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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 CITY OF SAN DIEGO, a
12 municipal corporation,

13 Plaintiff,

14 v.

15 MONSANTO COMPANY;
16 SOLUTIA, INC.; and
17 PHARMACIA CORPORATION,

18 Defendants.

Case No.: 15cv578-WQH-AGS

ORDER

18 HAYES, Judge:

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20 The matter before the Court is the Motion for Reconsideration or, in the alternative,
21 Certification for Interlocutory Appeal Pursuant to 28 U.S.C. § 1292(b) filed by Defendants
22 Monsanto Company, Solutia Inc., and Pharmacia Corporation. (ECF No. 175).

23 **I. BACKGROUND**

24 On March 13, 2015, Plaintiffs San Diego Unified Port District (the “Port District”)
25 and City of San Diego (the “City”) commenced this action by filing the Complaint. (ECF
26 No. 1). On August 3, 2015, the City and the Port District filed separate First Amended
27 Complaints (“FACs”) against Defendants Monsanto Company, Solutia Inc., and Pharmacia
28 Corporation (collectively, “Monsanto”). (ECF Nos. 24, 25). On August 31, 2015,

1 Monsanto filed a Motion to Dismiss the City’s FAC (ECF No. 31) and a Motion to Dismiss
2 the Port District’s FAC (ECF No. 32). On September 28, 2016, the Court issued an Order
3 granting in part and denying in part Monsanto’s Motion to Dismiss the Port District’s FAC
4 and granting Monsanto’s Motion to Dismiss the City’s FAC in its entirety. (ECF No. 81).

5 On December 22, 2016, the City filed the Second Amended Complaint (“SAC”)
6 alleging a single cause of action against Monsanto for public nuisance.¹ (ECF No. 93).

7 On March 24, 2017, Monsanto filed a Motion to Dismiss the SAC. (ECF No. 108).
8 Monsanto argued, in part, that the SAC must be dismissed for lack of jurisdiction because
9 the City must first exhaust administrative remedies before the Commission on State
10 Mandates (“the Commission”).² Monsanto argued that the City was required to exhaust
11 administrative remedies because the tort damages the City seeks in this case are permit
12 compliance costs that qualify as unfunded state mandates under *Department of Finance v.*
13 *Commission on State Mandates*, 378 P.3d 356 (Cal. 2016). Monsanto asserted that the City
14 is currently seeking reimbursement for these permit compliance costs through test claims
15 before the Commission. Further Monsanto argued that the Court should exercise its
16 discretion to dismiss or stay this matter pending resolution of the test claims on prudential
17 exhaustion grounds. On April 7, 2017, the City filed a response in opposition and argued
18 that administrative exhaustion is inapplicable to this case because the Commission was not
19 authorized to address the City’s public nuisance claim for tort damages or to award tort
20 damages for the costs of PCB removal. Further, the City argued that the Court should not
21 exercise its discretion to require exhaustion because any decision by the Commission
22 would have no impact on this action. (ECF No. 109).

26 ¹ The Port District is currently proceeding on its own causes of action against Monsanto.

27 ² Monsanto also contended that the SAC should be dismissed for lack of standing, for failure to state a
28 claim, and as barred by the statute of limitations. The Court denied the motion to dismiss on these grounds
as well. In the instant motion, Monsanto only seeks reconsideration of the Court’s ruling as to prudential
exhaustion.

1 On November 11, 2017, the Court denied the Motion to Dismiss. (ECF No. 163).
2 With respect to the parties' arguments on exhaustion, the Court stated,

3 [I]n this case, the City brings a cause of action in tort for public nuisance
4 against a private entity pursuant to applicable sections of the California Civil
5 Code and the California Code of Civil Procedure. California law does not
6 establish an administrative procedure for a public nuisance claim. *See*
7 *Abelleira*, 109 P.2d at 949 (“[W]here an administrative remedy is provided by
8 statute, relief must be sought from the administrative body and this remedy
9 exhausted before the courts will act.”). While some portion of the damages
10 the City seeks from Monsanto in this public nuisance claim may overlap in
11 part with unfunded state mandate costs at issue in pending test claims before
12 the Commission, the jurisdictional requirement of administrative exhaustion
13 is limited to “where an administrative remedy is required by statute.” *Id.* The
14 Court concludes that the City is not precluded from bringing its public
15 nuisance claim by any statutory administrative exhaustion requirement. The
16 Court further concludes that prudential exhaustion is not warranted at this
17 stage in proceedings. The Court declines to exercise any discretion to stay or
18 dismiss the City’s suit pending resolution of the test claims. *See Morrison-*
19 *Knudsen Co.*, 811 F.2d at 1223.

20 (ECF No. 163 at 20).

21 On December 20, 2017, Monsanto filed a Motion for Reconsideration or, in the
22 alternative, Certification for Interlocutory Appeal Pursuant to 28 U.S.C. § 1292(b). (ECF
23 No. 175). Monsanto requests that the Court reconsider its earlier denial of a stay of this
24 litigation on prudential exhaustion grounds and, in the alternative, requests that “the Court
25 certify that portion of its November 22nd Order declining to dismiss or stay this case
26 pending exhaustion of administrative remedies for appeal to the Ninth Circuit pursuant to
27 28 U.S.C. Section 1292(b).” (ECF No. 175-1 at 7). On January 16, 2018, the City filed a
28 response in opposition. (ECF No. 187). On January 22, 2018, Monsanto filed a reply.
(ECF No. 188).

25 II. RECONSIDERATION

26 A. Contentions

27 Monsanto requests that the Court reconsider the earlier denial of a stay of this
28 litigation on prudential exhaustion grounds. Monsanto contends that reconsideration is

1 warranted because the Court committed clear error by failing to stay or dismiss the case on
2 prudential exhaustion grounds. Monsanto asserts that the California Court of Appeal
3 decision in *Department of Finance v. Commission on State Mandates*, 226 Cal. Rptr. 3d
4 846 (Ct. App. 2017)³ “constitutes new or different circumstances under which the failure
5 to dismiss or stay this case would be clear error.” (ECF No. 175-1 at 12). Monsanto
6 contends that this decision “entitles the City to reimbursement from the State for the very
7 same storm water permit compliance costs” that the City seeks from Monsanto as damages
8 in this public nuisance action. *Id.* at 7. Monsanto contends that prudential exhaustion will
9 reduce the scope of discovery and motion practice and result in a “more streamlined trial”
10 because “the Commission’s final determination regarding the amount of the unfunded State
11 mandate that must be reimbursed by the State to the City will moot or substantially narrow
12 the scope of the City’s action and its damages.” *Id.* at 17. Monsanto contends that the
13 collateral source rule is inapplicable to this action and that the law prohibits double
14 recovery by the City of both permit compliance costs reimbursed by the state and damages
15 for tort liability. (ECF No. 188).

16 The City contends that reconsideration is not warranted and that the recent state
17 appellate decision in *Department of Finance v. Commission on State Mandates* does not
18 modify the legal principles underlying the Court’s prior determination that administrative
19 exhaustion is not required. The City contends that the state appellate court decision “does
20 not change the fact that the agency cannot, as a matter of law, award the City damages for
21 its tort claims.” (ECF No. 187 at 5). The City asserts that the “only overlap” between
22 damages sought from Monsanto in this case and unfunded state mandate costs at issue in
23 the state appellate court decision is “in the cost of street-sweeping.” *Id.* at 10. The City
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26 ³ The Court grants Monsanto’s request for judicial notice (ECF No. 175-4) of *Department of Finance v.*
27 *Commission on State Mandates*, Case No. C070357 (Cal. Ct. App. Dec 19, 2017) pursuant to Federal Rule
28 of Evidence 201. *See United States ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d
244, 248 (9th Cir. 1992) (“[W]e ‘may take notice of proceedings in other courts, both within and without
the federal judicial system, if those proceedings have a direct relation to matters at issue.’”).

1 contends that “the reimbursement of the costs of street sweeping does not substantially
2 impact the City’s claimed damages.” *Id.* Further, the City contends that California has
3 “long adhered to the collateral source rule” and that, under the collateral source rule, “the
4 City’s recovery of . . . costs from the State does not preclude the City from seeking those
5 same costs from Monsanto[.]” *Id.* at 10–11. The City contends that “Monsanto should not
6 be given the benefit of payments of public funds to avoid tort liability.” *Id.* at 11.

7 **B. Legal Standard**

8 Reconsideration is an “extraordinary remedy, to be used sparingly in the interests of
9 finality and conservation of judicial resources.” *Kona Enters., Inc. v. Estate of Bishop*, 229
10 F.3d 887, 890 (9th Cir. 2000). “[A] motion for reconsideration should not be granted,
11 absent highly unusual circumstances, unless the district court is presented with newly
12 discovered evidence, committed clear error, or if there is an intervening change in the
13 controlling law.” *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d
14 873, 880 (9th Cir. 2009) (quoting *389 Orange St. Partners v. Arnold*, 179 F.3d 656, 665
15 (9th Cir. 1999) (internal quotation marks omitted)). “A motion for reconsideration ‘may
16 *not* be used to raise arguments or present evidence for the first time when they could
17 reasonably have been raised earlier in the litigation.’” *Id.* at 880 (quoting *Kona*, 229 F.3d
18 at 890). “Whether or not to grant reconsideration is committed to the sound discretion of
19 the court.” *Navajo Nation v. Confederated Tribes & Bands of the Yakama Indian Nation*,
20 331 F.3d 1041, 1046 (9th Cir. 2003).

21 **C. Discussion**

22 The Ninth Circuit Court of Appeals has held that “[a]dministrative exhaustion can
23 be either statutorily required or judicially imposed as a matter of prudence.” *Puga v.*
24 *Chertoff*, 488 F.3d 812, 815 (9th Cir. 2007).⁴ “Where there is no explicit statutory
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28 ⁴ In its previous Order the Court also concluded that “the City was not precluded from bringing its public nuisance claim by any statutory administrative exhaustion requirement.” (ECF No. 163 at 20). Although Monsanto “respectfully disagrees” with this ruling, Monsanto does not “ask this Court to reconsider its ruling on statutory exhaustion.” (ECF No. 175-1 at 13 n.1; ECF No. 188 at 6).

1 requirement of exhaustion of administrative remedies, the application of exhaustion rules
2 is a matter committed to the discretion of the district court.” *Morrison-Knudsen Co., Inc.*
3 *v. CHG Int’l, Inc.*, 811 F.2d 1209, 1223 (9th Cir. 1987) (citing *Wong v. Dep’t of State*, 789
4 F.2d 1380, 1385 (9th Cir. 1986)).

5 Courts may require prudential exhaustion if “(1) agency expertise makes
6 agency consideration necessary to generate a proper record and reach a proper
7 decision; (2) relaxation of the requirement would encourage the deliberate by
8 pass of the administrative scheme; and (3) administrative review is likely to
9 allow the agency to correct its own mistakes and to preclude the need for
10 judicial review.”

11 *Puga*, 488 F.3d at 815 (quoting *Noriega-Lopez v. Ashcroft*, 335 F.3d 874, 881 (9th Cir.
12 2003)); *see also Morrison-Knudsen*, 811 F.2d at 1223 (“In exercising its discretion to
13 decline jurisdiction, or to stay proceedings, the district court must balance the agency’s
14 interest in applying its expertise, correcting its own errors, making a proper record, and
15 maintaining an efficient, independent administrative system, against the interests of private
16 parties in finding adequate redress.”).

17 In this case, the Court previously concluded that “prudential exhaustion is not
18 warranted at this stage in proceedings” and “decline[d] to exercise any discretion to stay or
19 dismiss the City’s suit pending resolution of the test claims” before the Commission. (ECF
20 No. 163 at 20). At the time the Court made its ruling, several test claims challenging
21 provisions of various NPDES permits issued to the City by the San Diego Regional Quality
22 Control Board were currently pending before the Commission and a petition for writ of
23 mandate to overturn the Commission’s decision that permit requirements in the 2007
24 NPDES permit constitute an unfunded state mandate was pending before the state court of
25 appeal. (ECF No. 163 at 19).

26 On December 19, 2017, after this Court issued its ruling denying the request for
27 prudential exhaustion, the Court of Appeal of the State of California in the Third Appellate
28 District issued a decision in *Department of Finance v. Commission on State Mandates*, 226
Cal. Rptr. 3d 846 (Ct. App. 2017). The case was before the state appellate court for a

1 determination as to whether the Commission correctly determined that conditions imposed
2 on the 2007 water permit issued to the County of San Diego and cities located in the county
3 by the Regional Water Quality Control Board are state mandates. The state appellate court
4 determined that

5 there is no federal law, regulation, or administrative case authority that
6 expressly mandated the San Diego Regional Board to impose any of the
7 challenged requirements discussed above. As a result, their imposition are
8 state mandates, and section 6 requires the State to provide subvention to
reimburse the permittees for the costs of complying with the requirements.

9 *Id.* at 867. The following permit requirements were determined to be mandates for which
10 the permittees are entitled to reimbursement from the State: (1) street sweeping and
11 cleaning storm water conveyances; (2) hydromodification plan; (3) low impact
12 development practices in the SUSMP; (4) jurisdictional and regional education programs;
13 (5) regional and watershed urban runoff management programs; (6) program effectiveness
14 assessments; and, (7) permittee collaboration. *Id.* at 863–67. The state appellate court
15 remanded to the trial court for further proceedings consistent with the opinion. *Id.* at 867.

16 Monsanto contends that the Court’s decision to deny the stay was clear error and
17 that the subsequent state appellate court decision constitutes “new or different
18 circumstances” which compel the Court to stay or dismiss this case on prudential
19 exhaustion grounds. (ECF No. 175-1 at 12). The Ninth Circuit Court of Appeals has
20 stated,

21 As a general rule, however, we have applied prudential exhaustion
22 requirements in actions against agencies and agency officials, and not
23 typically in actions between two private parties That the doctrine of
24 prudential exhaustion was crafted principally to channel actions against
25 agencies and agency officials is reflected in the policy concerns we have
considered in applying it.

26 *Western Radio Services Co. v. Qwest Corp.*, 530 F.3d 1186, 1199 (9th Cir. 2008). Under
27 the facts of this case where an agency action is not challenged, the prudential exhaustion
28 factors typically considered by courts do not weigh in favor of requiring prudential

1 exhaustion. *See Puga*, 488 F.3d at 815. The Commission does not have any “agency
2 expertise” in the context of a public nuisance action against a private party which would
3 make “agency consideration necessary to generate a proper record and reach a proper
4 decision.” *Id.* The City’s action against Monsanto does not challenge an agency action
5 and there is no need to stay this case to allow the Commission to correct any errors. *See*
6 *Western Radio Servs.*, 530 F.3d at 1199. Allowing this public nuisance case against a
7 private party to proceed will not lead to the deliberate bypass of the administrative scheme
8 before the Commission, which allows local governments to claim costs as unfunded state
9 mandates. *See Dep’t of Finance v. Comm’n on State Mandates*, 378 P.3d 356, 360 (Cal.
10 2016) (stating that under the California State Constitution “if the legislature or a state
11 agency requires a local government to provide a new program or higher level of service,
12 the local government is entitled to reimbursement from the state for associated costs.”).
13 Finally, Monsanto does not contend that proceedings before the Commission and state
14 courts regarding test claims will impact any issue other than damages in this litigation. The
15 Court concludes that requiring the City to resolve all test claims before the Commission
16 prior to litigating this case would not significantly promote the efficient use of judicial
17 resources. The Court’s determination that prudential exhaustion was not warranted at this
18 stage in the proceedings does not constitute clear error and does not merit reconsideration.
19 *See Morrison-Knudsen Co.*, 811 F.2d at 1223 (stating that the “application of exhaustion
20 rules is a matter committed to the discretion of the district court.”).

21 The state appellate court decision in *Department of Finance v. Commission on State*
22 *Mandates* does not constitute changed circumstances sufficient to warrant reconsideration
23 of the Court’s prior decision on prudential exhaustion. As the Court previously stated,
24 there may ultimately be some overlap between the permit compliance costs sought from
25 the state as unfunded state mandates in test claims before the Commission and the tort
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1 damages sought from Monsanto in this public nuisance action.⁵ The state appellate court
2 affirmed the Commission’s determination that the permittees are entitled to reimbursement
3 for some costs associated with a number of permit requirements in the 2007 NPDES permit
4 because they constituted state mandates. However, policy considerations and the
5 prudential exhaustion factors do not weigh in favor of staying or dismissing this public
6 nuisance case while test claims are litigated in the state courts and before the Commission.
7 The state appellate court decision in *Department of Finance v. Commission on State*
8 *Mandates* does not constitute changed circumstances justifying reconsideration or any stay
9 or dismissal of this public nuisance action. Monsanto has failed to establish that any
10 reconsideration of the Court’s prior order is warranted. *See Navajo Nation*, 331 F.3d at
11 1046 (“Whether or not to grant reconsideration is committed to the sound discretion of the
12 court.”).

13 **III. INTERLOCUTORY APPEAL**

14 In the alternative, Monsanto moves the Court for an order certifying its November
15 22, 2017 Order for interlocutory appeal. (ECF No. 175-1). Monsanto contends that
16 “whether a municipality is required to exhaust its administrative remedies for state-
17 imposed permit compliance costs with the Commission before concurrently litigating for
18 the same or overlapping costs” is a controlling question of law presented in the November
19 22 Order. (ECF No. 175-1 at 21). Monsanto contends that discretionary decisions of
20 district courts, including discretionary decisions not to require prudential exhaustion,
21 “routinely serve as a proper bas[is] for certification of an interlocutory appeal in the Ninth
22 Circuit.” *Id.* at 23. Monsanto contends that certification is appropriate because there is a
23 difference of opinion among district courts on whether exhaustion is necessary on this issue
24 and because “this Court’s order is . . . at odds with decades of California law requiring
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27 ⁵ The Court does not reach City’s collateral source argument in its ruling. Further, the Court has not made
28 any ruling as to whether the tort damages sought from Monsanto in this case would be reduced by any
costs recovered by the City as unfunded state mandates from the State of California, assuming any overlap
exists.

1 exhaustion of administrative remedies in similar circumstances.” *Id.* at 25. Monsanto
2 contends that interlocutory appeal will reduce the scope and materially advance the
3 litigation.

4 The City contends that interlocutory appeal is not warranted in this case on this issue.
5 The City contends that Monsanto’s asserted “controlling question of law” requires factual
6 determinations about “what remedy is sought, and whether any administrative proceeding
7 can provide that remedy.” (ECF No. 187 at 14). The City contends that no substantial
8 ground for difference of opinion exists and that this appeal will not reduce the scope of
9 litigation.

10 A district court may certify an otherwise non-appealable order for review by an
11 appellate court when three conditions are met: (1) the order involves a “controlling question
12 of law”; (2) there is “substantial ground for difference of opinion”; and (3) “an immediate
13 appeal from the order may materially advance the ultimate termination of the litigation.”
14 28 U.S.C. § 1292(b). All three criteria must be met in order for a district court to certify
15 an issue for interlocutory appeal. *Couch v. Telescope Inc.*, 611 F.3d 629, 633 (9th Cir.
16 2010). “Section 1292(b) is a departure from the normal rule that only final judgments are
17 appealable, and therefore must be construed narrowly.” *James v. Price Stern Sloan, Inc.*,
18 283 F.3d 1064, 1067 n.6 (9th Cir. 2002); *United States v. Woodbury*, 263 F.2d 784, 788
19 n.11 (9th Cir. 1959) (“§ 1292(b) is to be applied sparingly and only in exceptional cases”).

20 A question is “controlling” for purposes of § 1292(b) where “resolution of the issue
21 on appeal could materially affect the outcome of litigation in the district court.” *In re*
22 *Cement Antitrust Litig.*, 673 F.2d 1020, 1026 (9th Cir. 1982). “To determine if a
23 ‘substantial ground for difference of opinion’ exists under § 1292(b), courts must examine
24 to what extent the controlling law is unclear.” *Couch*, 611 F.3d at 633. “Courts
25 traditionally will find that a substantial ground for difference of opinion exists where the
26 circuits are in dispute on the question and the court of appeals of the circuit has not spoken
27 on the point, if complicated questions arise under foreign law, or if novel and difficult
28 questions of first impression are presented.” *Id.* (internal citations and quotation marks

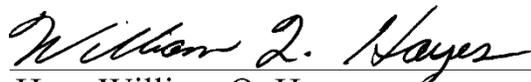
1 omitted). “That settled law might be applied differently does not establish a substantial
2 ground for difference of opinion.” *Id.* at 633.

3 In this case, Monsanto fails to identify a controlling question of law in the Court’s
4 November 22 Order. “[W]hether a municipality is required to exhaust its administrative
5 remedies for state-imposed permit compliance costs with the Commission before
6 concurrently litigating for the same or overlapping costs” is not a pure question of law in
7 this case. The resolution is predicated on a factual determination that there are the “same
8 or overlapping costs” in the various proceedings. (ECF No. 175-1 at 21). Courts in the
9 Ninth Circuit have determined that mixed questions of fact and law are not appropriate for
10 interlocutory appeal under § 1292(b). *See, e.g., City of San Jose v. Monsanto Co.*, No.
11 5:15-CV-03178-EJD, 2017 WL 6039670, at *1 (N.D. Cal. Dec. 6, 2017); *Halloum v.*
12 *McCormick Barstow LLP*, No. C-15-2181 EMC, 2015 WL 4512599, at *2 (N.D. Cal. July
13 24, 2015); *Karoun Dairies, Inc. v. Karlacti, Inc.*, No. 08CV1521 AJB (WVG), 2014 WL
14 11906588, at *4 (S.D. Cal. Sept. 3, 2014). Rather than presenting a controlling question
15 of law appropriate for interlocutory appeal, Monsanto challenges the Court’s application
16 of existing law on administrative exhaustion and prudential exhaustion to the factual
17 circumstances of this case. Because Monsanto fails to identify a controlling question of
18 law sufficient to warrant certification for interlocutory appeal pursuant to 28 U.S.C. §
19 1292(b), the motion for certification for interlocutory appeal is denied. *See In re Cement*,
20 673 F.2d at 1026 (holding that interlocutory appeal is only justified under “exceptional
21 circumstances.”).

22 IV. CONCLUSION

23 IT IS HEREBY ORDERED that the motion for reconsideration or, in the alternative,
24 certification for interlocutory appeal pursuant to 28 U.S.C. § 1292(b) is DENIED. (ECF
25 No. 175).

26 Dated: April 17, 2018

27 
28 Hon. William Q. Hayes
United States District Court