UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term 2006

Argued: November 8, 2006 Decided: June 8, 2007

Docket No. 06-2228-cv

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RACHEL EHRENFELD,

Plaintiff-Appellant,

- against -

KHALID SALIM BIN MAHFOUZ,

Defendant-Appellee.

--X

Before: FEINBERG, LEVAL, and CABRANES, Circuit Judges.

Plaintiff-Appellant Rachel Ehrenfeld appeals from a judgment of the United States District Court for the Southern District of New York (Richard C. Casey, J.) granting the motion to dismiss of Defendant-Appellee Khalid Salim Bin Mahfouz on the basis of the lack of personal jurisdiction under N.Y. C.P.L.R. § 302(a)(1) and N.Y. C.P.L.R. § 302(a)(3), denying Ehrenfeld's request for jurisdictional discovery, and dismissing the case for lack of personal jurisdiction.

Question regarding N.Y. C.P.L.R. § 302(a)(1) certified to the New York Court of Appeals. Judgment affirmed as to N.Y. C.P.L.R. § 302(a)(3) and jurisdictional discovery.

DANIEL J. KORNSTEIN, MARK PLATT, CECELIA CHANG, MIKAELA A. MCDERMOTT, Kornstein Veisz Wexler & Pollard, LLP, New York, NY, for Plaintiff-Appellant.

STEPHEN J. BROGAN, TIMOTHY J. FINN, Jones Day, Washington, DC, and MICHAEL NUSSBAUM, Bonner, Kiernan, Trebach & Crociata, Washington, DC, for Defendant-Appellee.

Kurt A. Wimmer, Jason P. Criss, Covington & Burling LLP, New York, for Amici Curiae Amazon.com, American Society of Newspaper Editors, Association of American Publishers, Inc., Authors Guild, Inc., Electronic Frontier Foundation, European Publishers Council, Forbes Inc., John Fairfax Holdings, Ltd., Media/Professional Insurance, Media Institute, Newspaper Association of America, Online News Association, Radio-Television News Directors Association, Reporters Committee for Freedom of the Press, and World Press Freedom Committee, in support of Plaintiff-Appellant.

FEINBERG, Circuit Judge:

Plaintiff-Appellant Rachel Ehrenfeld appeals from a judgment of the United States District Court for the Southern District of New York (Richard C. Casey, J.) granting the motion to dismiss of Defendant-Appellee Khalid Salim Bin Mahfouz on the basis of the lack of personal jurisdiction under N.Y.

1 C.P.L.R. § 302(a)(1) and N.Y. C.P.L.R. § 302(a)(3), denying
2 Ehrenfeld's request for jurisdictional discovery, and
3 dismissing the case for lack of personal jurisdiction. For the
4 reasons hereafter stated, we certify to the New York Court of
5 Appeals a question inquiring whether § 302(a)(1) of New York's
6 long-arm statute confers personal jurisdiction over a person
7 (1) who sued a New York resident in a non-U.S. jurisdiction;
8 and (2) whose contacts with New York stemmed from the foreign
9 lawsuit and whose success in the foreign suit resulted in acts
10 that must be performed by the subject of the suit in New York?
11 We affirm the District Court's judgment as to N.Y. C.P.L.R. §
12 302(a)(3) and jurisdictional discovery.

13 I. BACKGROUND

14 Ehrenfeld is the author of Funding Evil: How Terrorism is
15 Financed -- and How to Stop It, which was published by Bonus
16 Books in 2003 in the United States. Mahfouz is a Saudi Arabian
17 citizen who was formerly the president and chief executive
18 officer of The National Commercial Bank of Saudia Arabia. In
19 Funding Evil, Ehrenfeld alleges that Mahfouz, among others,
20 financially supported terrorism. Mahfouz sued Ehrenfeld in
21 England for libel on the basis of these allegations. Ehrenfeld
22 alleges that Mahfouz chose that venue because of its more
23 favorable libel laws. Ehrenfeld did not appear in the English

1 case and the English court issued a default judgment against
2 her stating, in most relevant part, that Ehrenfeld must refrain
3 from "publishing, or causing or authori[z]ing the further
4 publication" of the disputed statements about Mahfouz in
5 Funding Evil within the English court's jurisdiction.

6 Basing federal jurisdiction on diversity, 28 U.S.C. §
7 1332, Ehrenfeld seeks a declaration under the Declaratory
8 Judgment Act, 28 U.S.C. § 2201, that (1) Mahfouz could not
9 prevail on a libel claim against Ehrenfeld under the laws of
10 New York and the United States; and (2) the judgment in the
11 English case is not enforceable in the United States on
12 constitutional and public policy grounds.

13 Mahfouz moved to dismiss Ehrenfeld's suit for lack of
14 subject-matter jurisdiction and personal jurisdiction under,
15 respectively, Rules 12(b)(1) and 12(b)(2) of the Federal Rules
16 of Civil Procedure. The district court dismissed the case for
17 lack of personal jurisdiction and declined to address whether
18 subject matter jurisdiction existed.

19 II. DISCUSSION

20 A. Preliminary Issues

21 Before discussing the issue of personal jurisdiction under
22 N.Y. C.P.L.R. § 302(a)(1) and § 302(a)(3), we address two
23 preliminary matters.

1 1. Ripeness

2 We first address Mahfouz's argument that subject matter
3 jurisdiction is lacking because the case is not "ripe." "The
4 ripeness doctrine is drawn both from Article III limitations on
5 judicial power and from prudential reasons for refusing to
6 exercise jurisdiction." Nat'l Park Hospitality Ass'n v. DOI,
7 538 U.S. 803, 808 (2003) (internal quotation marks omitted);
8 see also Simmonds v. I.N.S., 326 F.3d 351, 356-7 (2d Cir. 2003)
9 ("'Ripeness' is a term that has been used to describe two
10 overlapping threshold criteria for the exercise of a federal
11 court's jurisdiction.").[1]
12 Article III ripeness "prevents courts from declaring the
13 meaning of the law in a vacuum and from constructing
14 generalized legal rules unless the resolution of an actual
15 dispute requires it." Simmonds, 326 F.3d at 357. This case
16 presents a "concrete dispute affecting cognizable current
17 concerns of the parties within the meaning of Article III,"
18 id., and is therefore ripe within the constitutional sense.

[1] Neither party has distinguished between constitutional and prudential ripeness, but it appears that their arguments primarily go to the court's prudential power to dismiss the case.

1 A case held not to be prudentially ripe reflects a court's
2 judgment that the case would "be better decided later" and that
3 the parties' "constitutional rights [would not be] undermined
4 by the delay." Id. (emphasis omitted). Two factors inform our
5 analysis of prudential ripeness: 1) "the fitness of the issues
6 for judicial decision"; and 2) "the hardship to the parties of
7 withholding court consideration." Abbott Labs. v. Gardner, 387
8 U.S. 136, 149 (1967).

9 In Yahoo! v. La Ligue Contre Le Racisme, 433 F.3d 1199
10 (9th Cir. 2006) (en banc), a case involving facts similar to
11 those here, a group of three judges of the 11-judge en banc
12 court stated that the case should be dismissed for lack of
13 prudential ripeness.[2] These judges reasoned, in part, that the
14 question was not yet fit for judicial decision because the
15 foreign orders were interim orders that could be modified
16 before any attempt to enforce the orders in the United States.
17 Id. at 1215. It was therefore unclear whether enforcement of
18 the foreign court's final order would be repugnant to
19 California's public policy.

[2] When these three judges were combined in Yahoo! with three other judges who voted to dismiss the case for lack of personal jurisdiction, there was a majority of six votes of the en banc court to dismiss the case. See Yahoo!, 433 F.3d at 1201.

Moreover, Yahoo! had voluntarily changed its policy to comply at least partially with the interim order, so it was unclear whether the foreign court would hold that Yahoo! was, as a result, in compliance with the foreign court's orders. Id. at 1215, 1223. The same three judges stated:

> The possible -- but at this point highly speculative -- impact of further compliance with the [foreign] court's orders on access by American users would be highly relevant to the question whether enforcement of the orders would be repugnant to California public policy. But we cannot get to that question without knowing whether the [foreign] court would find that Yahoo! has already complied "in large measure," for only on a finding of current noncompliance would the issue of further compliance, and possible impact on American users, arise.

Id. at 1217. Thus, these three judges concluded that they were "uncertain about whether, or in what form, a First Amendment question might be presented to [them]," id. at 1217, that the suit came "perilously close to a request for a forbidden advisory opinion," id. at 1223, and that "[i]n its current form, this case presents the sort of '[p]roblems of prematurity and abstractness' that counsel against reaching the First Amendment question that Yahoo! insists is presented by this

1 case," id. at 1211 (quoting Socialist Labor Party v. Gilligan,
2 406 U.S. 583, 588 (1972)).

3 In contrast, in the case before us the English judgment is
4 a final order requiring Ehrenfeld to refrain from "publishing,
5 or causing or authori[z]ing the further publication" of the
6 disputed statements about Mahfouz in <u>Funding Evil</u> within the
7 English court's jurisdiction. There has been no suggestion
8 that the order will be changed or that Ehrenfeld has instituted
9 a policy under which she will be in compliance with the order.
10 In other words, this case presents a clear and concrete issue
11 for resolution by a court and does not present any of the
12 problems of prematurity that characterized the <u>Yahoo!</u> case. We
13 therefore decline to dismiss the case for lack of prudential
14 ripeness.

15 2. Constitutional Due Process

16 The second preliminary matter concerns whether personal
17 jurisdiction in this case satisfies constitutional due process.
18 We note that even if the New York Court of Appeals concludes
19 that personal jurisdiction is proper under § 302(a)(1) of the
20 New York long-arm statute, this Court must make the ultimate
21 determination whether this jurisdiction satisfies
22 constitutional due process. See Metropolitan Life Ins. Co. v.

1 Robertson-Ceco Corp., 84 F.3d 560, 567 (2d Cir. 1996) ("[I]n
2 resolving questions of personal jurisdiction in a diversity
3 action, a district court must conduct a two-part inquiry.
4 First, it must determine whether the plaintiff has shown that
5 the defendant is amenable to service of process under the forum
6 state's laws; and second, it must assess whether the court's
7 assertion of jurisdiction under these laws comports with the
8 requirements of due process."). We decline to address this
9 issue now because "the state statute is susceptible of an
10 interpretation that would eliminate the constitutional issue
11 and terminate the litigation." Allstate Ins. Co. v. Serio, 261
12 F.3d 143, 151 (2d Cir. 2001) (internal quotation marks
13 omitted); see also id. at 151-2 (thoroughly discussing the
14 importance of the policy, also emphasized by the Supreme Court,
15 that federal courts avoid constitutional issues whenever
16 possible); but see Petroleum Helicopters, Inc. v. Avco Corp.,
17 804 F.2d 1367, 1369 (5th Cir. 1986) (deciding constitutional
18 due process issue prior to certifying a question similar to the
19 one presented in this case).

20 B. Standard of Review

21 This court reviews questions of statutory interpretation
22 de novo. United States v. Pettus, 303 F.3d 480, 483 (2d Cir.
23 2002). But "it is well-established that the controlling

1 interpretation of state laws should normally be given by state
2 rather than federal courts." Yoon v. Fordham Univ. Faculty &
3 Admin. Ret. Plan, 263 F.3d 196, 203 (2d Cir. 2001).

4 C. Personal Jurisdiction Under New York's Long-Arm
5 Statute

6 1. N.Y. C.P.L.R. § 302(a)(1)

7 a. Certification Generally

8 Certification is appropriate "[w]henever it appears . . .
9 that determinative questions of New York law are involved in a
10 case pending before [it] for which no controlling precedent of
11 the [New York] Court of Appeals exists." N.Y. Comp. Codes R. &
12 Regs. tit. 22, § 500.27(a) (2006)[3]. However, questions are not
13 to be routinely certified "simply because a certification
14 procedure is available." Kidney by Kidney v. Kolmar Labs.,
15 Inc., 808 F.2d 955, 957 (2d Cir. 1987). Factors justifying
16 certification include "the absence of authoritative state court

[3] This statute reads, in relevant part:

> Section 500.27 Discretionary proceedings to review certified questions from Federal courts and other courts of last resort.
> (a) Whenever it appears to the Supreme Court of the United States, any United States Court of Appeals, or a court of last resort of any other state that determinative questions of New York law are involved in a case pending before that court for which no controlling precedent of the Court of Appeals exists, the court may certify the dispositive questions of law to the Court of Appeals.

1 interpretations of the state statute, the importance of the
2 issue to the state and the likelihood that the question will
3 recur, and the capacity of certification to resolve the
4 litigation." Green v. Montgomery, 219 F.3d 52, 60 (2d Cir.
5 2000); see also Krohn v. New York City Police Dep't, 341 F.3d
6 177, 180 (2d Cir. 2003). The Court may also consider whether
7 the question implicates issues of state public policy. See
8 Krohn, 341 F.3d at 180.

9 b. New York State Law

10 This case presents a question regarding the scope of New
11 York C.P.L.R. § 302(a)(1) -- a provision of New York's long-arm
12 statute -- that we have not previously addressed and about
13 which New York State court decisions do not yield a clear
14 answer. Section 302(a)(1) confers jurisdiction over a non-
15 domiciliary who "in person or through an agent ... transacts
16 any business within the state" if the cause of action arises
17 out of the defendant's New York transactions. A non-
18 domiciliary "transacts business" in New York "by purposefully
19 avail[ing] [him or herself] of the privilege of conducting
20 activities within the ... State, thus invoking the benefits and
21 protections of its laws." McKee Elec. Co. v. Rauland-Borg
22 Corp., 20 N.Y.2d 377, 382 (1967) (quoting Hanson v. Denckla,
23 357 U.S. 235, 253 (1958)) (internal quotation marks omitted);

1 see also CutCo Indus., Inc. v. Naughton, 806 F.2d 361, 365 (2d
2 Cir. 1986).

3 Courts interpreting N.Y. C.P.L.R. § 302(a)(1) have held
4 that non-commercial activity may qualify as the "transaction of
5 business." See Padilla v. Rumsfeld, 352 F.3d 695, 709 & n.19
6 (2d Cir. 2003), rev'd on other grounds, 542 U.S. 426 (2004).
7 In addition, a single transaction in New York may suffice to
8 invoke personal jurisdiction "even though the defendant never
9 enter[ed] New York, so long as the defendant's activities here
10 were purposeful and there is a substantial relationship between
11 the transaction and the claim asserted." PDK Labs, Inc. v.
12 Friedlander, 103 F.3d 1105, 1109 (2d Cir. 1997) (alteration in
13 original) (quoting Kreutter v. McFadden Oil Corp., 71 N.Y.2d
14 460, 467 (1988) (internal quotation marks omitted)).

15 On the other hand, a single "cease and desist" letter sent
16 to a New York resident in an attempt to settle legal claims
17 will not be sufficient to invoke personal jurisdiction. See
18 id. A cease-and-desist letter <u>and</u> subsequent communications
19 used to secure further New York investments (and not merely to
20 settle legal claims), by contrast, was held to be sufficient to
21 find personal jurisdiction under the "transacts business"
22 standard. See id.

1 Ehrenfeld alleges that Mahfouz's contacts with New York
2 were: 1) the service on Ehrenfeld of a letter stating Mahfouz's
3 claims in English court (essentially a cease and desist
4 letter); 2) receipt by Ehrenfeld on at least six occasions of
5 letters and e-mails relating to the English case; 3) personal
6 service on Ehrenfeld by Mahfouz's representatives on four
7 occasions of papers pertaining to the English case; and 4)
8 receipt by Ehrenfeld by e-mail and letter of the English
9 Court's order. Ehrenfeld argues that Mahfouz had an additional
10 contact with New York: she says that he implemented a scheme
11 (which consisted of securing the English judgment and related
12 actions), all designed to chill her research and writing in New
13 York. Mahfouz also operates a website that can be accessed in
14 New York. New York courts have not addressed whether personal
15 jurisdiction should attach when the contacts with New York are
16 of this nature.
17
18
19 c. The Appropriateness of Certification
20 As discussed above, this case turns on an "unsettled"
21 question of state law for which there is "no direct precedent."
22 See Alexander & Alexander Serve., Inc. v. Lloyd's Syndicate
23 317, 902 F.2d 165, 169 (2d Cir. 1990); see also Westchester v.
24 Comm'r of Transp. of Conn., 986 F.2d 624, 627 (2d Cir. 1993)

1 (certifying "questions of first impression under Connecticut
2 law" for which "[t]here appear to be no controlling precedents
3 in Connecticut"); Israel v. State Farm Mut. Auto. Ins. Co., 239
4 F.3d 127, 136 (2d Cir. 2000) (certifying a case in which the
5 Court found "no Conecticut precedent directly addressing the
6 questions presented").

7 Mahfouz argues that certification is nevertheless improper
8 because the case involves only a question of the application of
9 settled law to new facts; so, he says, no unsettled question of
10 state law is at stake.[4] However, in Alexander & Alexander, we
11 stated that a question of first impression under the long-arm
12 statute "should be decided by the New York court because it
13 directly involves the application of an important public policy
14 of the State of New York, since that state has a strong
15 interest in deciding the jurisdictional reach of its courts."
16 902 F.2d at 168-69. This statement, which Mahfouz does not
17 address, undermines his contention that a case involving the
18 application of the long-arm statute, which he deems settled
19 state law, to new facts may not be certified. As in Alexander
20 & Alexander, we certify "rather than having the only precedent
21 on point be that of a federal court, which may be mistaken."
22 Id. at 169.

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[4] Ehrenfeld argues that if we are unsure whether New York's long-arm statute applies to Mahfouz's alleged conduct, we should certify to the New York Court of Appeals.

1 Furthermore, the question certified is significant,
2 implicates important public policy for the State of New York,
3 and is likely to be repeated. See Local Rule of the Second
4 Circuit § 0.27[5]. The question is important to authors,
5 publishers and those, like Mahfouz, who are the subject of
6 books and articles. Thus, the question is "significant,"
7 within the meaning of Local Rule § 0.27. The issue may
8 implicate the First Amendment rights of many New Yorkers, and
9 thus concerns important public policy of the State. Because
10 the case may lead to personal jurisdiction over many defendants
11 who successfully pursue a suit abroad against a New York
12 citizen, the question before us is also likely to be repeated.
13 Cf. Alexander & Alexander, 902 F.2d at 169. ("[I]t is arguable
14 ... that the New York courts will become a forum for suits

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[5] The Rule reads, in full:

> Certification of Questions of State Law
>
> Where authorized by state law, this Court may certify to the highest court of a state an unsettled and significant question of state law that will control the outcome of a case pending before this Court. Such certification may be made by this Court sua sponte or on motion of a party filed with the clerk of this Court. Certification will be in accordance with the procedures provided by the state's legislature or highest state court rules, e.g., Conn. Public Act No. 85-111; New York Court of Appeals Rule 500.7. Certification may stay the proceedings in this Court pending the state court's decision whether to accept the certification and its decision of the certified question.

1 against any unauthorized alien or foreign insurer who benefits
2 from the existence of a trust fund in a bank located in New
3 York....”).

4 For the reasons detailed above, we believe that the New
5 York Court of Appeals can best resolve the issue of personal
6 jurisdiction under N.Y. C.P.L.R. § 302(a)(1) that we are
7 certifying.[6]

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[6] Ehrenfeld also argues that the District Court improperly denied her jurisdictional discovery that might have revealed facts sufficient to sustain personal jurisdiction under N.Y. C.P.L.R. § 302(a)(1). A District Court’s denial of jurisdictional discovery is reviewed for abuse of discretion. See Lehigh Valley Indus., Inc. v. Birenbaum, 527 F.2d 87, 93 (2d Cir. 1975). Ehrenfeld contends that the District Court committed an error of law by requiring her to make a prima facie showing of jurisdiction before allowing discovery. Citing to Jazini v. Nissan Motor Corp., 148 F.3d 181 (2d Cir. 1998), the District Court stated that the “Second Circuit has disallowed jurisdictional discovery where a plaintiff has failed to establish a prima facie case and where there is a foreign defendant because such logic would require all foreign defendants to submit to discovery on this issue. Ehrenfeld’s request for additional jurisdictional discovery is therefore denied.” The District Court’s use of the term “disallowed” is arguably a mischaracterization of Jazini, which held that a district court did not err when it denied jurisdictional discovery to a plaintiff suing a foreign corporation. See id. at 186. If the District Court understood Jazini as forbidding jurisdictional discovery any time a plaintiff does not make a prima facie showing of jurisdiction, this would indeed be legal error. See In re Magnetic Audiotape Antitrust Litig., 334 F.3d 204, 206 (2d Cir. 2003) (requiring only “legally sufficient allegations of jurisdiction” to survive a pre-discovery motion to dismiss). However, we think the District Court’s comment on Jazini should be read as a justification of its exercise of discretion to deny jurisdictional discovery, not as a clear limit on its authority to exercise its discretion. Elsewhere, for example, the District Court stated that it “finds that there exists no need for additional jurisdictional discovery” -- a comment that does not imply any bright-line cabining of its discretion.

2. N.Y. C.P.L.R. § 302(a)(3)

Alternatively, plaintiff argues that N.Y. C.P.L.R. § 302(a)(3) provides an independent basis for personal jurisdiction under New York's long-arm statute. Plaintiff contends that she does not have to describe the elements of a tort in order to state a cause of action arising under a "tortious act" as required by N.Y. C.P.L.R. § 302(a)(3). Rather, she argues, defendant's wrongful "scheme" to chill her First Amendment rights satisfies the statute. She relies principally on the case of Garbellotto v. Montelindo Compagnie Navegacion, 294 F.Supp. 487 (S.D.N.Y. 1969), which held that personal jurisdiction existed under § 302(a)(3) where there was a cause of action for breach of warranty, see id. at 488-89. Yet even in that case, the Court noted that "[a] breach of warranty ... is not only a violation of the sales contract ... but is a tortious wrong...." Id. at 488 n.4. Plaintiff's argument, then, is that as long as a plaintiff describes an act as somehow wrongful and not exclusively for breach of contract, it can be considered "tortious." There is, however, no limiting principle to this argument. Any time a plaintiff considered himself wronged for whatever reason, even if no legally cognizable right of action existed, personal jurisdiction would exist over the defendant in a declaratory judgment suit. We do not believe certification is appropriate

1 here, because we have seen no New York case law that ascribes
2 such a broad meaning to "tortious act." See, e.g., Sung Hwan
3 Co. v. Rite Aid Corp., 7 N.Y.3d 78, 84-85 (2006) (holding that
4 an act considered tortious under Korean law was covered by §
5 302(a)(3), even though it provided for a remedy not available
6 under New York law). We recognize the possibility that the
7 claim brought in New York need not be a tort under New York law
8 to justify invocation of § 302(a)(3) to confer jurisdiction.
9 Id. Nonetheless, there must be some basis for considering the
10 defendant's actions to be tortious, either under the law of New
11 York or some other pertinent jurisdiction. In this case,
12 plaintiff has shown no basis for considering defendant's
13 actions to be tortious. Therefore, the District Court properly
14 found that it could not exercise personal jurisdiction over
15 defendant under § 302(a)(3).
16
17
18 III. Conclusion
19 For the reasons stated above, we affirm the District
20 Court's opinion as to N.Y. C.P.L.R. § 302(a)(3) and
21 jurisdictional discovery.
22 Because of the absence of authoritative state court
23 precedent regarding the jurisdictional question raised under

1 N.Y. C.P.L.R. § 302(a)(1), the fact that the answer may resolve
2 this litigation, and, most of all, the importance of the
3 question, its policy implications for the State and the
4 likelihood that the question will recur, we hereby respectfully
5 certify the following question to the New York Court of
6 Appeals: Does § 302(a)(1) of New York's long-arm statute confer
7 personal jurisdiction over the defendant?

8 The certified question may be deemed expanded to cover any
9 further pertinent question of New York law involved in this
10 appeal that the Court of Appeals chooses to answer. This panel
11 retains jurisdiction and will consider any issues that may
12 remain on appeal once the New York Court of Appeals has either
13 provided us with its guidance, or declined certification.

14 It is therefore ordered that the Clerk of this Court
15 transmit to the Clerk of the Court of Appeals of the State of
16 New York a Certificate, as set forth below, together with a
17 complete set of briefs, appendices, and record filed by the
18 parties with this court. The parties are further ordered to
19 bear equally such fees and costs, if any, as may be required by
20 the New York Court of Appeals.

21 Certificate

1 The foregoing is hereby certified to the Court of Appeals
2 of the State of New York, pursuant to 2d Cir. R. § 0.27 and
3 N.Y. Comp. Codes R. & Regs. tit. 22, § 500.27, as ordered by
4 the United States Court of Appeals for the Second Circuit.