

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

R. O., a Minor, by his parent and guardian
JONATHAN OCHSHORN; T. S., a Minor,
by his parent and guardian MARK E.
SORRELLS; ANDREW M.H. ALEXANDER;
HARRY T. STINSON; L. F., a Minor, by her
parent and guardian ELIZABETH A.
FATTARUSO; A. H., a Minor, by his parent
and guardian TERESA HALPERT
DESCHANES; BRYAN ELLERBROCK; and
P. P., a Minor, by his parent and guardian
RAMESH RAJ POKHAREL,

Plaintiffs,

vs.

PLAINTIFFS' RULE 54(b)
MEMORANDUM OF LAW

ITHACA CITY SCHOOL DISTRICT; JUDITH
C. PASTEL, Superintendent, in her official and
individual capacities; WILLIAM RUSSELL,
Assistant Superintendent, in his official and
individual capacities; and JOSEPH WILSON,
Ithaca High School Principal, in his official and
individual capacities,

Defendants.

CIV. NO. 5:05-CV-695
(NAM/GDB)

This Memorandum of Law is submitted in support of plaintiffs' application for a certification pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, determining and certifying that this Court's Order dated March 23, 2009, insofar as that Order granted partial summary judgment to defendants on three of plaintiffs' causes of action, is ripe for immediate appellate review and that there is no just reason to delay that review.

PRELIMINARY STATEMENT

Plaintiffs have asserted several claims arising out of defendants' imposition of guidelines on *The Tattler*, the student-run newspaper of Ithaca High School. In its

Decision and Order dated March 23, 2009, this Court dismissed plaintiffs' first, second and third causes of action which challenged defendants' authority to subject *The Tattler* to content-based restrictions. Plaintiffs have taken an appeal to the Second Circuit Court of Appeals from that portion of the Court's Order

ARGUMENT

No appeal may be taken from any district court ruling on a claim unless it is a final ruling that resolves the claim. 28 U.S.C. § 1291. A claim is final when there is nothing more to do on that claim except await the resolution of the remaining portions of the litigation. See *Information Resources, Inc. v. Dun and Bradstreet Corp.*, 294 F.3d 447, 451-452 (2d Cir.2002). Although an order denying summary judgment is inherently interlocutory and therefore not appealable, that portion of an order granting partial summary judgment on one or more of a party's claims may be rendered available for immediate appellate review pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.

Under Rule 54(b), an order granting summary judgment completely disposing of one or more claims, thus rendering a decision on those claims final for the purposes of 28 U.S.C. § 1291, may be appealed if the district court expressly determines that there is no just reason to delay appellate review of those claims. See *O'Bert ex rel. Estate of O'Bert v. Vargo*, 331 F.3d 29, 40-41 (2d Cir. 2003). In effect, the district court severs what then becomes a final judgment on those claims from the remainder of the litigation.

The decision whether to enter a judgment under Rule 54(b) is for the sound discretion of the district court. The district court must balance the needs of the parties for an immediate appeal against the weight of the general rule against piecemeal appeals and the interests of efficient management of the litigation. See *Curtiss-Wright Corp. v. General Elec. Co.*, 446 U.S. 1 (1980). The Court of Appeals

will review *sua sponte* the decision to render an order eligible for immediate review, if the district court grants such a final judgment. Determinations whether the claims at issue are properly separable, and final for purposes of 28 U.S.C. § 1291, are essentially issues of law and thus reviewed *de novo*; a determination whether there exists no just reason to delay appellate review is within the discretion of the district court and is reviewable only for abuse of that discretion. The district court's determination on this question is to be treated with "substantial deference." See *Hudson River Sloop Clearwater, Inc. v. Dept. of the Navy*, 891 F.2d 414, 417-418 (2d Cir 1989); *Curtiss-Wright Corp.*, 446 U.S. at 10; *Ginett v. Computer Task Group, Inc.*, 962 F.2d 1085, 1092 (2d Cir. 1992); *Transport Workers Union of America, Local 100, AFL-CIO v. New York City Transit Authority*, 505 F.3d 226, 230 (2d Cir. 2007). Moreover, if the question of whether a final judgment ought to have been entered is a close one, the Second Circuit has stated that it will honor the district court's determination if it "will make possible a more expeditious and just result for all parties." *Gumer v. Shearson, Hammill & Co.*, 516 F.2d 283, 286 (2d Cir. 1974).

The Second Circuit has laid out the three steps involved in making the certification decision: (1) the action must have multiple claims or parties, (2) at least one claim must have been finally decided within the meaning of 28 U.S.C. § 1291, and (3) there must be no just reason for delay. See *Ginett*, 962 F.2d at 1091.

POINT I

THE ALLEGATIONS OF PLAINTIFFS' COMPLAINT PRESENT MULTIPLE CLAIMS FOR RELIEF.

The question whether the factual allegations made by a party present multiple claims for relief has often been a difficult one to resolve. See *generally* 10 Moore's

Federal Practice, § 54.22 (Matthew Bender 3d ed.) Even a single transaction or occurrence can present multiple claims; conversely the allegation of multiple causes of action does not necessarily amount to the allegation of multiple claims. See *Cold Metal Process Co. v. United Engineering & Foundry Co.*, 351 U.S. 445, 451-453 (1956).

The focus of claim multiplicity analysis has been on the factual relatedness of the different theories of recovery. The Second Circuit has defined "claim" for the purposes of Rule 54(b) as "the aggregate of operative facts which give rise to a right enforceable in the courts." *Gottesman v. General Motors Corp.*, 401 F.2d 510, 512 (2d Cir. 1968). Applying that standard, this Court has, for example, ruled that a claim for breach of fiduciary duty is sufficiently separable from claims for breach of contract and securities fraud, arising from the same transaction, to constitute a separate and distinct claim; the Court noted that "the aggregate of facts required to prove the fiduciary breach cause are different than those required to prove breach of contract, for example." *Capital District Physician's Health Plan v. O'Higgins*, 951 F. Supp. 352, 365 (N.D.N.Y. 1997), vacated on other grounds pursuant to settlement, 1998 WL 34083619 (N.D.N.Y. 1998).

The Second Circuit has also stated that claims are normally viewed as "more than one claim" for purposes of Rule 54(b) "if they involve at least some different questions of fact and law and could be separately enforced (citations omitted) or if 'different sorts of relief' are sought (citations omitted)." *Advanced Magnetics, Inc. v. Bayfront Partners, Inc.*, 106 F.3d 11, 21 (2d Cir. 1997), also noting that "claims are separable when there is more than one possible recovery and the recoveries are not mutually exclusive." In *Advanced Magnetics*, for example, the plaintiff's two

causes of action involved no different factual questions; any trial of the first claims would not present evidence of any fact that would not be presented at the trial that was to be held on the second claims; and any appellate decision on the first claims would be mooted if the plaintiff were to recover on the surviving claims. Under the circumstances, the Second Circuit concluded that the more-than-one-claim standard of Rule 54(b) had not been met.

Here, however, the dismissed causes of action involve quite different factual considerations from the remaining two. Initially, the dismissal of plaintiffs' first three causes of action amounts to a determination that there are no unresolved issues of material fact, which would entitle defendants to summary judgment as a matter of law. Upon appellate review, the Second Circuit would of necessity first determine whether there exist such unresolved issues of fact, but it would not be required to decide those issues. Should the Circuit determine that there exist no such unresolved issue of fact, it would then be required to determine, given the facts, whether the grant of summary judgment as a matter of law was appropriate. Under either scenario, it would be both desirable and appropriate to determine whether these causes of action remain in the case before proceeding to trial. Should the Circuit affirm the district court's dismissals, only the fourth and fifth causes of action would remain to be tried.

Although the first, second, third and fourth causes of action all arise under the First Amendment, the first, second, and third causes of action -- those dismissed by the district court -- concern whether the defendants had authority under the Constitution to censor the contents and distribution of *The Tattler*. A trial of these causes of action would involve evidence of the nature of the forum in which the

challenged speech occurred, whether the challenged speech constituted tolerated, private expression or promoted, school-sponsored expression, whether the disputed cartoon was obscene or plainly offensive, and whether defendants' conduct amounted to prior restraint; in other words, these causes of action focused on whether defendants possessed the requisite authority to regulate the student speech contained in *The Tattler* and impose guidelines in order to do so. These three causes of action sought relief in the form of monetary damages.

In contrast, the fourth and fifth causes of action sought a declaratory judgment that the guidelines imposed by defendants were unconstitutionally overbroad, vague and ambiguous, and an injunction against implementation of the guidelines. These causes of action focused on the constitutionality of the guidelines actually imposed, assuming that defendants possessed the requisite authority to impose any guidelines, and sought equitable relief. The court's dismissal of the first three causes of action constituted a ruling that defendants did have the right to impose the guidelines; all that remained to determine was whether those guidelines met constitutional standards for vagueness, overbreadth, and ambiguity.

In addition, defendants have raised a defense of qualified immunity. Because qualified immunity shields defendants only from claims for monetary damages, the district court declared that defendants' claims of qualified immunity were moot, as all of plaintiffs' claims seeking monetary relief had been dismissed. If the two remaining claims are tried, and a subsequent appeal from the final judgment after trial with respect to the first three causes of action is successful with respect to any one of them, the subsequent re-trial would not only require the presentation of voluminous evidence material to the first three causes of action,

and not relevant to the remaining two causes of action, the issue of qualified immunity, absent from the initial trial, would also have to be addressed at any re-trial.

As the Second Circuit has stated, "there is a continuum between 'interrelated' and 'inextricably intertwined,' as there always some underlying interrelatedness among the claims of parties in a multi-claim or multi-party civil action. But the mere fact of interrelatedness "cannot, in itself, 'inextricably intertwine' the claims so as to preclude appellate review. *Ginett*, 962 F.2d at 1095-1096. The related causes of action in this case do not rise to the level of relatedness that would preclude certification, as the more-than-one-claim standard for a Rule 54(b) determination is met under the circumstances of this case.

POINT II

THE DISMISSED CLAIMS ARE FINAL WITHIN THE MEANING OF 28 U.S.C. § 1291.

A final decision is one that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467 (1978) (quoted case omitted). The grant of partial summary judgment dismissing plaintiffs' first, second, and third causes of action as a matter of law is such a final decision on each of these individual claims. Accordingly, if certified for immediate appeal by this Court, the certified claims will be deemed final within the meaning of 28 U.S.C. § 1291.

POINT III

**THERE IS NO JUST REASON TO DELAY APPELLATE REVIEW
OF THE DISMISSED CLAIMS.**

The third requirement for Rule 54(b) certification is that there is "no just reason for delay" of appellate review of the claims at issue. Whether there is no just reason for delay "is left to the sound judicial discretion of the district court' and 'is to be exercised in the interest of sound judicial administration.'" *Ginett v. Computer Task Group, Inc.*, 962 F.2d 1085, 1092 (2d Cir. 1992) (citations omitted). Certification should be granted only where there are "interests of sound judicial administration" and efficiency to be served, *Curtiss-Wright Corp. v. General Electric Co.*, 446 U.S. 1, 8 (1980) (quoting *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 437 (1956), or in the "infrequent harsh case," *Ansam Associates, Inc. v. Cola Petroleum, Ltd.* 760 F.2d 442, 445 (2d Cir. 1985), where there is a danger of hardship or injustice if there is a delay, and the hardship or injustice could be alleviated by immediate appellate review. *See also Harriscom v. Svenska AB v. Harris Corp.*, 947 F.2d 627, 629 (2d Cir. 1991). In other words, certification does not require a finding that hardship or injustice would ensue if it were not granted; certification can be granted in the interests of sound judicial administration and efficiency, provided the other requirements of the Rule have been met. As the Second Circuit has noted, the Supreme Court has recognized that, given the realities of modern civil litigation, the courts cannot "hide behind the old 'infrequent harsh case' chestnut," and that the "proper guiding star" in determining Rule 54(b) certification is the interest of sound judicial administration at both the district court and the appellate level. *Ginett*, 962 F.2d at 1095.

Although the Second Circuit has cautioned against the overuse of Rule 54(b) certification, it has sanctioned the use of Rule 54(b) certification "where there are interests[s] of sound judicial administration and efficiency to be served." *Hogan v. Consol. Rail Corp.*, 961 F.2d 1021, 1025 (2d Cir. 1992). The Second Circuit has adopted a strict adherence to the Rule's requirements because of the historic federal policy against piecemeal appeals, as this "policy promotes judicial efficiency, expedites the ultimate termination of an action and relieves appellate courts of the need to repeatedly familiarize themselves with the facts of a case." *Oklahoma Turnpike Authority v. Bruner*, 259 F.3d 1236, 1241 (10th Cir. 2001). A Rule 54(b) certification in this case, however, would in fact further rather than impede the goals of this historic policy.

In *Hogan*, the district court had granted Rule 54(b) certification to obtain pretrial appellate review of that court's determination that there was insufficient evidence to keep one of the defendants, N & W Railway Company, in the case, in order to prevent the need for an entirely new trial if its assessment of the evidence against N & W proved erroneous. Upon review, the Second Circuit concluded that the certification had been granted in error, for a number of reasons, chiefly because the dismissed and surviving claims were so interrelated that they were not separable (primarily because Conrail, the remaining defendant, asserted that N & W would in any event be partly responsible for any liability imposed against Conrail), and it was possible that further discovery or investigation could produce additional evidence sufficient to warrant submitting to a jury the claims against N & W, and, if so, the district court would be able to amend its interlocutory dismissal order if no final judgment had been entered.

Neither of these factors is present here. First, as discussed above in Point I, the dismissed and surviving causes of action are separable for Rule 54(b) purposes. Second, as this Court is well aware, discovery and deposition in this case have been both exhaustive and voluminous, and there appears to be no possibility that any additional facts or evidence will emerge. Accordingly, certification is appropriate here, as it was not in *Hogan*.

Another important factor in assessing whether there is no just reason for delay is whether certification would result in the appellate court having to decide the same issue more than once, if there were a subsequent appeal. See *Curtiss-Wright Corp.*, 446 U.S. at 8. Here, however, this Court has already granted defendants' motion, joined in by plaintiffs, to delay the trial of the remaining claims pending resolution of plaintiffs' appeal from this Court's order granting partial summary judgment. Thus, any trial would be held in abeyance until the Second Circuit has ruled whether partial summary judgment on plaintiffs' first, second and third causes of action was appropriate. Cf. *Doolittle v. Ruffo*, 1997 WL 151882 (N.D.N.Y. 1997) (where certification of one defendant's claims for immediate appeal would delay already-scheduled trial of another defendant's claims, certification should not be granted even if the claims are separable and final).

Here, if certification were granted and the order were affirmed, trial would proceed on the fourth and fifth causes of action only, and no further appeal could be taken with respect to the first, second, or third causes of action; if the order were reversed, all five causes of action would be tried together, and any subsequent appeal with respect to the first, second, or third causes of action would not involve the issue whether the original partial summary judgment order was correct. Rule

54(b) certification should be granted "where an expensive and duplicative trial can be avoided if, without delaying prosecution of the surviving claims, a dismissed claim were reversed in time to be tried with the other claims." *Advanced Magnetics, Inc. v. Bayfront Partners, Inc.*, 106 F.3d 11, 16 (2d Cir. 1997).

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that this Court should grant plaintiffs' application for certification of immediate appellate review of the dismissal of their first, second and third causes of action.

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