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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

FAWN CAIN, TANYA ARCHER, and SANDI OVITT, Relators and Plaintiffs, vs. **SALISH KOOTENAI COLLEGE, INC., et al**., Defendants.	Cause No.: CV 12-181-M-BMM **PLAINTIFFS' RESPONSE OPPOSING MOTION TO CERTIFY ORDER DISMISSING COLLEGE**

COME NOW Relators and Plaintiffs ("Plaintiffs"), by and through their counsel of record, Trent Baker, and Jason Williams of the law firm Datsopoulos, MacDonald & Lind, P.C., and file this Response in opposition to Motion to Certify Order Dismissing the College (Doc. 109). Plaintiffs oppose the motion to certify on the grounds that such an order would create piecemeal appeals and unnecessary delay in this matter.

INTRODUCTION

This case began on October 30, 2012 when the Plaintiff's filed their complaint. Two years later, on December 3, 2014, the court issued an order which allowed the Plaintiffs to amend their complaint against the individual board members and dismissed the Salish Kootenai College and Salish Kootenai College Foundation. (Doc. 39). After two additional years, on April 3, 2017, the Ninth Circuit Court of Appeals reversed and remanded the case for discovery on jurisdictional issues prior to motions regarding dismissing the College. (Doc. 78). One year later, on May 17, 2018, this court issued its order dismissing the College. The Plaintiffs have already been involved in this litigation for approximately six (6) years. A rule 54(b) certification would only further delay this case and create piecemeal litigation. For these reasons the court should deny Defendant's motion to certify the order dismissing the College.

LEGAL STANDARD

Federal Rules of Civil Procedure direct what happens when a judgment is only to some of the parties involved in a case. Rule 54(b) states:

> Judgment on Multiple Claims or Involving Multiple Parties. When an action presents more than one claim for relief—whether as a claim, counterclaim, crossclaim, or third-party claim—or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay. Otherwise, any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties

and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities. Fed. R. C. P Rule 54b.

A party seeking review of a district court order typically must await the "final decision of the district court" before it can invoke the appellate jurisdiction of the courts of appeals. 28 U.S.C. § 1291. The party seeking interlocutory appeal bears the burden of demonstrating that the appeal meets the requirements for certification. Couch v. Telescope Inc., 611 F.3d 629, 633 (9th Cir. 2010). No litigant is entitled to certification as a matter of right; even if the requirements of § 1292(b) are satisfied, "a district court still has the discretion in deciding whether or not to grant a party's motion for certification." In re LDK Solar Sec. Litig., 584 F. Supp. 2d 1230, 1258 (N.D. Cal. 2008). This power "should be used sparingly and with discrimination," Lear Siegler, Inc. v. Adkins, 330 F.2d 595, 598 (9th Cir. 1964), and "only in exceptional situations in which allowing an interlocutory appeal would avoid protracted and expensive litigation," In re Cement Antitrust Litig., 673 F.2d 1020, 1026 (9th Cir. 1982).

Courts have indicated that "[i]n reviewing a 54(b) order, we must scrutinize the interrelationship of claims in order to prevent piecemeal appeals, but we should defer to the district court's determination that delay was not justified unless it is clearly unreasonable." Mason v. Sybron Corp., No. 87-3946, 1988 U.S. App. LEXIS 22424, at *1-2 (9th Cir. Sep. 9, 1988); citing Curtiss-Wright Corp. v. General Elec. Co., 446 U.S. 1, 10-12, 100 S. Ct. 1460, 64 L. Ed. 2d 1 (1980).

In this case, the certification would create piecemeal litigation as it would effectively separate the case against the College from the case against the individuals. Moreover, Defendants cannot show that immediate appeal "may materially advance the ultimate termination of the litigation," a second prerequisite for interlocutory review under § 1292(b). This case does not present the type of exceptional situation where immediate review can avoid unusually protracted and expensive litigation. On the contrary, the Defendant has already filed a motion to dismiss the individuals named in this case and regardless of the outcome of that motion, there is no evidence this case is atypical, and it as likely as not to conclude before any decision on an interlocutory appeal could reasonably be expected. Resolution of the claims against the individuals may obviate the need for any appeal regarding dismissal of the College.

1. **Certification would result in piecemeal litigation**

"Under modern doctrine, '[a] "final decision" generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment ….'" United States v. One, 1986 Ford Pickup, 56 F.3d 1181, 1184 (9th Cir. 1995). Finality is "to be given a practical rather than a technical construction": the finality requirement is intended to prevent "piecemeal litigation" rather than to vindicate some purely technical definition of finality. Armstrong v. Schwarzenegger, 622 F.3d 1058, 1064 (9th Cir. 2010).

Defendants fail to demonstrate how certification would not create piecemeal litigation. In fact, the Defendants' Brief shows certification would create piecemeal litigation. The Defendants indicate that "if appeal is taken now, Plaintiffs may litigate their claims against whichever defendants have been adjudicated as the appropriate defendants by the Ninth Circuit Court of Appeals." Doc 110, pg. 3. This would create a scenario where Plaintiffs and Defendants have to litigate only a portion of the case and hold off on another portion of the case.

Should the Order be certified, the claims against the College would then be at the appellate level while claims against the individuals remain at the District court level. The case would have two different judicial paths. The Defendants' suggestion that the Plaintiffs pursue the claim against whichever defendants have been adjudicated as appropriate by the Ninth Circuit would not occur until after the entire case is adjudicated in this Court and then can be addressed at the appellate level.

Certification would create piecemeal litigation in this matter. The Defendants' Motion to Certify the Order Dismissing the College should be denied so that this case can continue as a whole towards a final resolution.

2. The Certification would not materially advance the ultimate termination of the litigation

Defendants likewise cannot satisfy the requirement that immediate appeal would materially advance the ultimate termination of this case. First, this

requirement is met "only in exceptional situations in which allowing an interlocutory appeal would avoid protracted and expensive litigation." Davis v. Calvin, No. 07-1383, 2009 WL 981920, at *1 (E.D. Cal. Apr. 10, 2009) (citing U.S. Rubber Co. v. Wright, 359 F.2d 784, 785 (9th Cir. 1966)). Defendants have not presented any evidence or even argument that certification will avoid "protracted and expensive litigation" or that this is anything other than a "typical case." Neither element is met. On the contrary, it is certification that will likely cause "protracted" proceedings, as shown by prior appellate proceedings.

Second, the requirement that an immediate appeal would "materially advance" a case's ultimate termination is not met where appeal "might delay the resolution of the litigation because it could not be completed before the scheduled trial date." Shurance v. Planning Control Int'l, Inc., 839 F.2d 1347, 1348 (9th Cir. 1988)). Resolution of any appeal taken now would not be completed until after this case is likely to conclude. The Ninth Circuit generally holds oral argument 12-20 months after a notice of appeal is filed, and issues its decision another 3-12 months after that. U.S. Court of Appeals for the Ninth Circuit, Frequently Asked Questions, Nos. 17-18, https://www.ca9.uscourts.gov/content/faq.php (last visited July 12, 2018). Thus, even if the Court certified an appeal on the date of this filing, the earliest the Ninth Circuit would likely decide the appeal would be October 2019. At which point the remaining portions of this case would be addressed at the district court level. In the alternative, it would be more efficient to allow the case to

go through the normal course to decide the remaining issues and allow for a final status which can then be addressed as a whole at the appellate level if necessary.

Because there is no substantial ground presented by the Defendants that a certification would materially advance the case, 28 U.S.C. § 1292(b) does not permit certification for an interlocutory appeal in this case.

CONCLUSION

The Motion for Certification of the Order should be denied because the requirements for a certification have not been met in this case. A certification would create piecemeal litigation and would delay rather than materially advance this case. For the foregoing reasons, the Court should deny Defendant's Motion to Certify the Order Dismissing the College.

DATED this 12th day of July, 2018.

DATSOPOULOS, MacDONALD & LIND, P.C.

By: /s/Trent N. Baker
Trent Baker
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CERTIFICATE OF COMPLIANCE

In accordance with U.S. District Court Local Rule 7.1(d)(2), the undersigned certifies that the word count of the above brief, excluding captions, certificates of service and compliance, table of contents, table of authorities, and exhibit index is 1,491.

DATSOPOULOS, MacDONALD & LIND, P.C.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing was served upon the following counsel of record, by the means designated below, this 12th day of July, 2018.

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