville Partners, and Laurel Hollow Investors, Inc., on their own behalf and on behalf of all others similarly situated, Plaintiffs,

v.

JENKENS & GILCHRIST, a Texas Professional Corporation, Jenkens & Gilchrist, an Illinois Professional Corporation, BDO Seidman, L.L.P., Pasquale & Bowers, L.L.P., Cantley & Sedacca, L.L.P., Dermody, Burke, and Brown, Certified Public Accountants, PLLC, Paul M. Daugerdas, Paul Shanbrom, Edward Sedacca, Deutsche Bank AG, and Deutsche Bank Securities, Inc., d/b/a Deutsche Bank Alex Brown, A Division of Deutsche Bank Securities, Inc., Defendants.

No. 03 Civ. 5460(SAS).

Dec. 27, 2004.

[David R. Deary](#), [W. Ralph Canada](#), Shore & Deary, L.L.P., Dallas, Texas, [Jeffrey Daichman](#), Nahum Kainovsky, Kane Kessler, P.C., New York, New York, [Joe R. Whatley, Jr.](#), Othni Lathram, Whatley Drake, L.L.C., Birmingham, Alabama, [Ernest Cory](#), Cory Watson Crowder & Degaris, P.C., Birmingham, Alabama, for Plaintiffs.

[Michael R. Young](#), [I. Bennett Capers](#), [Anamika Samanta](#), Wilkie Farr & Gallagher, L.L.P., New York, New York, [Richard Hans](#), [Cary Samowitz](#), Piper Rudnick, L.L.P., New York, New York, for Defendants BDO Seidman, L.L.P. and Paul Shanbrom.

[John Lindquist](#), Trial Attorney, United States Department of Justice, Tax Division, Washington, D.C., [David S. Jones](#), Assistant United States Attorney, Tax and Bankruptcy Unit Chief United States Attorney's Office, Southern District of New York, New

York, New York, for the Government (An Interested Non-Party).

MEMORANDUM OPINION & ORDER

[SCHEINDLIN](#), J.

I. INTRODUCTION

*1 In an Opinion and Order dated November 23, 2004 (the "Nov. 23 Order"), I held that a certain document at issue in this litigation, known as the "Kerekes Memorandum," is not privileged.^{FN1} By letter dated December 7, 2004 (the "BDO Letter"), defendants BDO Seidman, LLP and Paul Shanbrom (collectively, "BDO") request that the Court certify for appeal, pursuant to [section 1292 of Title 28 of the United States Code](#), the issue of whether the Kerekes Memorandum is privileged. For the following reasons, BDO's request is denied.

^{FN1}See [Denney v. Jenkens & Gilchrist](#), 2004 WL 2712200 (S.D.N.Y. Nov. 23, 2004). Familiarity with that opinion is presumed.

II. APPLICABLE LAW

It is a "basic tenet of federal law to delay appellate review until a final judgment has been entered."^{FN2} However, a court, in its discretion, may certify an interlocutory order for appeal if the order "[1] involves a controlling question of law [2] as to which there is substantial ground for difference of opinion and [3] that an immediate appeal from the order may materially advance the ultimate termination of the litigation."^{FN3}

^{FN2}[Koehler v. Bank of Bermuda, Ltd.](#), 101 F.3d 863, 865 (2d Cir.1996)

^{FN3}[28 U.S.C. § 1292\(b\)](#) (emphasis added).

When considering requests for certification, district courts must carefully evaluate whether each of the above conditions are met.^{FN4} The Second Circuit has

urged courts “to exercise great care in making a § 1292(b) certification.”^{FN5} “[O]nly ‘exceptional circumstances [will] justify a departure from the basic policy of postponing appellate review until after the entry of a final judgment.’”^{FN6} Indeed, even where the three legislative criteria of [section 1292\(b\)](#) appear to be met, district courts have “unfettered discretion to deny certification” if other factors counsel against it.^{FN7}

^{FN4}. See, e.g., [Wausau Bus. Ins. Co. v. Turner Constr. Co.](#), 151 F.Supp.2d 488, 491 (S.D.N.Y.2001) (denying motion for certification where defendant could not demonstrate substantial grounds for difference of opinion as to controlling questions of law).

^{FN5}. [Westwood Pharm., Inc. v. Nat'l Fuel Gas Distrib. Corp.](#), 964 F.2d 85, 89 (2d Cir.1992).

^{FN6}. [Klinghoffer v. S.N.C. Achille Lauro](#), 921 F.2d 21, 25 (2d Cir.1990) (quoting [Coopers & Lybrand v. Livesay](#), 437 U.S. 463, 475 (1978)).

^{FN7}. [Nat'l Asbestos Workers Med. Fund v. Philip Morris, Inc.](#), 71 F.Supp.2d 139, 162-63 (E.D.N.Y.1999) (assuming the statutory criteria were met but nonetheless denying certification).

III. DISCUSSION

The first statutory factor is not met here. BDO has not identified any discrete controlling issue of law that they intend to challenge. Rather, BDO calls into question the result of the Nov. 23 Order, not any specific issue of law. The Nov. 23 Order merely applied well-established principles of law to a specific set of facts; BDO is, it appears, challenging the application of settled law to the facts of this case. This is not a proper case for certification.^{FN8}

^{FN8}. See, e.g., [In re Worldcom, Inc. Sec. Litig.](#), No. 02 Civ. 3288, 2003 WL 22533398, at *11 (S.D.N.Y. Nov. 7, 2003) (“This motion is not really about ... any error of law in the [opinion]. If it were, [defendants] would have pointed with more speci-

ficity to language or passages ... that require certification of an interlocutory appeal”); [Fogarazzo v. Lehman Bros., Inc.](#), No. 03 Civ. 5194, 2004 WL 1555136, at *1 (S.D.N.Y. July 9, 2004) (“That [defendant] has not clearly identified any legal issue or issues in the [opinion] that it is challenging is itself strong evidence that the motion should be denied”) (original emphasis).

BDO has failed to meet the second statutory factor—that there is a substantial ground for difference of opinion. It is true that Judge J. Curtis Joyner, in the Eastern District of Pennsylvania, has determined that the Kerekes Memorandum is privileged.^{FN9} However, the mere fact of disagreement outside this Circuit is not sufficient to show a substantial ground for difference of opinion, especially where, as here, the challenged decision merely applied settled principles of law.^{FN10} Moreover, the issue of waiver in this case is an intensely factual one, turning to a large extent on determinations of credibility. Because the factual record before Judge Joyner was less well developed than that before this Court—specifically, Judge Joyner did not have the benefit of the most recent affidavits of the two key witnesses—I do not consider his contrary ruling to be evidence of a substantial ground for disagreement.^{FN11}

^{FN9}. See [Miron v. BDO Seidman, LLP](#), No. 04 Civ. 968, 2004 U.S. Dist. LEXIS 22101 (E.D.Pa. Oct. 20, 2004). In [United States v. BDO Seidman, LLP](#), No. 02 C-4822, 2004 WL 1470034 (N.D. Ill. June 29, 2004), also cited by BDO in their letter, the court did not consider the issue of waiver, which is the only relevant issue here.

^{FN10}. See [In re Methyl Tertiary Butyl Ether Prods. Liab. Litig.](#), 174 F.Supp.2d 4, 8 (S.D.N.Y.2001) (citing [SEC v. Credit Bancorp, Ltd.](#), 103 F.Supp.2d 223, 227 (S.D.N.Y.2000)).

^{FN11}. BDO misconstrues the Nov. 23 Order when it claims that “[t]his Court itself observed that the issue of privilege was a close question.” BDO Letter at 2. I observed that the issue of whether the Kerekes Memorandum was an attorney-client communication was a close question. See Nov. 23 Order at

9. The issue of waiver was *not* a close question; and, because any privilege that might once have attached to the Kerekes Memorandum has been waived, the question of whether it was an attorney-client communication in the first place is moot.

*2 Finally, interlocutory review would not materially advance the ultimate termination of this lawsuit-the last, and most important, of [section 1292\(b\)](#)'s three factors.^{FN12}“An immediate appeal is considered to advance the ultimate termination of the litigation if that ‘appeal promises to advance the time for trial or to shorten the time required for trial.’”^{FN13} The Nov. 23 Order does not settle any dispositive issue in the case.^{FN14} BDO's argument that the Kerekes Memorandum “goes directly to the central issue of whether ... this case should be litigated in federal court, or whether ... arbitration should be compelled” is misplaced.^{FN15} I had already determined that BDO's arbitration agreements were void and inapplicable to the present action before the Kerekes Memorandum was discovered-the Kerekes Memorandum merely bolstered my ruling. Therefore, even if the Second Circuit were to find that the Kerekes Memorandum is privileged, it would not disturb my ruling that BDO is unable to compel arbitration.

^{FN12}See [Koehler v. Bank of Bermuda Ltd.](#), 101 F.3d 863 (2d Cir.1996) (“The use of [§ 1292\(b\)](#) is reserved for those cases where an intermediate appeal may avoid protracted litigation.”); [Lerner v. Millenco, L.P.](#), 23 F.Supp.2d 345, 347 (S.D.N.Y.1998) (“The Court of Appeals has emphasized the importance of the third consideration in determining the propriety of an interlocutory appeal.”).

^{FN13} [In Re Oxford Health Plans, Inc.](#), 182 F.R.D. 51 (S.D.N.Y.1998) (quoting 16 Charles A. Wright & Arthur Miller, [Federal Practice and Procedure](#) [§ 3930](#) p. 432 (2d ed.1996)).

^{FN14}See also [In re 105 East Second Street Associates](#), No. M-47, 1997 WL 311919, at *3 (S.D.N.Y. June 10, 1997) (holding that an appeal was not likely to advance the termination of litigation when it “would not result in the dismissal of any claims or de-

fenses ... [n]or would it resolve any other substantially dispositive issue in [the] proceeding.”).

^{FN15} BDO Letter at 2.

The Kerekes Memorandum may well prove to have a significant impact on this case, but certification is not required whenever a district court makes an important and contested discovery ruling in a protracted litigation. Because none of the three factors of [section 1292\(b\)](#) is met, BDO's request for certification must be denied.^{FN16}

^{FN16} I note that, in this Circuit, interlocutory discovery orders-even those compelling production of allegedly privileged materials-are not appealable under the collateral order doctrine. See [Chase Manhattan Bank, N.A. v. Turner & Newall, PLC](#), 964 F.2d 159, 163 (2d Cir.1992); [Xerox Corp. v. SCM Corp.](#), 534 F.2d 1031, 1032 (2d Cir.1976). The Second Circuit will, however, “exercise mandamus review of discovery orders relating to claims of privilege where: (i) an issue of importance and of first impression is raised; (ii) the privilege will be lost in the particular case if review must await a final judgment; and (iii) immediate resolution will avoid the development of discovery practices or doctrine undermining the privilege.” [Chase Manhattan Bank](#), 964 F.2d at 163. Although it is, of course, not for me to decide, I strongly doubt that the test for mandamus would be met in this instance.

IV. CONCLUSION

For the foregoing reasons, defendants' request for certification to pursue an interlocutory appeal is DENIED.

SO ORDERED.

S.D.N.Y., 2004.
Denney v. Jenkins & Gilchrist
Not Reported in F.Supp.2d, 2004 WL 2997930 (S.D.N.Y.)

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Not Reported in F.Supp.2d
Not Reported in F.Supp.2d, 2004 WL 2997930 (S.D.N.Y.)
(Cite as: 2004 WL 2997930 (S.D.N.Y.))

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