

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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MOTION INFORMATION STATEMENT

Docket Number(s): _____ Caption [use short title] _____

Motion for: Petition for Permission to Appeal Pursuant to 28 U.S.C. § 1292(b) and Fed. R. App. P. 5

Set forth below precise, complete statement of relief sought:
Petitioners request permission to take an interlocutory appeal of the district court's order of February 15, 2018
If permission is granted, Petitioners will argue that this Court should reverse the district court's ruling on the question set forth in the petition.

Goldman v. Breitbart News Network, LLC, et al.

MOVING PARTY: Time Inc., Heavy, Inc., Oath Holdings Inc. Gannett Company, Inc., and New England Sports Network, Inc. OPPOSING PARTY: Justin Goldman

Plaintiff Defendant
Appellant/Petitioner Appellee/Respondent

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Court- Judge/ Agency appealed from: U.S. Dist. Ct. for the Southern District of New York, Hon. Katherine B. Forrest

Please check appropriate boxes:
Has movant notified opposing counsel (required by Local Rule 27.1):
Yes No (explain):

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:
Has this request for relief been made below? Yes No
Has this relief been previously sought in this court? Yes No
Requested return date and explanation of emergency:

Opposing counsel's position on motion:
Unopposed Opposed Don't Know
Does opposing counsel intend to file a response:
Yes No Don't Know

Is oral argument on motion requested? Yes No (requests for oral argument will not necessarily be granted)
Has argument date of appeal been set? Yes No If yes, enter date:

Signature of Moving Attorney: /s/ Lacy H. Koonce Date: 3/30/2018 Service by: CM/ECF Other [Attach proof of service]

No. 18-

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

JUSTIN GOLDMAN,

—against—

Plaintiff-Respondent,

BREITBART NEWS NETWORK, LLC, VOX MEDIA, INC., HERALD MEDIA, INC.,
BOSTON GLOBE MEDIA PARTNERS, INC.,

Defendants,

HEAVY, INC., TIME INC., YAHOO, INC., GANNETT COMPANY, INC., and
NEW ENGLAND SPORTS NETWORK, INC.,

Defendants-Petitioners.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
NO. 1:17-CV-03144

PETITION FOR PERMISSION TO APPEAL UNDER 28 U.S.C. § 1292(b)

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, undersigned counsel state as follows:

Defendant-Petitioner Heavy, Inc. is a private, non-governmental corporation with no corporate parents, and no publicly traded entity owns 10% or more of Heavy, Inc.'s stock or the stock of any corporate parents, affiliates and/or subsidiaries of Heavy, Inc.

Defendant-Petitioner Time Inc. (incorrectly sued herein as "Time, Inc.") is a wholly owned subsidiary of Meredith Corporation, a publicly held corporation.

Defendant-Petitioner Oath Holdings Inc. is a wholly owned subsidiary of Verizon Communications Inc., a publicly traded company. Effective June 13, 2017, Defendant Yahoo! Inc. transferred to Yahoo Holdings, Inc. all liabilities relevant to this lawsuit. Effective January 1, 2018, Yahoo Holdings, Inc. changed its name to Oath Holdings Inc. Defendant Yahoo! Inc. no longer owns any interest in the past, present, or future liabilities relevant to this lawsuit.

Defendant-Petitioner Gannett Company, Inc. is a publicly traded company without a publicly traded parent or subsidiary. However, BlackRock, Inc., a publicly traded company, owns 10% or more of Gannett's stock.

Defendant-Petitioner New England Sports Network, Inc. (“NESN”) is a privately held corporation, and no publicly held corporation owns 10% or more of NESN’s stock or the stock in any of NESN’s parent or affiliate companies.

TABLE OF CONTENTS

	<u>Page</u>
INTRODUCTION	1
BACKGROUND	3
A. Facts	4
B. Embedding	4
C. Procedural History	7
D. The District Court’s Decision	7
QUESTION PRESENTED	9
ARGUMENT	10
I. THE DISTRICT COURT’S ORDER DETERMINED A CONTROLLING ISSUE OF LAW.	11
A. The Order Decided a Pure Legal Question.	11
B. The Issue of Law Presented Here is “Controlling.”	12
II. THE DISTRICT COURT’S REJECTION OF THE PRECEDENT OF TWO CIRCUITS CONFIRMS THAT THERE ARE SUBSTANTIAL GROUNDS FOR DIFFERENCE OF OPINION ON THE ISSUE DECIDED IN THE ORDER BELOW.....	16
III. INTERLOCUTORY REVIEW WOULD MATERIALLY ADVANCE TERMINATION OF THE LITIGATION.....	21
CONCLUSION	22
CERTIFICATE OF COMPLIANCE.....	25
CERTIFICATE OF SERVICE	26

TABLE OF AUTHORITIES

	Page(s)
Cases	
American Broadcasting Companies, Inc. v. Aereo, Inc., 134 S. Ct. 2498 (2014).....	19, 20, 21
In re Auction Houses Antitrust Litig., 164 F. Supp. 2d 345 (S.D.N.Y. 2001)	11
Balintulo v. Daimler AG, 727 F.3d 174 (2d Cir. 2013)	10
Capitol Records, Inc. v. MP3tunes, LLC, 48 F. Supp. 3d 703 (S.D.N.Y. 2014), rev'd in part on other grounds, 844 F.3d 79 (2d Cir. 2016)	21
Capitol Records, LLC v. ReDigi Inc., 934 F. Supp. 2d 640 (S.D.N.Y. 2013)	19
Capitol Records, LLC v. Vimeo, LLC, 972 F. Supp. 2d 537 (S.D.N.Y. 2013), aff'd in part on interlocutory appeal, 826 F.3d 78, 86-87 (2d Cir. 2016)	12, 15
In re Duplan Corp., 591 F.2d 139 (2d Cir. 1978)	12, 13
Flava Works, Inc. v. Gunter, 689 F.3d 754 (7th Cir. 2012)	8, 18
Flo & Eddie, Inc. v. Sirius XM Radio Inc., No. 13 Civ. 5784, 2015 WL 585641 (S.D.N.Y. Feb. 10, 2015), petition for leave to appeal granted, No. 15-497, 2015 WL 3478159 (2d Cir. May 27, 2015)	13, 15
Fox Television Stations, Inc. v. FilmOn X LLC, 150 F. Supp. 3d 1 (D.D.C. 2015).....	20

Grady v. Iacullo, No. 13-cv-00624-RM-KMT, 2016 WL 1559134 (D. Colo. Apr. 18, 2016)	19
Klinghoffer v. S.N.C. Achille Lauro, 921 F.2d 21 (2d Cir. 1990)	12, 13, 14, 21
Leaders Inst., LLC v. Jackson, No. 3:14-cv-3572-B, 2017 WL 52629514 (N.D. Tex. Nov. 22, 2017)	19
Leveyfilm, Inc. v. Fox Sports Interactive Media, LLC, No. 13 C 4664, 2014 WL 3368893 (N.D. Ill. July 8, 2014).....	19
Live Face on Web, LLC v. Biblio Holdings LLC, No. 15 Civ. 4848 (NRB), 2016 WL 4766344 (S.D.N.Y. Sept. 13, 2016)	19
MyPlayCity, Inc. v. Conduit Ltd., No. 10 Civ. 1615(CM), 2012 WL 1107648 (S.D.N.Y. Mar. 30, 2012)	19
Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146 (9th Cir. 2007)	passim
Perfect 10 v. Google, Inc., 416 F. Supp. 2d 828 (C.D. Cal. 2006), aff'd in part, 508 F.3d 1146 (9th Cir. 2007).....	16
Reese v. BP Expl. (Alaska) Inc., 643 F.3d 681 (9th Cir. 2011)	21
Totally Her Media, LLC v. BWP Media USA, Inc., No. CV 13-8379-AB, 2015 WL 12659912 (C.D. Cal. Mar. 24, 2015)	19
Weber v. United States, 484 F.3d 154 (2d Cir. 2007)	10
Statutes	
17 U.S.C. § 101	9, 18

17 U.S.C. § 106.....	3
28 U.S.C. § 1292(b)	passim

INTRODUCTION

Pursuant to 28 U.S.C. § 1292(b) (“§ 1292(b)”), Defendants-Petitioners Heavy, Inc. (“Heavy”), Time Inc. (“Time”), Gannett Company, Inc. (“Gannett”), Oath Holdings Inc. (“Yahoo”),¹ and New England Sports Network, Inc. (“NESN”) (the “Publishers”) respectfully petition for permission to appeal from an interlocutory order that breaks from settled precedent and raises copyright law issues with broad implications for all publishers of online content. Indeed, the decision below implicates online activity that occurs literally millions of times every day.

Specifically, in denying the Publishers’ motion for summary judgment, the district court held they could potentially be held liable for direct copyright infringement under the Copyright Act simply by publishing articles containing “embedded” links to copyrighted content hosted by a third party. Ex. A (the “Order”). As explained below, Internet websites consist of computer code that instructs the web browser software of users who visit the site to assemble content into an image on the user’s screen. “Embedding”—also sometimes referred to as “inline linking”—allows a website publisher to include content residing on third-party servers in the webpage the user sees. When content is embedded, it is never stored on or transmitted from the website publisher’s own servers; in essence, an embed is like

¹ Effective June 13, 2017, Yahoo! Inc. transferred all liabilities relevant to this lawsuit to Yahoo Holdings, Inc., which changed its name to Oath Holdings Inc. effective January 1, 2018.

a window through which the user sees the content on the underlying, third-party site. For example, content from social media services or video-sharing sites like YouTube frequently is linked to and incorporated into other websites through embedding.

As the district court acknowledged in certifying its Order for interlocutory review, this decision “created tremendous uncertainty for online publishers,” and resolving the legal issue—whether embedding content hosted on a third-party server is a public display under the Copyright Act—would “ha[ve] an impact beyond this case.” Ex. B, Order dated March 19, 2018, Dkt. No. 181 at 1. Indeed, the Order upended settled expectations regarding liability for the ubiquitous practice of linking to content on the internet. Those expectations were grounded in, among other authorities, the Ninth Circuit’s more-than-decade-old “Server Test” for determining direct copyright infringement liability on the internet—a test since applied by a host of other courts, but expressly rejected by the district court here. As one commentator observed, the decision “has the potential to shake the very foundation on which the modern internet is built, changing the way websites from huge publications to one-person blogs do business online.” Brian Feldman, *How a Photo of Tom Brady Could Change the Way That You See the Internet*, N.Y. Mag. (Feb. 16, 2018), <http://nymag.com/selectall/2018/02/court-rules-that-embedding-tweets-could-violate-copyright.html>. Given the broad impact of the Order, which

diverges from the holdings of two Circuits and numerous district courts, interlocutory appeal is both appropriate and necessary.

BACKGROUND

This copyright suit involves online news sites that embedded links to social media posts that included a photograph. Plaintiff-Respondent Justin Goldman alleges that the Publishers, by embedding on their websites links to Twitter posts (“Tweets”) containing a photograph Goldman took of NFL quarterback Tom Brady, directly infringed his exclusive right to publicly display the photograph under 17 U.S.C. § 106(5).

The Publishers moved for summary judgment based on longstanding precedent from the Ninth Circuit and elsewhere holding that merely linking to content hosted on and transmitted from a server controlled by a third party does not directly implicate the Copyright Act’s public display right. See *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1159-61 (9th Cir. 2007). This “Server Test” has been fundamental to the internet’s development over the past decade, providing a bright-line rule for determining liability for direct copyright infringement with respect to embedding links. The district court, however, upended that certainty, concluding that when the Publishers embedded links to Tweets in articles on their websites, “their actions violated [Goldman’s] exclusive display right” and that “the

fact that the image was hosted on a server owned and operated by an unrelated third party (Twitter) does not shield them from this result.” Ex. A at 2.

The court later certified its Order for interlocutory appeal under § 1292(b), noting the widespread impact of its decision and stating that appeal would “bring resolution to an important and controlling question of law and ... more efficiently resolve this matter.” Ex. B at 2.

A. Facts

On July 2, 2016, Goldman used his cell phone to take a photograph (the “Photo”) of Tom Brady walking in the Hamptons with members of the Boston Celtics. Ex. A at 3. The Photo revealed that Brady was part of the Celtics’ efforts to recruit superstar free agent Kevin Durant.

Goldman uploaded the Photo to Snapchat, “a social media platform where users share photographs and messages.” Id. “The Photo then went ‘viral,’ traveling through several social media platforms—and finally onto Twitter, where it was uploaded by several users.” Id. Within 48 hours, numerous news websites, including Publishers’, picked up the story and published articles, which embedded links to Tweets about and containing the Photo. Id. at 3-4.

B. Embedding

It is undisputed that with respect to the activity at issue in Defendants’ embedding motion “[n]one of the defendant websites copied and saved the Photo onto

their own servers.” Id. at 4-5. The Photo was “visible in their articles through a technical process known as ‘embedding.’” Id. When a user navigates to a webpage, the user’s web browser connects with the webpage’s server, at which point the webpage’s code, written in Hypertext Markup Language (“HTML”), “instructs the browser on how to arrange the webpage on the user’s computer.” Id. at 4.

The HTML code can allow for the arrangement of text and/or images on a page and can also include photographs. When including a photograph on a webpage, the HTML code instructs the browser how and where to place the photograph. Importantly for this case, the HTML code could instruct the browser either to retrieve the photograph from the webpage’s own server or to retrieve it from a third-party server.

Id. These instructions for the user’s browser to retrieve an image directly from a third-party server are referred to as “embed code.” The code provides a link to content hosted on a third-party website. Id. at 5.

“Most social media sites—Facebook, Twitter, and YouTube, for example—provide embed code that coders and web designers can easily copy in order to enable embedding on their own webpages,” and do so to encourage embedding of social media posts. Id. Twitter, for example, instructs its users that “[e]very Tweet displayed on Twitter.com and in TweetDeck includes an embed code to easily copy-and-paste into your webpage. ...” Defs. 56.1 Statement, Dkt. No. 120 (“SUF”) ¶ 23. If the author of a Tweet that is embedded on another site deletes that Tweet, the ‘widgets’ used by Twitter’s embed HTML code will no longer

cause the Tweet to appear as a “fully-rendered Tweet,” and will instead show only the text of the Tweet itself, without any media that had been attached to it. Id. ¶ 24.

The result is familiar to anyone who has used Google image search or read an article embedding a celebrity’s tweets: the viewer sees “a seamlessly integrated webpage, a mix of text and images, although the underlying images may be hosted in varying locations.” Id. Importantly, the webpage embedding the link to a given image does not control the image. If the site hosting the image alters or takes down the image, then it will be altered or disappear from the site providing the embedded link. See SUF ¶ 24.

“Here, it is undisputed that none of the defendant websites actually downloaded the Photo from Twitter, copied it, and stored it on their own servers. Rather each defendant website merely embedded [Tweets containing] the Photo, by including the necessary embed code in their HTML instructions. Ex. A at 5. The Photo that was part of that embedded Tweet was hosted on and served from a server controlled by Twitter. Id. at 2, 5, 18-19; see also SUF ¶ 39.

Heavy, Gannett, and NESN only embedded the Photo. Two of the Publishers, Yahoo and Time, published articles that contained both embedded links to Tweets containing the Photo and separate copies of the Photo hosted on Yahoo and Time servers (which were not at issue in the Publishers’ motion). The district court acknowledged that for a minority of the defendants, a favorable ruling on the

embedding issue would result in only partial summary judgment, but nevertheless found that “a reversal on appeal would result in the dismissal of several defendants and narrow the issues for those defendants who would remain ... thus materially advanc[ing] the ultimate termination of the litigation.” Ex. B at 2. For the sake of simplicity, this Petition will refer only to the embedded Tweets.

C. Procedural History

Goldman filed suit in April 2017. Defendants filed separate motions to dismiss based on embedding and also fair use. The district court denied both motions. Memorandum & Order, Aug. 21, 2017, Dkt. No. 91. The court then “divided the litigation into two phases—the first to determine whether defendants’ actions violate[d] the exclusive right to display a work ... and the second to deal with all remaining issues.” Ex. A at 2. In October 2017, Defendants moved for summary judgment based on embedding, and the court heard oral argument on January 16, 2018. *Id.*

D. The District Court’s Decision

Defendants moved for summary judgment on the grounds that, by merely providing links to content hosted on a third-party website, the defendants did not publicly display the Photo under the “Server Test” adopted in *Perfect 10* and its progeny. Mem. in Supp. Defs. Motion for Summary Judgment, Dkt. No. 121, at 13. Although a display took place, “when a website provides a link to content

hosted and transmitted directly from a third-party server to the user, it is that third party that is displaying and distributing the work, not the publisher.” *Id.* (emphasis added). This is because providing HTML instructions for finding an image on a third-party server is not equivalent to showing a copy of the image. As the Ninth Circuit explained in *Perfect 10*:

HTML instructions are lines of text, not a photographic image. ... HTML instructions do not themselves cause infringing images to appear on the user's computer screen. The HTML merely gives the address of the image to the user's browser. The browser then interacts with the computer that stores the infringing image. It is this interaction that causes an infringing image to appear on the user's computer screen. Google may facilitate the user's access to infringing images. However, such assistance raises only contributory liability issues, and does not constitute direct infringement of the copyright owner's display rights.

508 F.3d at 1161 (internal citations omitted). The Seventh Circuit likewise compared the provision of HTML instructions to embed a link to content (in that case, videos) to “listing plays and giving the name and address of the theaters where they are being performed,” and held that “the provision of contact information” (i.e., HTML instructions to embed content) raises contributory but not direct liability issues. *Flava Works, Inc. v. Gunter*, 689 F.3d 754, 761 (7th Cir. 2012).

The district court's Order embraces the opposite view of embedding, holding that when the Publishers embedded Tweets from Twitter's servers, their actions violated Goldman's exclusive display right, thus potentially constituting direct copyright infringement. Ex. A at 2. The court based its decision on the legislative

history of the 1976 Copyright Act, which (it concluded) evidenced an intent for the display right to be read more broadly. *Id.* at 8, 19. The court did not attempt to reconcile its decision with the text of the Act, which provides that to “display” a work is “show a copy of it,” and to “display a work ‘publicly,’” as relevant here, is to “transmit or otherwise communicate a performance or display of the work.” 17 U.S.C. § 101 (emphasis added); cf. *Perfect 10*, 508 F.3d at 1160.

In reaching its decision, the district court expressly rejected *Perfect 10*, finding that the Ninth Circuit erroneously interpreted the Copyright Act to require a party to “possess” a copy of an image in order to display it. See Ex. A at 21-22 (“[T]his Court is skeptical that *Perfect 10* correctly interprets the display right of the Copyright Act”).

The court also read *Perfect 10* narrowly to apply to search engines that require users to affirmatively click on a thumbnail before seeing a full-size display. *Id.* at 22 (holding that *Perfect 10* was “heavily informed” by these two factors). The court found that “[b]oth the nature of Google Search Engine, as compared to the defendant websites, and the volitional act taken by users of the services, provide[d] a sharp contrast to the facts at hand.” *Id.* at 23.

QUESTION PRESENTED

Did the district court err in holding that a website publisher that embeds links to content from a third-party website, but does not host or transmit the con-

tent from its own servers, engages in a “public display” of that content under the Copyright Act?

ARGUMENT

Interlocutory review is appropriate when an order (1) “involves a controlling question of law”; (2) “as to which there is substantial ground for difference of opinion”; and (3) “an immediate appeal from the order may materially advance the ultimate termination of the litigation.” 28 U.S.C. § 1292(b); see also *Balintulo v. Daimler AG*, 727 F.3d 174, 186 (2d Cir. 2013) (“When a ruling satisfies these [§ 1292(b)] criteria and ‘involves a new legal question or is of special consequence,’ then the district court ‘should not hesitate to certify an interlocutory appeal.’”) (quoting *Mohawk Indus. v. Carpenter*, 558 U.S. 100, 111 (2009)). In passing § 1292(b), “Congress ... sought to assure the prompt resolution of knotty legal problems.” *Weber v. United States*, 484 F.3d 154, 159 (2d Cir. 2007) (citation omitted).

As the district court recognized, the Order easily satisfies the § 1292(b) criteria. The Order presents precisely the type of “knotty legal problem[]” that merits “prompt resolution” by this Court. Ex. B at 1 (quoting *Weber*, 484 F.3d at 159). The district court squarely rejected a more-than-decade-old Ninth Circuit decision that had been almost unanimously embraced by subsequent courts, and was widely relied upon by online publishers and platform operators. The Order upends settled

expectations and transforms conduct that occurs millions of times a day online into potential acts of copyright infringement. It is therefore unsurprising that the Order “has created tremendous uncertainty for online publishers,” Ex. B at 2, giving this case “practical importance going well beyond run-of-the-mill concerns of parties before the Court.” *In re Auction Houses Antitrust Litig.*, 164 F. Supp. 2d 345, 348 (S.D.N.Y. 2001).

I. THE DISTRICT COURT’S ORDER DETERMINED A CONTROLLING ISSUE OF LAW.

There can be no question that the district court’s Order resolves a potentially outcome-determinative question of law of broad significance.

A. The Order Decided a Pure Legal Question.

The Order addressed a pure “issue of law”: “how images shown on one website but stored on another website’s server implicate an owner’s exclusive display right.” Ex. A at 1; see also *id.* at 3 (“The parties agree that the principle issue briefed on this motion is a legal one and amenable to summary judgment.”); Ex. B at 2 (defining the “key issue in this case” as “whether there is copyright liability under the display right where one publisher ‘embeds’ an image hosted on a third-party server”). In reaching its decision, moreover, the court rejected the Server Test adopted by the Ninth Circuit in *Perfect 10* more than a decade ago. See Ex. A at 17. Whether the Server Test is compelled by the “plain language of the statute,” as the Ninth Circuit held, 508 F.3d at 1160, or is inconsistent with that language, as

the district court found, is a “pure question of law that the reviewing court could decide quickly and cleanly without having to study the record.” *Capitol Records, LLC v. Vimeo, LLC*, 972 F. Supp. 2d 537, 551 (S.D.N.Y. 2013) (holding that application of DMCA Safe Harbor to pre-1972 sound recordings was a controlling issue of law because it “turn[ed] almost exclusively on a question of statutory interpretation”) (citation omitted), *aff’d in part on interlocutory appeal*, 826 F.3d 78, 86-87 (2d Cir. 2016).

B. The Issue of Law Presented Here is “Controlling.”

Nor is there any serious doubt that the question here, if resolved in the Publishers’ favor, is “controlling.” Plainly, “a question of law is ‘controlling’ if reversal of the district court's order would terminate the action,” as would be the case for half of the defendants here. *Klinghoffer v. S.N.C. Achille Lauro*, 921 F.2d 21, 24 (2d Cir. 1990). But resolving the question “need not necessarily terminate an action in order to be ‘controlling,’” *id.*; a question is also “controlling” if its resolution “may importantly affect the conduct of an action.” *In re Duplan Corp.*, 591 F.2d 139, 148 n.11 (2d Cir. 1978) (Friendly, J.).

This Court has also held that “the impact that an appeal will have on other cases is a factor that we may take into account in deciding whether to accept an appeal that has been properly certified by the district court.” *Klinghoffer*, 921 F.2d at 24. Thus, when a determination is “likely to have precedential value for a large

number of other suits,” interlocutory review is particularly appropriate—though that factor is not a prerequisite to granting a petition. *Id.* (quoting *Brown v. Bullcock*, 294 F.2d 415, 417 (2d Cir. 1961)).

Here, reversal of the Order would result in complete dismissal of all claims against three of the six defendants in the case. Without an interlocutory appeal, those defendants may have to litigate this case through discovery and trial, even though, on an eventual appeal, they may be held not liable in the first place. The complete elimination of half the defendants in a six-defendant case undoubtedly “affect[s] the conduct of [the] action.” *Duplan Corp.*, 591 F.2d at 148 n.11.

For the two Publishers that allegedly made other, non-embedding uses of the Photo, reversal of the Order now still would mean that “significant portions of th[e] lawsuit ... will have to be dismissed,” which would affect damages and could potentially determine liability as well. *Flo & Eddie, Inc. v. Sirius XM Radio Inc.*, No. 13 Civ. 5784, 2015 WL 585641, at *2 (S.D.N.Y. Feb. 10, 2015), petition for leave to appeal granted, No. 15-497, 2015 WL 3478159 (2d Cir. May 27, 2015). Those defendants (Yahoo and Time) have been sued over two separate uses, in two separate publications. Reversal of the Order would mean that one of the two publications from each of those defendants would be dismissed from the case.

Finally, the question whether embedding links to content from social media directly implicates the public display right has significant “precedential value for a

large number of cases.” *Klinghoffer*, 921 F.2d at 24. At a minimum, the same question (presented by the same plaintiff) is already being litigated before another judge in the Southern District of New York. See *Goldman v. Advance Publ’ns, Inc.*, No. 16 Civ. 9031 (ALC) (SN). Rather than forcing those parties to relitigate the issue the district court in this case just decided—thereby creating the potential for a conflict among courts in this Circuit—judicial economy favors resolution of this threshold issue on a Circuit-wide basis now.

More generally, in rejecting the Server Test, the Order opens the door to many similar lawsuits. This case involves embedded images hosted on Twitter; and as the district court recognized, “given the frequency with which embedded images are ‘retweeted,’ the resolution of this legal question has an impact beyond this case.” Ex. B at 2. As the Court is no doubt aware, copyright infringement lawsuits arising out of use of photos online constitute an increasingly large share of federal litigation—particularly in this Circuit. See, e.g., Anandashankar Mazumdar, *Photography Cases Spur Copyright Lawsuit Growth in New York*, Bloomberg BNA (Nov. 7, 2017), <https://www.bna.com/photography-cases-spurn73014471850/>. While it appears that most potential plaintiffs had understood Perfect 10 to bar direct infringement claims based upon embedding, any such understanding has now been thrown into question.

In *Flo & Eddie*, this Court granted interlocutory review of a decision that the

holders of common law copyrights in pre-1972 sound recordings held the right to exclusive public performance, where the district court acknowledged that other broadcasters would “undoubtedly be sued in follow-on actions.” 2015 WL 585641, at *2. The same is true here. See also *Vimeo*, 972 F. Supp. 2d at 553 (recognizing that issue decided by court concerning “red flag” knowledge of infringement “is a difficult question that has important ramifications for service providers such as [the defendant]”).

As the District Court here acknowledged, concern over new exposure for conduct that was widely understood as non-infringing “has created tremendous uncertainty for online publishers” Ex. B at 2—a point that was emphasized by the amicus curiae brief submitted by a consortium of publishers’ associations in support of the Publishers’ motion to certify the Order for appeal. See Amicus Brief, Dkt No. 178-1, at 2-3. Commentators agree. One noted that it could “potentially disrupt[] the way that news outlets use Twitter and caus[e] many in technology to re-examine ubiquitous practices from embedding to linking.” Eriq Gardner, Judge Rules News Publishers Violated Copyright by Embedding Tweets of Tom Brady Photo, *Hollywood Reporter* (Feb. 15, 2018), <https://www.hollywoodreporter.com/thr-esq/judge-rules-news-publishers-violated-copyright-by-embedding-tweets-tom-brady-photo-1085342>. Another explained that

[o]ne of the most ubiquitous features of the internet is the ability to link to content elsewhere. Everything is connected via billions of links and embeds to blogs, articles, and social media. But a federal judge’s ruling threatens that ecosystem. ... The decision can be appealed, but if it stands and is adopted by other courts, it could change the way online publishing functions.

Louise Matsakis, *A Ruling Over Embedded Tweets Could Change Online Publishing*, *Wired* (Feb. 16, 2018), <https://www.wired.com/story/embedded-tweets-copyright-law/>; see also Feldman, *supra*.

In the Perfect 10 litigation, the district court adopted the Server Test not only because it “reflects the reality of how content actually travels over the internet before it is shown on users’ computers,” but because the alternative “would cause a tremendous chilling effect on the core functionality of the web—its capacity to link, a vital feature of the internet that makes it accessible, creative, and valuable.” *Perfect 10 v. Google, Inc.*, 416 F. Supp. 2d 828, 840 (C.D. Cal. 2006), *aff’d in part*, 508 F.3d 1146. As the commentary on the decision below confirms, the Order has already begun to have that chilling effect. Interlocutory review is thus necessary “to bring resolution to an important and controlling question of law.” Ex. B at 2.

II. THE DISTRICT COURT’S REJECTION OF THE PRECEDENT OF TWO CIRCUITS CONFIRMS THAT THERE ARE SUBSTANTIAL GROUNDS FOR DIFFERENCE OF OPINION ON THE ISSUE DECIDED IN THE ORDER BELOW.

Given the Ninth Circuit’s decision in *Perfect 10*—as well as numerous dis-

strict court decisions embracing that decision and a Seventh Circuit decision on a closely related issue—the district court’s ruling is plainly one “as to which there is substantial ground for difference of opinion.”

In *Perfect 10*, the Ninth Circuit held that “the plain language of the statute” compelled adoption of a bright-line test for whether an online publisher has made a public display of content:

[A] computer owner that stores an image as electronic information and serves that electronic information directly to the user (“i.e., physically sending ones and zeroes over the [I]nternet to the user’s browser”) is displaying the electronic information in violation of a copyright holder’s exclusive display right. Conversely, the owner of a computer that does not store and serve the electronic information to a user is not displaying that information, even if such owner in-line links to or frames the electronic information.

508 F.3d at 1160, 1159 (internal citations omitted). The Ninth Circuit grounded this holding squarely in the Copyright Act’s text, and in particular its definitions of “display,” “copies,” and “fixed.” *Id.* at 1160-61. When a website publisher inline links to images stored on another website, it “does not have a copy of the images for purposes of the Copyright Act,” “cannot communicate a copy,” and therefore is not the party that publicly “displays” the image. *Id.* at 1160-61 (citing 17 U.S.C. § 101). The court acknowledged that, although inline linking “may facilitate the user’s access to infringing images ... , such assistance raises only contributory liability issues and does not constitute direct infringement of the copyright owner’s display rights.” *Id.* at 1161 (emphasis added) (internal citations omitted).

The district court’s decision here is also in substantial tension with the Seventh Circuit’s decision in *Flava Works*, 689 F.3d 754, which expressly endorsed the Perfect 10 analysis. The court below distinguished *Flava Works* on the grounds that it primarily involved contributory—not direct—infringement. But the Seventh Circuit clearly adopted the Server Test in reaching its decision. *Id.* at 757. In analyzing whether the defendant (myVidster) contributed to infringement of the public performance right by allowing its users to embed videos on its site, the court compared myVidster’s actions to publishing theater listings, and held that doing so “is not ‘transmitting or communicating’” the performances. *Id.* at 761. Cf. 17 U.S.C. § 101 (defining “perform or display a work ‘publicly’” as to “transmit or otherwise communicate a performance or display of the work”). Indeed, the court expressly rejected the concept of embedding as direct infringement:

Is myVidster doing anything different [from publishing theater listings]? To call the provision of contact information [i.e., the provision of HTML instructions to embed a piece of content] transmission or communication and thus make myVidster a direct infringer would blur the distinction between direct and contributory infringement and by doing so make the provider of such information an infringer even if he didn’t know that the work to which he was directing a visitor to his website was copyrighted. ... myVidster doesn’t touch the data stream, which flows directly from one computer to another, neither being owned or operated by myVidster.

Flava Works, 689 F.3d at 761 (emphasis added). See also *id.* at 762 (holding that service allowing upload of “backup” copies of infringing videos to defendant’s own servers did, by contrast, “infringe[] *Flava*’s copyrights directly”).

Numerous other district courts have also applied or endorsed Perfect 10 or the Server Test (even if not by name) in a variety of contexts.² Although the district court here found these cases distinguishable for various reasons, they illustrate the broad applicability and acceptance of the Server Test before Plaintiff filed this lawsuit.

There are also substantial grounds for difference of opinion with respect to the district court's application of the Supreme Court's decision in *American Broadcasting Companies, Inc. v. Aereo, Inc.*, 134 S. Ct. 2498 (2014). There, the Supreme Court held that a streaming video service that delivered broadcast television transmissions to subscribers through an elaborate system that assigned a single dime-sized "antenna" to each subscriber was, in essence, no different than a cable transmitter. The Court held that the back-end technical distinctions "mean[] nothing to the subscriber," and "mean[] nothing to the broadcaster." *Id.* at 2507. The Court thus rejected the notion that a "single difference, invisible to subscriber and

² See *MyPlayCity, Inc. v. Conduit Ltd.*, No. 10 Civ. 1615(CM), 2012 WL 1107648 (S.D.N.Y. Mar. 30, 2012), adhered to on recons., 2012 WL 2929392 (S.D.N.Y. July 18, 2012); *Live Face on Web, LLC v. Biblio Holdings LLC*, No. 15 Civ. 4848 (NRB), 2016 WL 4766344, at *1 (S.D.N.Y. Sept. 13, 2016); *Capitol Records, LLC v. ReDigi Inc.*, 934 F. Supp. 2d 640 (S.D.N.Y. 2013); see also *Grady v. Iacullo*, No. 13-cv-00624-RM-KMT, 2016 WL 1559134 (D. Colo. Apr. 18, 2016); *Totally Her Media, LLC v. BWP Media USA, Inc.*, No. CV 13-8379-AB (PLAx), 2015 WL 12659912 (C.D. Cal. Mar. 24, 2015); *Leveyfilm, Inc. v. Fox Sports Interactive Media, LLC*, No. 13 C 4664, 2014 WL 3368893 (N.D. Ill. July 8, 2014); but see *Leaders Inst., LLC v. Jackson*, No. 3:14-cv-3572-B, 2017 WL 52629514 (N.D. Tex. Nov. 22, 2017).

broadcaster alike, could transform a system that is for all practical purposes a traditional cable system” into something totally different. *Id.*

Although *Aereo* arose in a completely different context, the district court held that this language from *Aereo* “strongly support[s] plaintiff’s argument that liability should not hinge on invisible, technical processes imperceptible to the viewer.” *Ex. A* at 21. The court thus decided that the question of who is hosting and transmitting content to website viewers is irrelevant if the content is visible to the viewer either way.

However, reading *Aereo* to establish that technological architecture no longer matters for determining copyright liability would upend large swaths of copyright law. That is why the Supreme Court was careful to cabin its “limited holding” to the unique facts of the case, and to emphasize that the decision should not be construed to “discourage or to control the emergence or use of different technologies ... not before the Court, as to which Congress has not plainly marked the course.” *Id.* at 2510-11 (quotation marks and citations omitted). Other courts have accordingly refused to apply *Aereo*’s reasoning outside its specific context and rejected arguments that the Court “adopted a technology-agnostic interpretation of ... the Copyright Act.” *Fox Television Stations, Inc. v. FilmOn X LLC*, 150 F. Supp. 3d 1, 16 (D.D.C. 2015) (“[T]echnological differences could very well matter as to whether a particular provider ‘performs’ within the meaning of the [Copy-

right Act].”); see also *Capitol Records, Inc. v. MP3tunes, LLC*, 48 F. Supp. 3d 703, 719 (S.D.N.Y. 2014) (holding that that third-party web domains, which were “not ‘substantially similar’ to a community antenna television provider” were “beyond Aereo’s reach”), rev’d in part on other grounds, 844 F.3d 79 (2d Cir. 2016)).

The question of how broadly Aereo applies—and whether the district court exceeded those bounds here—is an unsettled question ripe for review by this Court, and the district court’s expansive reading of Aereo’s reasoning—in conflict with other courts—further underscores that there are substantial grounds for disagreeing with the decision below.

III. INTERLOCUTORY REVIEW WOULD MATERIALLY ADVANCE TERMINATION OF THE LITIGATION.

Finally, interlocutory review would plainly serve the interest of speeding the end of this litigation.

Section 1292(b) does not “require[] that the interlocutory appeal have a final, dispositive effect on the litigation, only that it ‘may materially advance’ the litigation.” *Reese v. BP Expl. (Alaska) Inc.*, 643 F.3d 681, 688 (9th Cir. 2011); accord. *Klinghofer*, 921 F.2d at 24.

As discussed above, reversal of the Order would immediately bring an end to the litigation for several defendants. Moreover, resolving the embedded uses issue would streamline the claims and narrow the issues for discovery and trial for the remaining defendants. As the district court put it, immediate appeal will “ma-

terially advance the ultimate termination of th[e] litigation” and “more efficiently resolve this matter.” Id. Ex. B at 2.

CONCLUSION

For the foregoing reasons, the Court should grant the Publishers’ petition for interlocutory appeal under § 1292(b).

Dated: New York, New York Respectfully submitted,
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CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Fed. R. App. P. 5(c)(1) and 32(f) and (g), the foregoing Defendants-Appellees' Petition for Permission to Appeal under 28 U.S.C. § 1292(b) is proportionately spaced, has a typeface of 14 points or more and contains 5,187 words.

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CERTIFICATE OF SERVICE

I, Lacy H. Koonce, III, a member of the Bar of this Court, hereby certify that on March 30, 2018, I caused to be electronically filed the foregoing PETITION FOR PERMISSION TO APPEAL PURSUANT TO 28 U.S.C. § 1292(b) and caused the same to be served via Electronic Mail, as agreed by the parties in writing, on counsel of record at the following addresses:

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EXHIBIT A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

USDC SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #: _____
DATE FILED: February 15, 2018

----- X
JUSTIN GOLDMAN,

Plaintiff,

-v-

BREITBART NEWS NETWORK, LLC,
HEAVY, INC., TIME, INC., YAHOO, INC.,
VOX MEDIA, INC., GANNETT COMPANY,
INC., HERALD MEDIA, INC., BOSTON
GLOBE MEDIA PARTNERS, INC., and NEW
ENGLAND SPORTS NETWORK, INC.,

Defendants.
----- X

17-cv-3144 (KBF)

OPINION & ORDER

KATHERINE B. FORREST, District Judge:

When the Copyright Act was amended in 1976, the words “tweet,” “viral,” and “embed” invoked thoughts of a bird, a disease, and a reporter. Decades later, these same terms have taken on new meanings as the centerpieces of an interconnected world wide web in which images are shared with dizzying speed over the course of any given news day. That technology and terminology change means that, from time to time, questions of copyright law will not be altogether clear. In answering questions with previously un contemplated technologies, however, the Court must not be distracted by new terms or new forms of content, but turn instead to familiar guiding principles of copyright. In this copyright infringement case, concerning a candid photograph of a famous sports figure, the Court must construe how images shown on one website but stored on another website’s server implicate an owner’s exclusive display right.

Today, many websites embed Twitter posts into their own content; for those familiar with digital news or other content, this is common knowledge. Here, plaintiff Justin Goldman's copyrighted photo of Tom Brady went "viral"—rapidly moving from Snapchat to Reddit to Twitter—and finally, made its way onto the websites of the defendants, who embedded the Tweet alongside articles they wrote about Tom Brady actively helping the Boston Celtics recruit basketball player Kevin Durant.

Plaintiff, claiming he never publicly released or licensed his photograph, filed suit against the defendant websites, claiming a violation of his exclusive right to display his photo, under § 106(5) of the Copyright Act.

With the consent of the parties, this Court divided the litigation into two phases—the first to determine whether defendants' actions violate the exclusive right to display a work (here an embedded Tweet), and the second to deal with all remaining issues, such as the liability (or non-liability) for other defendants and any defenses that have been raised.

Defendants filed a motion for partial Summary Judgment on October 5, 2017. (ECF No. 119.) The Court heard oral argument on January 16, 2018.

Having carefully considered the embedding issue, this Court concludes, for the reasons discussed below, that when defendants caused the embedded Tweets to appear on their websites, their actions violated plaintiff's exclusive display right; the fact that the image was hosted on a server owned and operated by an unrelated third party (Twitter) does not shield them from this result.

Accordingly, defendants' motion for partial Summary Judgment is DENIED. Partial Summary Judgment is GRANTED to the plaintiff.

I. FACTUAL BACKGROUND

The parties agree that the principle issue briefed on this motion is a legal one and amenable to summary judgment. The following facts are materially undisputed and all inferences are drawn in favor of the plaintiff. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986).

A. The Tom Brady Photo

On July 2, 2016, plaintiff Justin Goldman snapped a photograph of Tom Brady (the "Photo"), Danny Ainge, and others on the street in East Hampton. (ECF No. 149, Goldman Declaration ("Goldman Decl.") ¶ 2.) Shortly thereafter, he uploaded the photograph to his Snapchat Story.¹ (Id. ¶ 5.) The Photo then went "viral," traveling through several levels of social media platforms—and finally onto Twitter, where it was uploaded by several users, including Cassidy Hubbarth (@cassidyhubbarth), Bobby Manning (@RealBobManning), Rob H (@rch111), and Travis Singleton (@SneakerReporter). (Id. ¶ 6–10; ECF No. 120, Defendants' Statement of Undisputed Facts Pursuant to Local Rule 56.1 ("Defs.' 56.1 Statement") ¶ 28.) These uploads onto Twitter are referred to as "Tweets."

Defendants in this case are online news outlets and blogs who published articles featuring the Photo. Each of defendants' websites prominently featured the Photo by "embedding" the Tweet into articles they wrote over the course of the next

¹ Snapchat is a social media platform where users share photographs and messages; a Snapchat story is a series of photos a user posts—each photo is available for twenty-four hours only.

forty-eight hours; the articles were all focused on the issue of whether the Boston Celtics would successfully recruit basketball player Kevin Durant, and if Tom Brady would help to seal the deal.

It is undisputed that plaintiff holds the copyright to the Photo.

B. Embedding

None of the defendant websites copied and saved the Photo onto their own servers. Rather, they made the Photo visible in their articles through a technical process known as “embedding.” Some background is helpful to an understanding of the embedding process.

A webpage is made up of a series of instructions usually written by coders in Hypertext Markup Language (“HTML”). These instructions are saved to a server (a computer connected to the internet), and when a user wishes to view a webpage, his or her computer’s browser connects with the server, at which point the HTML code previously written by the coder instructs the browser on how to arrange the webpage on the user’s computer. The HTML code can allow for the arrangement of text and/or images on a page and can also include photographs. When including a photograph on a web page, the HTML code instructs the browser how and where to place the photograph. Importantly for this case, the HTML code could instruct the browser either to retrieve the photograph from the webpage’s own server or to retrieve it from a third-party server.

“Embedding” an image on a webpage is the act of a coder intentionally adding a specific “embed” code to the HTML instructions that incorporates an image,

hosted on a third-party server, onto a webpage. To embed an image, the coder or web designer would add an “embed code” to the HTML instructions; this code directs the browser to the third-party server to retrieve the image. An embedded image will then hyperlink (that is, create a link from one place in a hypertext document to another in a different document) to the third-party website. The result: a seamlessly integrated webpage, a mix of text and images, although the underlying images may be hosted in varying locations. Most social media sites—Facebook, Twitter, and YouTube, for example—provide code that coders and web designers can easily copy in order to enable embedding on their own webpages.

Here, it is undisputed that none of the defendant websites actually downloaded the Photo from Twitter, copied it, and stored it on their own servers. Rather, each defendant website merely embedded the Photo, by including the necessary embed code in their HTML instructions. As a result, all of defendants’ websites included articles about the meeting between Tom Brady and the Celtics, with the full-size Photo visible without the user having to click on a hyperlink, or a thumbnail, in order to view the Photo.

II. LEGAL PRINCIPLES

A. Summary Judgment Standard

This Court applies the well-known summary judgment standard set forth in Rule 56 of the Federal Rules of Civil Procedure. Summary Judgment may not be granted unless a movant shows, based on admissible evidence in the record, “that there is no genuine dispute as to any material fact and the movant is entitled to

judgment as a matter of law.” Fed. R. Civ. P. 56(a). The moving party bears the initial burden of demonstrating “the absence of a genuine issue of material fact.” Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). When the moving party does not bear the ultimate burden on a particular claim or issue, it need only make a showing that the non-moving party lacks evidence from which a reasonable jury could find in the non-moving party’s favor at trial. Id. at 322–23.

In making a determination on summary judgment, the court must “construe all evidence in the light most favorable to the non-moving party, drawing all inferences and resolving all ambiguities in its favor.” Dickerson v. Napolitano, 604 F.3d 732, 740 (2d Cir. 2010) (citing LaSalle Bank Nat’l Ass’n v. Nomura Asset Capital Corp., 424 F.3d 195, 205 (2d Cir. 2005)). Once the moving party has discharged its burden, the opposing party must set out specific facts showing a genuine issue of material fact for trial. Wright v. Goord, 554 F.3d 255, 266 (2d Cir. 2009). “A party may not rely on mere speculation or conjecture as to the true nature of the facts to overcome a motion for summary judgment,” as “mere conclusory allegations or denials cannot by themselves create a genuine issue of material fact where none would otherwise exist.” Hicks v. Baines, 593 F.3d 159, 166 (2d Cir. 2010) (internal quotation marks, citations, and alterations omitted).

“In considering a motion for summary judgment, if our analysis reveals that there are no genuine issues of material fact, but that the law is on the side of the non-moving party, we may grant summary judgment in favor of the non-moving party even though it has made no formal cross-motion.” Orix Credit Alliance, Inc. v.

Horten, 965 F. Supp. 481, 484 (S.D.N.Y. 1997) (citing Int’l Union of Bricklayers v. Gallante, 912 F. Supp. 695, 700 (S.D.N.Y. 1996); see also Coach Leatherware Co. v. AnnTaylor, Inc., 933 F.2d 162, 167 (2d Cir. 1991) (“[I]t is most desirable that the court cut through mere outworn procedural niceties and make the same decision as would have been made had defendant made a cross-motion for summary judgment.” (citing Local 33, Int’l Hod Carriers v. Mason Tenders Dist. Council, 291 F.2d 496, 505 (2d Cir. 1961))). “Summary judgment may be granted to the non-moving party in such circumstances so long as the moving party has had an adequate opportunity to come forward with all of its evidence.” Orix Credit Alliance, 965 F. Supp. at 484. (citing Cavallaro v. Law Office of Shapiro & Kreisman, 933 F. Supp. 1148, 1152 (E.D.N.Y. 1996)).

B. The Copyright Act

“From its beginning, the law of copyright has developed in response to significant changes in technology.” Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 430 (1984). Copyright protections “subsists . . . in original works of authorship fixed in any tangible medium of expression.” 17 U.S.C. § 102(a). The Copyright Act of 1976, enacted in response to changing technology, gives a copyright owner several “exclusive rights,” including the exclusive right to “display the copyrighted work publicly.” 17 U.S.C. § 106(5). To display a work, under the Act, is to “show a copy of it, either directly or by means of a film, slide, television image, or any other device or process.” 17 U.S.C. § 101 (emphasis added). The Act’s Transmit Clause defines that exclusive right as including the right to

“transmit or otherwise communicate . . . a display of the work . . . to the public, by means of any device or process.” Id. It further defines “device or process” as “one now known or later developed.” Id.

A review of the legislative history reveals that the drafters of the 1976 Amendments intended copyright protection to broadly encompass new, and not yet understood, technologies. Indeed, on the first page of the House Report, the drafters proclaimed that the Amendments were necessary in part because “technical advances have generated new industries and new methods for the reproduction and dissemination of copyrighted works;” furthermore, Congress did “not intend to freeze the scope of copyrightable subject matter at the present stage of communications technology.” H.R. Rep. 94-1476, 47, 51 (1976).

Specifically, in considering the display right, Congress cast a very wide net, intending to include “[e]ach and every method by which the images . . . comprising a . . . display are picked up and conveyed,” assuming that they reach the public. Id. at 64 (emphasis added). It further noted that “display’ would include the projection of an image on a screen or other surface by any method, the transmission of an image by electronic or other means, and the showing of an image on a cathode ray tube, or similar viewing apparatus connected with any sort of information storage and retrieval system.” Id. (emphasis added). Indeed, an infringement of the display right could occur “if the image were transmitted by any method (by closed or open circuit television, for example, or by a computer system) from one place to members of the public elsewhere.” Id. at 80 (emphasis added).

The Register of Copyrights testified during hearings that preceded the passage of the Act: “[T]he definition [of the display right] is intended to cover every transmission, retransmission, or other communication of [the image],” beyond the originating source that might store the image, but including “any other transmitter who picks up his signals and passes them on.” H. Comm. On the Judiciary, 89th Cong., Copyright Law Revision Part 6: Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law: 1965 Revision Bill, at 25 (Comm. Print. 1965). He highlighted the importance of the display right in light of changing technology, specifically warning that “information storage and retrieval devices . . . when linked together by communication satellites or other means . . . could eventually provide libraries and individuals throughout the world with access to a single copy of a work by transmission of electronic images” and therefore that “a basic right of public exhibition should be expressly recognized in the statute.” Id. at 20 (emphasis added).

C. American Broadcasting Cos., Inc. v. Aereo, Inc.

The Supreme Court most recently considered the intersection of novel technologies and the Copyright Act in the Aereo decision, rendered in 2014. American Broadcasting Cos., Inc. v. Aereo, Inc., 134 S. Ct. 2498 (2014). The issue in Aereo was the performance right; the Court was deciding whether Aereo “infringed this exclusive right by selling its subscribers a technologically complex service that allows them to watch television programs over the Internet at about the same time as the programs are broadcast over the air.” Id. at 2503. Aereo charged a monthly

fee to allow subscribers to watch broadcast television programming over the internet; it maintained a vast number of servers and antennas in a central warehouse. When a user wanted to watch a program, he would visit Aereo's website and select a show; in turn, Aereo's servers would select an antenna, tune it to the on-air broadcast, and transmit it via the internet to the subscriber. Aereo argued that since the user chose the programs and Aereo's technology merely responded to the user's choice, it was the user and not Aereo who was in fact "transmitting" the performance.

The Court rejected this analysis, comparing Aereo to the cable companies that parts of the 1976 Amendments were intended to reach. When comparing cable technology (where the signals "lurked behind the screen") to Aereo's technology (controlled by a click on a website), the Court stated: "[T]his difference means nothing to the subscriber. It means nothing to the broadcaster. We do not see how this single difference, invisible to subscriber and broadcaster alike, could transform a system that is for all practical purposes a traditional cable system into 'a copy shop that provides its patrons with a library card.'" Id. at 2507.

Even the dissent, which would have found no liability based on the lack of Aereo's volition in choosing which programming to make available, stated that where the alleged infringer plays no role in selecting the content, it cannot be held directly liable when a customer makes an infringing copy: "Aereo does not 'perform' for the sole and simple reason that it does not make the choice of content." Id. at 2514 (Scalia, J., dissenting).

D. The “Server Test”

Defendants urge this Court to define the scope of the display right in terms of what they refer to as the “Server Test.” According to defendants, it is “well settled” law and the facts of this case call for its application. As set forth below, the Court does not view the Server Test as the correct application of the law with regard to the facts here. Nevertheless, it is useful to briefly chronicle the body of law that has developed in that area and explain why it is inapplicable.

In Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146 (9th Cir. 2007) (“Perfect 10 II”), the Ninth Circuit considered a claim of direct infringement of the display right against Google based upon Google Image Search. The district court addressed two different questions: 1) did the thumbnail images that automatically pop up when a user types in a search term constitute direct infringements of the display right; and 2) did the full size images that appeared on the screen after a user clicked on a thumbnail constitute direct infringements of the same display right. In answer, the court made a sharp distinction between the two based upon where the images were hosted. Perfect 10 v. Google, Inc., 416 F. Supp. 2d 828, 839 (C.D. Cal. 2006) (“Perfect 10 I”). First, it found the thumbnails to be infringing, based on the fact that they were stored on Google’s server. Id. at 844. Conversely, it held that the full size images, which were stored on third-party servers and accessed by “in-line linking”—which works, like embedding, based upon the HTML code instructions—were not infringements. Id. In so doing, the court rejected the plaintiff’s proposed Incorporation Test, which would define display as the “act of

incorporating content into a webpage that is then pulled up by the browser.” Id. at 839. It adopted instead the Server Test, where whether a website publisher is directly liable for infringement turns entirely on whether the image is hosted on the publisher’s own server, or is embedded or linked from a third-party server.

On appeal, the Ninth Circuit affirmed.² In the Ninth Circuit, therefore, at least as regards a search engine, the “Server Test” is settled law.

Defendants here argue that Perfect 10 is part of an “unbroken line of authority” on which this Court should rely in determining broadly whether a copyright owner’s display right has been violated. Outside of the Ninth Circuit, however, the Server Test has not been widely adopted. Even a quick survey reveals that the case law in this area is somewhat scattered. Of the other Circuits, only the Seventh Circuit has weighed in thus far—in Flava Works, Inc. v. Gunter, 689 F.3d 754 (7th Cir. 2012), the question before the court was whether the defendant was a contributory infringer. Defendant in that case, a “social bookmarker,” whose service involved enabling individuals who share interests to point each other towards online materials (in this case, videos) that cater towards that taste, through embedding the code for the video onto its website. The videos remained hosted on the original servers. As with Perfect 10, upon arriving on defendant’s website, thumbnails would appear; after clicking on one, the user would retrieve content from plaintiff’s website. The Flava Court found that defendants were not contributory infringers; the question of direct infringement was never reached. The

²It found, however, that “Google is likely to succeed in proving its fair use defense” as to the thumbnail images.

lower court, however, had opined that “[t]o the extent that Perfect 10 can be read to stand for the proposition that inline linking can never cause a display of images or videos that would give rise to a claim of direct copyright infringement, we respectfully disagree. In our view, a website’s servers need not actually store a copy of the work in order to ‘display’ it.” Flava Works, Inc. v. Gunter, 2011 WL 3876910, at *4 (N.D. Ill. Sept. 1, 2011), rev’d on other grounds, 689 F.3d 754 (7th Cir. 2012) (emphasis added).

Four courts in this District have discussed the Server Test and Perfect 10’s holding; none adopted the Server Test for the display right. First, in Live Face on Web, LLC v. Biblio Holdings LLC, 2016 WL 4766344 (S.D.N.Y. Sept. 12, 2016), the issue before the court was the distribution right, not the display right. Defendant argued that a distribution had not occurred, since the alleged infringing content was hosted on a third-party server, and not its own. The court noted that defendant cited no legal authority for this proposition, but stated that “such authority may exist,” citing Perfect 10. Id. at *4. The court did not adopt the Server Test; rather, it held that additional discovery was necessary as the issue had “hardly” been briefed. Id. at *5. Second, in MyPlayCity, Inc., v. Conduit Ltd., 2012 WL 1107648 (S.D.N.Y. Mar. 30, 2012), the distribution right was again at issue. In that case, when the user clicked a “play now” button on the defendant’s customized tool bar, it would be able to play games hosted on the plaintiff’s servers. The court cited Perfect 10 and then found that, due to the fact that plaintiff’s servers “‘actually disseminated’ the copies of [plaintiff’s] copyrighted games, [defendant] cannot be

held liable for infringing on [plaintiff's] distribution rights.” Id. at *14. Third, in Pearson Education, Inc. v. Ishayev, 963 F. Supp. 2d 239 (S.D.N.Y. 2013), the court held that standard text hyperlinks (not including images) that users click in order to view and visit other sites were not a use of infringing content, relying in part on Perfect 10; the exclusive right at issue here, too, was the distribution right.

Only the fourth case in this District, Capitol Records, LLC v. ReDigi Inc., 934 F. Supp. 2d 640 (S.D.N.Y. 2013) squarely dealt with the § 106(5) display right. There, however, the court did no more than offer a simple factual statement, “The Ninth Circuit has held that the display of a photographic image on a computer may implicate the display right, though infringement hinges, in part, on where the image was hosted.” Id. at 652 (emphasis added). It then proceeded to deny summary judgment based on material disputes as to the content of the allegedly infringing issues. Id.

Additionally, in a trademark decision rendered in this District prior to Perfect 10, when considering whether defendant Tunes was liable for trademark infringement to the Hard Rock Café for “framing” the Hard Rock logo on their website, the court held that it was. Hard Rock Café Int’l v. Morton, 1999 WL 717995 (S.D.N.Y. Sept. 9, 1999). After considering both the fact that “it [was] not clear to the computer user that she or he has left the [plaintiff's] web site” and the fact that there was a “seamless presentation” on the website, the court found that “the only possible conclusion is that the Hard Rock Hotel Mark is used or exploited to advertise and sell CDS.” Id. at *25.

Only a handful of other district courts have considered the issue.³ In Grady v. Iacullo, 2016 WL 1559134 (D. Colo. Apr. 18, 2016), the court considered the exclusive reproduction and distribution rights, and, relying on Perfect 10, reopened discovery in order to allow plaintiff an opportunity to show that defendant stored the allegedly infringing images on his own computer.⁴ In another recent district court case, plaintiff survived the motion to dismiss stage in a distribution case, based on the theory that each time a user used defendant's website, it "cause[d] a copy of [plaintiff's] software to be distributed to the website visitor's computer in cache, memory, or hard drive" and that the "[defendant's] website distributed copies of the code to each of the website's visitors." Live Face on Web, LLC v. Smart Move Search, Inc., 2017 WL 1064664 (D.N.J. Mar. 21, 2017), at *2.

Finally, in The Leader's Institute, LLC v. Jackson, 2017 WL 5629514 (N.D. Tex. Nov. 22, 2017), at issue on summary judgment was, *inter alia*, whether plaintiffs infringed defendant's exclusive display rights by "framing" defendant's websites. The court rejected Perfect 10, holding that by "framing the defendant's copyrighted works, the plaintiffs impermissibly displayed the works to the public." Id. at *10. It distinguished Perfect 10 on its facts, noting that, "[U]nlike Google, [plaintiffs' website] did not merely provide a link by which users could access [defendant's] content but instead displayed [defendant's] content as if it were its own." Id. at *11. It further stated: "[T]o the extent Perfect 10 makes actual

³ The Court does not here review district court cases from the Ninth Circuit, as they are appropriately controlled by Perfect 10's analysis.

⁴ It subsequently granted summary judgment to the plaintiff upon a showing that the defendant had, in fact, downloaded the images onto his computer.

possession of a copy a necessary condition to violating a copyright owner's exclusive right to display the copyrighted works, the Court respectfully disagrees with the Ninth Circuit. . . . The text of the Copyright Act does not make actual possession of a work a prerequisite for infringement.” Id.

In sum, this Court is aware of only three decisions outside of the Ninth Circuit considering the display right in light of Perfect 10; one from the Seventh Circuit which adopted the Server Test for contributory liability, one from the Southern District which stated as a factual matter only that Perfect 10 existed, and one from the Northern District of Texas rejecting Perfect 10.

III. DISCUSSION

Defendants' argument is simple—they have framed the issue as one in which the physical location and/or possession of an allegedly infringing image determines liability under the § 106(5) exclusive display right. Defendants argue that—despite the seamless presentation of the Brady Photo on their webpages—they simply provided “instructions” for the user to navigate to a third-party server on which the photo resided. According to defendants, merely providing instructions does not constitute a “display” by the defendants as a matter of law. They maintain that Perfect 10's Server Test is settled law that should determine the outcome of this case.

Plaintiff maintains both 1) that to apply the Server Test leads to results incongruous with the purposes and text of the Copyright Act; and 2) even if the Server Test is rightfully applied in a case such as Perfect 10, or another case in

which the user takes a volitional action of his own to display an image, it is inappropriate in cases such as those here, where the user takes no action to “display” the image. He and his amici⁵ caution that to adopt the Server Test broadly would have a “devastating” economic impact on photography and visual artwork licensing industries, noting that it would “eliminate” the incentives for websites to pay licensing fees, and thus “deprive content creators of the resources necessary to invest in further creation.” (ECF No. 145-1 at 4.)

The Court agrees with plaintiff. The plain language of the Copyright Act, the legislative history undergirding its enactment, and subsequent Supreme Court jurisprudence provide no basis for a rule that allows the physical location or possession of an image to determine who may or may not have “displayed” a work within the meaning of the Copyright Act. Moreover, the Court agrees that there are critical factual distinctions between Perfect 10 and this case such that, even if the Second Circuit were to find the Server Test consistent with the Copyright Act, it would be inapplicable here.

A. The Copyright Act

Nowhere does the Copyright Act suggest that possession of an image is necessary in order to display it. Indeed, the purpose and language of the Act support the opposite view. The definitions in § 101 are illuminating. First, to display a work publicly means to “to transmit . . . a . . . display of the work . . . by

⁵ Getty Images, the American Society of Media Photographers, Digital Media Licensing Association, National Press Photographers Association, and North American Nature Photography Association submitted an amicus brief supporting plaintiff. (ECF No. 145-1.)

means of any device or process.” 17 USC § 101. To transmit a display is to “communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent.” Id. (emphasis added). Devices and processes are further defined to mean ones “now known or later developed.” Id. This is plainly drafted with the intent to sweep broadly.

Here, defendants’ websites actively took steps to “display” the image. A review of just a few of the declarations proffered by defendants illustrates the point. For defendant Heavy.com:

[I]n order to embed the SneakerReporter Tweet, Heavy.com navigated to Twitter and copied the SneakerReporter Tweet’s URL. Heavy.com then used out of the box content management functionality provided by WordPress to embed the SneakerReporter Tweet within the Heavy.com Article.

(ECF No. 130, Nobel Decl. ¶ 5.).

Defendant Boston Herald “pasted a code line into its blog/article that contains Twitter HTML instructions.” (ECF No. 137, Emond Decl. ¶ 16.)

Defendant The Big Lead submitted a declaration in which the managing editor stated, “My entering the URL for the RealBobManningTweet into the field for embedded content in the CMS [content management system] caused this URL to be inserted into embedding code that became part of the HTML code for the Big Lead Article.” (ECF No. 127, Lisk Decl. ¶ 7.)

Defendant Gannett submitted a declaration in which the Vice President stated that:

[I]f I wanted that web page to display a photo that a third party user had posted to a site like Twitter, I could do so without me ever having

to make a copy of the photo. I would simply include in my HTML code some additional coding containing a link to the URL of the Twitter page where the photo appeared.

(ECF No. 126, Hiland Decl. ¶ 6) (emphasis added).

It is clear, therefore, that each and every defendant itself took active steps to put a process in place that resulted in a transmission of the photos so that they could be visibly shown. Most directly this was accomplished by the act of including the code in the overall design of their webpage; that is, embedding. Properly understood, the steps necessary to embed a Tweet are accomplished by the defendant website; these steps constitute a process. The plain language of the Copyright Act calls for no more.

Indeed, and as discussed above, the Copyright Act's authors intended to include "each and every method by which images . . . comprising a . . . display are picked up and conveyed;" moreover they went as far as to note that an infringement of the display right could occur "if the image were transmitted by any method (. . . for example, by a computer system) from one place to members of the public elsewhere." H.R. Rep. 94-1476, 64, 70 (1976). Persuasive as well is the warning of the Register of Copyrights that a "basic right of public exhibition" was necessary to the 1976 Amendments precisely because "information storage and retrieval devices . . . when linked together by communication satellites or other means . . . could eventually provide libraries and individuals throughout the world with access to a single copy or a work by transmission of electronic images." H. Comm. On the Judiciary, 89th Cong., Copyright Law Revision Part 6: Supplementary Report of the

Register of Copyrights on the General Revision of the U.S. Copyright Law: 1965 Revision Bill, at 25 (Comm. Print. 1965).

In sum, this Court sees nothing in either the text or purpose of the Copyright Act suggesting that physical possession of an image is a necessary element to its display for purposes of the Act.

B. Aereo's Impact

Moreover, though the Supreme Court has only weighed in obliquely on the issue, its language in Aereo is instructive. At heart, the Court's holding eschewed the notion that Aereo should be absolved of liability based upon purely technical distinctions—in the end, Aereo was held to have transmitted the performances, despite its argument that it was the user clicking a button, and not any volitional act of Aereo itself, that did the performing. The language the Court used there to describe invisible technological details applies equally well here: “This difference means nothing to the subscriber. It means nothing to the broadcaster. We do not see how this single difference, invisible to subscriber and broadcaster alike, could transform a system that is for all practical purposes a traditional cable system into a ‘copy shop that provides patrons with a library card.’” Aereo, 134 S. Ct. at 2507.

Of course, in Aereo there was no argument about the physical location of the antennae, which were without dispute located in Aereo's warehouses; similarly there was no dispute that Aereo's servers saved data from the on-air broadcasts onto its own hard drives. On the other hand, Aereo was arguably a more passive participant in transmitting the performance right than is a user in the case here—

who has no choice in what is displayed to him when he navigates to one of defendant's webpages. Furthermore, the principles that undergird the Aereo decision—chief among them that mere technical distinctions invisible to the user should not be the lynchpin on which copyright liability lies—apply with equal vigor here.

As noted above, even the dissent implies that were Aereo to engage in any sort of curatorial process as to content, that liability might lie: “In sum, Aereo does not perform for the sole and simple reason that it does not make the choice of content.” Id. at 2514 (Scalia, J., dissenting). This adds credence to the notion that where, as here, defendants are choosing the content which will be displayed, that they would indeed be displaying.

In sum, this Court reads Aereo, while not directly on point, as strongly supporting plaintiff's argument that liability should not hinge on invisible, technical processes imperceptible to the viewer.

C. Perfect 10

The Court declines defendants' invitation to apply Perfect 10's Server Test for two reasons. First, this Court is skeptical that Perfect 10 correctly interprets the display right of the Copyright Act. As stated above, this Court finds no indication in the text or legislative history of the Act that possessing a copy of an infringing image is a prerequisite to displaying it. The Ninth Circuit's analysis hinged, however, on making a “copy” of the image to be displayed—which copy would be stored on the server. It stated that its holding did not “erroneously collapse the

display right in section 106(5) into the reproduction right in 106(1).” Perfect 10 II, 508 F.3d at 1161. But indeed, that appears to be exactly what was done.

The Copyright Act, however, provides several clues that this is not what was intended. In several distinct parts of the Act, it contemplates infringers who would not be in possession of copies—for example in Section 110(5)(A) which exempts “small commercial establishments whose proprietors merely bring onto their premises standard radio or television equipment and turn it on for their customer’s enjoyment” from liability. H.R. Rep. No. 94-1476 at 87 (1976). That these establishments require an exemption, despite the fact that to turn on the radio or television is not to make or store a copy, is strong evidence that a copy need not be made in order to display an image.

Second, even if it correctly interprets the Act, to the degree that defendants interpret Perfect 10 as standing for a broadly-construed Server Test, focusing on the physical location of allegedly infringing images, this Court disagrees. Rather, Perfect 10 was heavily informed by two factors—the fact that the defendant operated a search engine, and the fact that the user made an active choice to click on an image before it was displayed—that suggest that such a broad reading is neither appropriate nor desirable.

In Perfect 10, the district court’s Opinion, while not strictly cabining its adoption of the Server Test to a search engine like Google, nevertheless relied heavily on that fact in its analysis. It stated, for example, that adopting the Server Test “will merely preclude search engines from being held directly liable for in-line

linking and or framing infringing contents stored on third-party websites.” Perfect 10 I, 416 F. Supp. 2d at 844 (emphasis added). It went on: “Merely to index the web so that users can more readily find the information they seek should not constitute direct infringement” Id. (emphasis added). On appeal, the Ninth Circuit began its statement of the case by saying, “we consider a copyright owner’s efforts to stop an Internet search engine from facilitating access to infringing images.” Perfect 10 II, 508 F.3d at 1154.

In addition, the role of the user was paramount in the Perfect 10 case—the district court found that users who view the full-size images “after clicking on one of the thumbnails” are “engaged in a direct connection with third-party websites, which are themselves responsible for transferring content.” Perfect 10 I, 416 F. Supp. 2d at 843.

In this Court’s view, these distinctions are critical. In Perfect 10, Google’s search engine provided a service whereby the user navigated from webpage to webpage, with Google’s assistance. This is manifestly not the same as opening up a favorite blog or website to find a full color image awaiting the user, whether he or she asked for it, looked for it, clicked on it, or not. Both the nature of Google Search Engine, as compared to the defendant websites, and the volitional act taken by users of the services, provide a sharp contrast to the facts at hand.

In sum, the Court here does not apply the Server Test. It is neither appropriate to the specific facts of this case, nor, this Court believes, adequately

grounded in the text of the Copyright Act. It therefore does not and should not control the outcome here.

D. Defenses

Defendants warn that to find for plaintiff here would “cause a tremendous chilling effect on the core functionality of the web.” (ECF No. 121, Defs.’ Mem. of Law in Supp. at 35) (quoting Perfect 10 I, 426 F. Supp. 2d at 840). Their amici⁶ warn that not adopting the Server Test here would “radically change linking practices, and thereby transform the Internet as we know it.”

The Court does not view the results of its decision as having such dire consequences. Certainly, given a number as of yet unresolved strong defenses to liability separate from this issue, numerous viable claims should not follow.

In this case, there are genuine questions about whether plaintiff effectively released his image into the public domain when he posted it to his Snapchat account. Indeed, in many cases there are likely to be factual questions as to licensing and authorization. There is also a very serious and strong fair use defense, a defense under the Digital Millennium Copyright Act, and limitations on damages from innocent infringement.

⁶ The Electronic Frontier Foundation, a non-profit foundation dedicated to free expression, and Public Knowledge, a not-for-profit public interest advocacy and research organization, submitted an amicus brief at ECF No. 143-1. (Amicus Brief of the Electronic Frontier Foundation and Public Knowledge in Support of Defendants’ Motion for Partial Summary Judgment.)

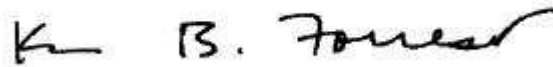
In sum, for all the reasons discussed above, the Court DENIES defendants' motion for partial summary judgment and GRANTS partial summary judgment to the plaintiff.

IV. CONCLUSION

For the reasons stated above, defendants' motion for partial Summary Judgment is DENIED. The Court GRANTS partial Summary Judgment to the plaintiff. The Clerk of Court is directed to terminate the motion at ECF No. 119.

SO ORDERED.

Dated: New York, New York
February 15, 2018

Handwritten signature of Katherine B. Forrest in black ink.

KATHERINE B. FORREST
United States District Judge

EXHIBIT B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

USDC SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #:
DATE FILED: March 19, 2018

----- X
JUSTIN GOLDMAN,

Plaintiff,

-v-

BREITBART NEWS NETWORK, LLC,
HEAVY, INC., TIME, INC., YAHOO, INC.,
VOX MEDIA, INC., GANNETT COMPANY,
INC., HERALD MEDIA, INC., BOSTON
GLOBE MEDIA PARTNERS, INC., and NEW
ENGLAND SPORTS NETWORK, INC.,

Defendants.
----- X

17-cv-3144 (KBF)

MEMORANDUM
DECISION & ORDER

KATHERINE B. FORREST, District Judge:

In this high-profile, high-impact copyright case, defendants have moved for certification of the Court’s partial summary judgment decision for interlocutory appeal under 28 U.S.C. § 1292(b) and to stay all other proceeding pending appeal.

28 U.S.C. § 1292(b) allows the district court to certify an interlocutory appeal from an Opinion or Order where the Order “involves a controlling question of law as to which there is substantial ground for difference of opinion and [where] an immediate appeal from the order may materially advance the ultimate termination of the litigation.” The Second Circuit has recognized that § 1292(b) was passed in part “to assure the prompt resolution of knotty legal problems.” Weber v. United States, 484 F.3d 154, 159 (2d Cir. 2007.)

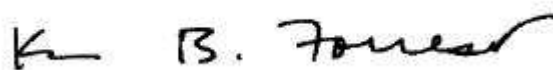
The Court finds that certification under §1292(b) is appropriate here for several reasons. The Court credits the parties' representations that its February 15, 2018 Opinion, finding defendants liable for violating the display right under § 106(5) of the Copyright Act, has created tremendous uncertainty for online publishers. In this case, the embedded image was hosted on Twitter; given the frequency with which embedded images are "retweeted," the resolution of this legal question has an impact beyond this case.

While there are remaining issues to be determined, the key issue in this case—whether there is copyright liability under the display right where one publisher "embeds" an image hosted on a third-party server—has already been decided. Furthermore, a reversal on appeal would result in the dismissal of several defendants and narrow the issues for those defendants who would remain. It would thus materially advance the ultimate termination of this litigation.

Accordingly, in order to bring resolution to an important and controlling question of law and to more efficiently resolve this matter, the Court certifies its February 15, 2018 Opinion for interlocutory appeal. All other proceedings are stayed pending this appeal.

SO ORDERED.

Dated: New York, New York
March 19, 2018



KATHERINE B. FORREST
United States District Judge