IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

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| PAUL GERLICH and ERIN FURLEIGH,<br>Plaintiffs,<br>vs.<br>STEVEN LEATH, WARREN MADDEN, THOMAS HILL, and LEESHA ZIMMERMAN,<br>Defendants. | **No. 4:14-cv-00264 – JEG**<br>**O R D E R** |

This matter comes before the Court on a Motion for Certificate of Appealability filed by Defendants Steven Leath, Warren Madden, Thomas Hill, and Leesha Zimmerman, to which Plaintiffs Paul Gerlich and Erin Furleigh did not respond. Neither party requested a hearing on the Motion, and the Court finds a hearing is unnecessary. The Motion is fully submitted and ready for disposition.

## I. BACKGROUND

On January 22, 2016, this Court entered an order on the merits of the parties' cross-motions for summary judgment on all claims, in which the Court held that Defendants had discriminated against Plaintiffs on the basis of viewpoint in violation of the First Amendment. An entry of partial judgment followed on January 25, 2016, leaving for further resolution only the issue of monetary damages and Plaintiffs' claims for fees, costs, and expenses in accordance with 42 U.S.C. § 1988 and other applicable law. On February 4, 2016, Defendants filed the present Motion for Certificate of Appealability pursuant to 28 U.S.C. § 1292, ECF No. 65, contending that the Court's January 22, 2016, order involves a controlling question of law on which there is substantial ground for difference of opinion, and certification of interlocutory review of that question of law would materially advance the ultimate termination of litigation.

## II. DISCUSSION

Federal courts of appeals usually will not review decisions of federal district courts when litigation is ongoing. This is because "[f]ederal appellate jurisdiction generally depends on the existence of a decision by the District Court 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) (quoting Catlin v. United States, 324 U.S. 229, 233 (1978)); 28 U.S.C. § 1291. An exception to this rule is codified in 28 U.S.C. § 1292(b), which grants the courts of appeals discretion to hear appeals from non-final orders under exceptional circumstances, termed "interlocutory review." "Section 1292(b) establishes three criteria for certification [of interlocutory review]: the district court must be of the opinion that (1) the order involves a controlling question of law; (2) there is substantial ground for difference of opinion; and (3) certification will materially advance the ultimate termination of the litigation." Union Cty., Iowa v. Piper Jaffray & Co., 525 F.3d 643, 646 (8th Cir. 2008) (per curiam) (quoting White v. Nix, 43 F.3d 374, 377 (8th Cir. 1994)).

Interlocutory review is an "extraordinary course" for which the movant "bears the heavy burden of demonstrating that the case is an exceptional one in which immediate appeal is warranted." White, 43 F.3d at 376. "It has, of course, long been the policy of the courts to discourage piece-meal appeals because most often such appeals result in additional burdens on both the court and the litigants. Permission to allow interlocutory appeals should thus be granted sparingly and with discrimination." Control Data Corp. v. Int'l Bus. Machs. Corp., 421 F.2d 323, 325 (8th Cir. 1970) (collecting cases). A sparing approach to certification of interlocutory review comports with the statute's legislative history, which shows that § 1292(b) was to be "used only in exceptional cases where a decision of the appeal may avoid protracted and expensive litigation, as in antitrust and similar protracted cases . . . . It is not thought that . . . mere

question as to the correctness of the ruling would prompt the granting of the certificate." S. Rep. No. 85-2434 (1958), reprinted in 1958 U.S.C.C.A.N. 5255, 5259. See also United States Rubber Co. v. Wright, 359 F.2d 784, 785 (9th Cir. 1966) (per curiam) (stating § 1292(b) "was not intended merely to provide review of difficult rulings in hard cases").

Interlocutory review is not appropriate in this case. Here, Defendants seek appellate determination as to whether a public university's licensing program for its registered trademarks constitutes "government speech" for purposes of First Amendment analysis. See Walker v. Texas Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239 (2015) (discussing the development of government speech doctrine in First Amendment jurisprudence).

**A. Controlling Question of Law**

The Court acknowledges that Defendants' government speech theory could present a controlling question of law, in that Defendants could not be found liable for viewpoint discrimination on the basis of conduct determined to be government speech. See id.

**B. Substantial Ground for Difference of Opinion**

Defendants contend there is substantial ground for difference of opinion as to whether Defendants' trademark licensing practices are government speech in light of the Supreme Court's decision in Walker. Defendants contend that because they are unaware of cases holding a public university's trademarks are *not* government speech, there is substantial ground for difference of opinion on the matter. The Court cannot agree. "[S]ubstantial ground for difference of opinion does not exist merely because there is a dearth of cases." White, 43 F.3d at 378. For the reasons stated in the Court's order on this matter entered January 22, 2016, a review of established First Amendment doctrine and the recent decision in Walker demonstrates that a public university's trademarks are not government speech. "While identification of a sufficient number of conflicting and contradictory opinions would provide substantial ground for

disagreement," Defendants have not marshaled any opinions on this matter. Id. (internal quotation marks and citation omitted). There is no substantial ground for difference of opinion.

**C. Materially Advance the Ultimate Termination of the Litigation**

As already noted, the merits of this case have previously been determined on summary judgment. All that remains to be tried before the case is finalized is Plaintiffs' claim for monetary damages. For that reason, interlocutory review would not serve the purpose of avoiding expensive and protracted litigation. Any benefit to Defendants on that register would be outweighed by the costs to judicial economy that result from hearing piece-meal appeals from the same lawsuit. Therefore, interlocutory review under § 1292(b) is inappropriate, and Defendants' motion must be denied.

## III. CONCLUSION

For the reasons stated, Defendants' Motion for Certificate of Appealability, ECF No. 65, must be **denied**.

**IT IS SO ORDERED**.

Dated this 17th day of February, 2016.