IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BLAKE J. ROBBINS, et al.,	:	Civil Action
	:	
Plaintiffs,	:	No. 10-665
	:	
v.	:	Hon. Jan E. DuBois
	:	
LOWER MERION SCHOOL DISTRICT, et al.,	:	
	:	
Defendants.	:	

DEFENDANTS' BRIEF IN SUPPORT OF THEIR POSITION THAT THE COURT NEED NOT MAKE FINDINGS OF FACT AND CONCLUSIONS OF LAW TO ENTER EQUITABLE RELIEF ON A PERMANENT BASIS

Date: September 1, 2010

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Defendants, Lower Merion School District, the Board of School Directors of the Lower Merion School District, and Christopher W. McGinley (collectively, the "District"), respectfully submit this brief in support of their position that the Court need not make findings of fact and conclusions of law to enter equitable relief on a permanent basis.

I. INTRODUCTION

At issue is the legal question whether the Court is required to enter findings of fact and conclusions of law when it enters permanent equitable relief to resolve this matter. It is not. There are no disputed facts that need to be resolved with respect to the equitable relief – which has already been agreed-upon and entered on an interim basis – and the District consents to the relief. Indeed, the District itself has asked the Court to make the relief permanent. And, the existing record irrefutably supports the entry of permanent relief. Accordingly, contrary to plaintiffs' unsupported positions, Rule 52(a) does not require the Court to state factual or findings or legal conclusions and Rule 65 does not require a finding of liability.

At issue from a practical perspective is whether the equitable phase of this action can be resolved now, at almost no further expense and burden to the parties, the Court, and District taxpayers, or only after substantial additional litigation. The District has proposed the simplest and most expeditious resolution: the Court should enter the existing equitable relief on a permanent basis. Doing so will permanently guarantee the comprehensive protections for ***all*** District students and families that plaintiffs' counsel himself has described as the "pinnacle" of the relief needed to resolve plaintiffs' equitable claims. Moreover, it should be noted that the extensive actions that the District already has taken, both pursuant to this Court's temporary relief orders and independently of this litigation – which include permanently discontinuing use of the TheftTrack remote monitoring application and even the LANrev computer management

software of which it was a part, and adopting new and revised policies and regulations governing the use of student laptops, the privacy of student data, and training for technology personnel – far exceed the limited declaratory and injunctive relief that plaintiffs sought in their complaint and injunction motion, and amply protect the rights of students and families that the District allegedly violated.

Notwithstanding that plaintiffs do not and cannot argue that the relief itself is insufficient to protect the class from the harms plaintiffs have alleged, they want the Court to do more: certify a class and render findings of fact and conclusions of law. Neither step is necessary or warranted as a matter of law, and each would involve substantial further litigation, the cost of which would be borne by District taxpayers while the entry of permanent relief intended for their benefit is delayed.

For example, plaintiffs harp on defendants' opposition to plaintiffs' pending motion for class certification as though class certification itself would resolve this matter. It would not. The parties would still have to negotiate and the Court would have to review and approve a settlement, or there would have to be a trial. Yet, there are no issues to resolve. And this action is not at a stage at which the Court can simply enter findings of fact and conclusions of law. The District has not even responded to plaintiffs' complaint, most of the claims of which are eminently dismissible as a matter of law because they do not apply to the alleged conduct. Nor has the District taken any discovery. In any event, whatever mechanism the Court might use to enable it to render findings and conclusions would be costly, would unnecessarily delay the entry of permanent relief, and would be wasteful (and inappropriate) because there are no issues to resolve and the District has consented to the relief. Thus, it is apparent that plaintiffs' approach would work to the detriment of the very class plaintiffs seek to represent.

Rather, plaintiffs seek benefits from class certification and findings of fact and conclusions of law that would inure not to the proposed class, but to themselves, their counsel, and the few other individuals who may pursue individual damages claims against the District (such as the other student on whose behalf plaintiffs' counsel has filed an individual damages action). Indeed, plaintiffs ask the Court to help pave the road for individual damages actions and bolster plaintiffs' counsel's claim for attorneys' fees. But that is not what the equitable phase of this case is about, and given the procedural posture of this case, plaintiffs' requests make no sense and would be inappropriate as a matter of law.

Accordingly, as further discussed below, the Court should promptly enter the District's proposed permanent equitable relief order and deny plaintiffs' motion for class certification.

II. BACKGROUND

A. The Agreed-Upon Equitable Relief Already in Place

Plaintiffs' claims arise from the District's remote monitoring – via TheftTrack, a feature of the LANrev computer management software – of laptop computers that the District issued to its high school students ("Student Laptops") as part of its One-to-One laptop program. More complete recitations of the facts giving rise to this action and the negotiation of the agreed-upon equitable relief orders currently in place are set forth in the District's Memorandum of Law in Opposition to Plaintiffs' Motion for Interim Attorneys' Fees Pursuant to 42 U.S.C. § 1988 ([Doc. No. 88], at 4-15) and Memorandum of Law in Opposition to Plaintiffs' Motion for Class Certification and in Support of Defendants' Cross-Motion for Entry of Permanent Equitable

Relief [Doc. No. 81] at 3-12.[1] Rather than repeat that background here, the District summarizes the pertinent facts as follows:

- Promptly after learning of Plaintiffs' complaint on the morning of February 18, 2010, the District discontinued use of TheftTrack. The District has not used TheftTrack or LANrev since February 18, 2010 and will not use them again.[2]

- On February 22, 2010, the District and Plaintiffs entered into a stipulated order pursuant to which the District agreed it would, *inter alia*: (i) not remotely activate webcams on, or remotely capture screenshots from, Student Laptops; and (ii) preserve pertinent evidence. (Order, entered Feb. 23, 2010 [Doc. No. 11], ¶ 1.)

- On May 14, 2010, the Court entered a comprehensive equitable relief order that arose from a series of discussions among counsel for the parties and the proposed intervenors. By agreement of the parties, the May 14, 2010 Order:

  (i) enjoins the District from remotely activating webcams on Student Laptops;

  (ii) enjoins the District from purchasing technology that allows for the remote activation of webcams on Student Laptops, with certain defined exceptions;

  (iii) enjoins the District from remotely capturing screenshots from Student Laptops, with certain defined exceptions;

  (iv) imposes specific, detailed requirements for any theft tracking technology the District may use for Student Laptops;

  (v) enjoins the District from accessing or reviewing any student-created files contained on Student Laptops, except in specifically defined circumstances;

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1 In addition, a comprehensive account of the District's remote monitoring of Student Laptops is available in the Report of Independent Investigation Regarding Remote Monitoring of Student Laptop Computers ("Investigation Report"), dated May 3, 2010. The Investigation report is attached to the District's opposition to plaintiffs' motion for class certification as Exhibit A and is available at the District's website at http://www.lmsd.org/sections/laptops/default.php?&id=1258.

2 *See* Decl. of David A. Ebby filed in support of the District's opposition to Plaintiffs' motion for class certification [Doc. No. 85-1], ¶¶ 3, 5.

(vi) requires the District to adopt official policies and regulations before the start of the 2010-2011 school year governing Student Laptops, the privacy of student data in such laptops, the training of District IS personnel with respect to Student Laptops and privacy, and the administration, oversight, and enforcement of such policies and regulations;

(vii) imposes numerous, specific requirements for the policies and procedures to be adopted pursuant to the Order;

(viii) requires the District – to the extent it is in possession of webcam photographs or screenshots from certain Student Laptops resulting from the District's use of TheftTrack – to provide the students who possessed those laptops while tracking was activated, and/or their parents or guardians consistent with the terms of the process described herein, an opportunity to view such images pursuant to a process to be developed under the auspices of, and supervised and approved by, this Court and Chief Magistrate Judge Thomas J. Rueter (*see also* Order, entered by Judge Rueter on May 14, 2010 [Doc. No. 67] (establishing viewing process));[3]

(ix) requires that all images referred to in (viii) shall be permanently destroyed by a date to be established by further order of the Court after the viewing process is completed and no pending governmental investigation or litigation requires the preservation of such images; and

(x) enjoins the District from otherwise disseminating or permitting access to any webcam photographs or screenshots, or any information contained therein, that the District obtained remotely from student laptops.

The Order further provides that it "shall be enforceable by any persons adversely affected by any violations of [the] Order, including parents or guardians of any adversely affected individual who is then a minor." (Order, entered May 14, 2010 [Doc. No. 68], ¶¶ 2-10.)

- On August 16, 2010, the District's Board approved new and revised policies and regulations that are consistent with the requirements of the May 14 Order and provide extensive additional privacy protections for students and their families.[4]

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[3] This process began almost immediately after entry of the May 14, 2010 Order and is substantially complete.

[4] The new and revised policies are summarized and set forth on the District's website at: http://www.lmsd.org/sections/laptops/.

> The adoption of the policies and regulations followed several public meetings at which the Board and its Policy Committee considered the new and revised policies and regulations. (*See* Doc. No. 81 at 11-12; Doc. No. 85-1, ¶ 8.)

Upon the entry of the May 14, 2010 Order, plaintiffs' counsel left no doubt that the parties and intervenors had negotiated, and the Court had entered, comprehensive equitable relief sufficient to protect the District's students and parents and put an end to the equitable relief phase of this case: "***I think we've really reached the pinnacle of what it is we needed to reach to put this to rest.***" (Judge Bans Webcam Spying on Students, Assoc. Press, May 14, 2010, Ex. A hereto (emphasis added).)

B. The District's Proposed Order Granting Permanent Equitable Relief

Through its pending Cross-Motion for Entry of Permanent Equitable Relief, the District seeks to make permanent that very same equitable relief.[5] (Proposed Order [Doc. No. 81-2], ¶¶ 2-7,10.) The District's proposed permanent equitable relief order also would: (i) require the District to preserve pertinent evidence; and (ii) prohibit the District from disseminating or permitting access to any webcam photographs or screenshots, or any information contained therein, that the District remotely obtained from student laptops except as permitted by the Court. (Id. ¶¶ 8-10.) Moreover, the proposed order would provide that "any person adversely affected by any violations" may enforce it, including parents or guardians of minor students (id. ¶ 11), and vest the Court with continuing jurisdiction over all matters relating to the proposed order (id. ¶ 12).

As the District argued in opposition to class certification and in support of its cross-motion, entering the already agreed-upon equitable relief on a permanent basis is the most

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[5] The proposed Wortley Intervenors joined the District's Cross-Motion. (*See* Doc. No. 83.)

expeditious way to end the equitable relief phase of this case and would best serve the interests of the District's students, parents, and taxpayers.

C. Plaintiffs' Brief

Plaintiffs contend that the Court must enter findings of fact and conclusions of law when it grants permanent equitable relief – including a finding of liability on the part of the District, notwithstanding that, among other things, the District has not even responded to plaintiffs' complaint and the parties agreed on the equitable relief that the District seeks to make permanent. Plaintiffs rely on Rules 52(a) and 65(d) of the Federal Rules of Civil Procedure, but as set forth below, the law contradicts their position in the circumstances here, where there are no disputed facts pertinent to the equitable relief, the parties agreed to the relief, and the District itself requests that the relief be entered on a permanent basis.

Plaintiffs also assert a number of speculative, jurisprudential reasons that the Court should enter findings and conclusions. As the District demonstrates below, those reasons do withstand scrutiny and only reflect plaintiffs' interest in advancing their individual interests, not those of the community that will be protected by the permanent equitable relief.

Notably, plaintiffs do not suggest that they have any objection to any terms of the proposed permanent equitable relief order. Nor should they, given that they negotiated and agreed to the terms of the order in an effort to resolve the equitable portion of this case, and that the relief far exceeds the limited equitable relief the plaintiffs requested in their complaint and motion for injunction (*i.e.*, an injunction prohibiting the District from remotely monitoring student laptops and requiring the District to preserve evidence) (*see* Compl. [Doc. No. 1], Prayer for Relief (requesting unspecified "declaratory and injunctive relief"); Motion for Injunction [Doc. No. 2]).

Finally, plaintiffs devote a substantial portion of their brief to an argument in support of their motion for class certification: they contend that certification is "necessary" even if the Court enters the proposed permanent equitable relief order. (*See* Pls. Br. at 10-16.) The District shows below that plaintiffs are wrong. Class certification is unnecessary and unwarranted, and would only protract this litigation at taxpayer expense.

III. ARGUMENT

A. The Court Need Not Enter Findings of Fact and Conclusions of Law – Much Less a Finding of Liability – When Entering Permanent Equitable Relief

1. Because There Are No Pertinent Disputed Facts and the District Consents to the Relief Plaintiffs Seek, Rule 52(a) Does Not Require the Court To State Factual Findings or Legal Conclusions

When there are no disputed facts (as is the case here), or when the defendant consents to the entry of the relief that the plaintiff seeks (as also is the case here), a court need not enter findings of fact and conclusions of law pursuant to Rule 52(a).

Rule 52(a) states that in "an action tried on the facts without a jury or with an advisory jury, the court must find the facts specially and state its conclusions of law separately." Fed. R. Civ. P. 52(a)(1). It further provides that "[i]n granting or refusing an interlocutory injunction, the court must similarly state the findings and conclusions that support its action." Fed. R. Civ. P. 52(a)(2). As plaintiffs note (Pls. Br. at 4), courts have extended this rule to permanent injunctions. "The purpose of Rule 52(a) is to assist the appellate courts in fulfilling [their] review function." Danny Kresky Enters. Corp. v. Magid, 716 F.2d 206, 215 (3d Cir. 1983) (holding that an objection to a lack of findings pursuant to Rule 52(a) can be waived); *see also* Clanton v. United States, 284 F.3d 420, 426-27 (2d Cir. 2002) (Rule 52(a) "aids the court of appeals in its review in the event of an appeal" and "informs the parties of the basis for the

court's decision and thereby helps them decide whether to appeal and what grounds to assert on that appeal").

Consistent with its purpose, Rule 52(a) does not require findings and conclusions when the pertinent facts are undisputed. *See*, *e.g.*, Immigration and Naturalization Serv. v. Bagamasbad, 429 U.S. 24, 25 (1976) ("As a general rule courts and agencies are not required to make findings on issues the decision of which is unnecessary to the results they reach."); Singson v. Norris, 553 F.3d 660, 663 (8th Cir. 2009) (affirming the District Court's refusal to make findings of fact with respect to plaintiff's religious views when those "beliefs and practices were undisputed"); *see also* Fed. R. Civ. P. 52 advisory committee note to subdivision (a) (explaining that the "judge need only make brief, definite, pertinent findings and conclusions ***upon the contested matters***") (emphasis added). Similarly, courts need not enter findings and conclusions when the parties agree on the relief. *See*, *e.g.*, Bowater N. Am. Corp. v. Murray Mach., Inc., 773 F.2d 71, 75 (6th Cir. 1985) (noting that findings and conclusions are unnecessary when a court enters agreed-upon relief); Angie's List, Inc. v. Ameritech Publ'g, Inc., No. 07-1630, 2010 WL 2719225, at *1 (S.D. Ind. July 7, 2010) ("Rule 52(a)(1) does not require courts to make findings of fact or conclusions of law when issuing consent decrees.").

Thus, when a defendant consents to the relief a plaintiff seeks without conceding liability, a court should not conduct or require additional proceedings solely for the purpose of rendering findings of fact and conclusions of law. *See* ABN AMRO Verzekeringer BV v. Geolistics Americas, Inc., 485 F.3d 85 (2d Cir. 2007). In ABN, the defendants, without conceding liability, tendered the full amount for which they could be held liable at trial. Id. at 92. The District Court then entered judgment for plaintiff, awarding it the amount tendered. Id. The plaintiff appealed on the grounds "that it was improper for the district court to enter

judgment in its favor without first finding, or requiring the defendants to concede, liability." Id. at 93. In concluding that the plaintiff's argument made "little sense," the Second Circuit explained that

> ABN's position would require either that the court refrain from entering judgment although all the issues upon which that judgment depends were settled (either by factual determination or concession), or that, as a prerequisite to judgment, the court conduct a trial of factual issues that could have no effect on the judgment. . . . It would make no sense to impose such requirements. Where a defendant has consented to judgment for all the relief the plaintiff can win at trial (according to the trial court's determination), the defendant's refusal to admit fault does not justify a trial to settle questions which can have no effect on the judgment.

Id. Thus, the District Court properly refused to address factual issues because "nothing of significance remained to adjudicate." Id.; s*ee also* Samsung Electronics Co., Ltd. v. Rambus, Inc., 523 F.3d 1374, 1380 (Fed. Cir. 2008) (holding that the District Court had no authority to make findings on an underlying issue when a party offered to pay the full amount sought); Ward v. Sante Fe Indep. Sch. Dist., 393 F.3d 599, 603-05 (5th Cir. 2004) (holding that the District Court appropriately declined to render findings and conclusions on constitutional claims because the court provided all of the relief that the plaintiffs could obtain).

For the same reasons, this Court need not and should not require the burdensome additional proceedings that would be required to render findings of fact and conclusions of law. There are no disputed issues of fact that need to be resolved for the Court to enter the equitable relief that the parties negotiated and agreed to and that plaintiffs' counsel himself described (*see* p. 6, *supra*) as sufficient to resolve the equitable relief phase of this action. Moreover, there is an ample factual record – in the form of the Investigation Report, not to mention the public record

of media coverage of this case and the underlying facts – to support the entry of permanent relief. There would be no mystery why the Court entered the permanent relief.

The cases on which plaintiffs' Rule 52 argument relies (*see* Pls. Br. at 4) are distinguishable because they all involved contested facts and/or contested injunctive relief. In Hook v. Hook & Ackerman, Inc., 213 F.2d 122 (3d Cir. 1954), for example, the plaintiff sought to enjoin the defendant from suing the plaintiffs' customers for patent infringement. The trial court entered a permanent injunction and the defendant appealed. On appeal, the Third Circuit explained that it could not decipher the grounds for, or the scope of, the injunction. Among other things, the propriety of the injunction turned on such questions as: "Do any customers of [the plaintiff] exist at all? Does [the defendant] seriously threaten patent infringement suits? Is [the plaintiff] still in the business of manufacturing boilers in any way similar to [the defendant's] boilers?" Id. at 130. Yet the court could not determine the answers to those questions from either the District Court's injunction order or the parties' pleadings. *See* id. *See also* Educ. Testing Servs. v. Katzman, 793 F.2d 533, 537 (3d Cir. 1986) (appeal by defendant of contested preliminary injunction entered without findings and conclusions); Chas. Pfizer & Co. v. Zenith Labs., Inc., 339 F.2d 429, 430-31 (3d Cir. 1964) (appeal by defendant of contested permanent injunction entered without findings and conclusions); Tribune Review Publ'g Co. v. Thomas, 153 F. Supp. 486, 495 (W.D. Pa. 1957) (ruling that findings were necessary on a disputed permanent injunction). Thus, these cases do not support plaintiffs' argument that the Court must render findings and conclusions even when defendants themselves consent to the entry of relief and no disputed facts must be resolved prior to entering the relief.[6]

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[6] The two unpublished consent orders to which plaintiffs devote two pages of their Brief (at 6-7) are of no moment here. Each consent order was entered in an enforcement action (continued...)

In contrast to the circumstances in these cases, it is no secret here, and it is clear on the record, that the District activated TheftTrack and collected images from certain Student Laptops without notice to students and parents and in the absence of policies and regulations governing the use of TheftTrack. Plaintiffs concede, as they must, that the interim equitable relief currently in force – which the District asks the Court to make permanent – ensures that such conduct does not happen again.

2. Rule 65(d) Does Not Require the Court to Find That the District Is Liable on One or More Counts of Plaintiffs' Complaint

Rule 65(d), which governs the scope of an order granting an injunction, requires merely that such an order

> (A) state the reasons why it issued;
>
> (B) state its terms specifically; and
>
> (C) describe in reasonable detail – and not by referring to the complaint or other document – the act or acts restrained or required.

Fed. R. Civ. P. 65(d)(1).

Disregarding the plain language of Rule 65 and the case law, plaintiffs contend that the statement of reasons why an injunction issued must include a finding "that defendants

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(...continued)

brought by the Commodity Futures Trading Commission. *See* Commodity Futures Trading Comm'n v. Healy, 2010 WL 2836760, No. 09-1331 (M.D. Pa. June 27, 2010); Commodity Futures Trading Comm'n v. Eustace, 2008 WL 4274398, No. 05-2973 (E.D. Pa. 2008). That the defendants in those actions consented to certain findings and conclusions to settle with the regulator has no bearing whatsoever on whether a court must enter findings and conclusions when entering permanent equitable relief. And, even in the context of a consent decree, a court need ***not*** state factual findings and legal conclusions. *See* 9C Charles Alan Wright & Arthur R. Miller, Federal Prac. & Proced. § 2574 (3d ed. 2008).

violated either the civil rights of the students and their families, and/or other state and federal laws as alleged in the complaint." (Pls. Br. at 9.) Rule 65 requires no such thing.

Judge Posner's opinion for the Seventh Circuit in Chathas v. Local 134 IBEW, 233 F.3d 508 (7th Cir. 2000), is remarkably apt. In that case, the plaintiffs rejected the defendants' offer to make permanent a previously entered preliminary injunction solely because the defendants would not concede liability. *See* id. at 511. As is the case here, the defendants then moved to make permanent the terms of the preliminary injunction, which motion the plaintiffs opposed in "the absence of a finding of illegality." *See* id. at 512; *see also* id. at 511 (stating that the plaintiffs argued "that they were entitled to a declaratory judgment or at least to a finding in or accompanying the permanent injunction that the defendants had violated the law"). The District Court entered the permanent injunction over the plaintiffs' objections and the plaintiffs appealed. *See* id.

The Seventh Circuit ruled that the District Court properly entered the injunction without a finding of liability. Noting that the plaintiffs had drafted the preliminary injunction that the defendants sought to make permanent and did not contest the terms of the permanent injunction, the court explained that

> [a]lthough Rule 65(d) does require that the order granting the injunction 'set forth the reasons for its issuance,' they need not take the form of findings that the defendant violated the law. The ***reason for the injunction might simply be that the defendant consented to its entry*** – that in fact was the reason the judge gave when he dismissed the suit. He gave a reason, too, why the plaintiffs' objection should not be controlling. He said that the plaintiffs had got all they were entitled to, and he was right, given that the injunction is valid and prohibits exactly the same conduct that the plaintiffs wanted it to prohibit. All that is missing is a finding of a violation, and as we have seen ***that is not a prerequisite to the issuance of a valid injunction.***

Id. at 513 (emphasis added); *see also* id. ("[I]t is not true that a permanent injunction is invalid unless it recites that the defendant violated the law. The obvious counterexample is a permanent injunction entered pursuant to a consent agreement in which the defendants deny liability."). And in another bit of analysis that resonates here, the Court noted that plaintiffs were not entitled to "a finding of illegality" simply because "they wished to brandish it in their continuing struggle" with the defendants (over control of a union). Id. at 512.

One fundamental principle underlying the decision in Chathas is that if a defendant has consented to judgment, there is nothing left for the court to decide and an opinion on whether the defendant violated the law would be an improper advisory opinion. *See* id. at 512. Thus, courts routinely hold that a statement that "the defendant consents" to the entry of a permanent injunction satisfies the requirement of Rule 65(d). *See, e.g.*, Mattel, Inc. v. 99 Cents Only Stores, 81 Fed. Appx. 94, 96 (9th Cir. Nov. 7, 2003) (unpublished) (holding that "the judgment gave a sufficient explanation by stating that the parties agreed to resolve the case by way of [a Rule 68] judgment"); Angie's List, 2010 WL 2719225, at *10 (holding that Rule 65(d) does not "require that the reasons a court must record for issuing an injunction include a finding of liability by any party; that the parties have consented to a decree is sufficient reason"); Pollock v. Syndicated Office Sys., Inc., No. 09-60813, 2010 WL 547903, at *2 (S.D. Fla. Feb. 2, 2010) (stating that the "reason" under Rule 65(d) "need only be the parties' consent"); N.Y. State Soc'y of Cert. Pub. Accountants v. Eric Louis Assocs., Inc., 79 F. Supp. 2d 331, 334 (S.D.N.Y. 1999) (stating that Rule 65(d) "could be satisfied by a simple statement of fact (*i.e.*, that the order is being issued because the defendant has consented to the injunction)").

The two cases cited by plaintiffs purportedly in support of their contention that Rule 65(d) requires a finding of liability (*see* Pls. Br. at 9) in fact lend no support to plaintiffs'

contention. In Ciba-Geigy Corp. v. Bolar Pharmaceutical Co., 747 F.2d 844, 846-47 (3d Cir. 1985), the defendant opposed and appealed the entry of the injunction. And American Civil Liberties Union of New Jersey v. Blackhorse Pike Regional Board of Education, 84 F.3d 1471 (3d Cir. 1996), did not address Rule 65 at all; it merely supports plaintiffs' irrelevant point that the standard for entering a preliminary injunction differs from that for entering a permanent injunction.

Thus, given the absence of any dispute for the Court to decide, and that the District consents to the entry of permanent equitable relief, Rule 65 does not require the Court's order granting permanent equitable relief to include factual findings or legal conclusions – much less a finding of liability – and indeed, there is no basis for the Court to make such findings.

3. Plaintiffs' Remaining Scattershot Arguments Are Red Herrings

Putting aside that there is no legal basis under Rules 52 or 65 for plaintiffs' position that the Court must enter findings of fact and conclusions of law when it enters permanent equitable relief, plaintiffs' additional jurisprudential arguments have no merit.

- First, plaintiffs repeatedly raise the possibility of an appeal of the Court's entry of permanent injunctive relief by the "parties" or proposed intervenors. (*See* Pls. Br. at 2, 5, 8, 16.) But the District itself has asked the Court to enter the relief, and the Wortley Intervenors have joined in that request (*see* Doc. No. 83). Moreover, the District's proposed order is based on the relief that the Wortley Intervenors requested (in an individual complaint), and it incorporates the relief sought by the Neill Intervenors (also in an individual complaint). (*See* Doc. No. 81 at 9-10.) And plaintiffs – who themselves also agreed to the equitable relief – would lack standing to appeal. When a "permanent injunction forbids exactly what the plaintiff[] want[s] it to forbid," the plaintiff cannot complain that "the court that gave him his victory did not say things that he would have liked to hear, such as that his opponent is a lawbreaker." Chathas, 233 F.3d at 512. *See also* Cal. v. Rooney, 483 U.S. 307, 310-11 (1987) (holding that a prevailing party's dissatisfaction with a court's analysis "that may have been adverse to the party's long-term interests does not allow the [party] to claim status as a losing party for purposes of [appeal]"); Husain v. Springer, 691 F. Supp. 2d 339, 343 (E.D.N.Y. 2009) ("[A] winning party cannot appeal merely because the court that gave him

his victory did not say things that he would have liked to hear, such as that his opponent is a law breaker.").[7]

- Second, plaintiffs raise supposed concerns about the enforceability of the permanent equitable relief by affected persons other than plaintiffs. (*See* Pls. Br. at 5, 10, 12-13, 16-17.) But the proposed order – like the May 14, 2010 equitable relief order – explicitly provides that "any person adversely affected by any violations" may enforce it, including parents or guardians of minor students, and that the Court shall retain jurisdiction over all matters relating to the proposed order. (Proposed Order [Doc. No. 81-2], ¶¶ 11-12.)

- Third, plaintiffs assert the canard that the Court must enter findings and conclusions to afford affected nonparties the potential benefit of issue preclusion. (*See* Pls. Br. at 3 n.2, 10; *see also* id. at 5 n.4 (suggesting that it would be "senseless and wasteful" as a "matter of public policy" to issue permanent relief without findings and conclusions).) Notwithstanding the parties' efforts to gather information and negotiate the equitable relief, this case is in its procedural infancy; ***the District has not even responded to plaintiffs' complaint***. Thus, when plaintiffs raise the idea of precluding ***relitigation***, when none of their claims has been litigated, they reveal that their real motive here is to facilitate the damages claims of a few individuals. Those individual interests should not delay the resolution of the equitable relief phase of this case, which will benefit the entire District community.[8]

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[7] *See also* Solar Turbines Inc. v. Envt'l Protection Agency, 879 F.2d 1073, 1078 n.3 (3d Cir. 1989) (quoting In re Arthur Treacher's Franchisee Litig., 689 F.2d 1137 n.16 (3d Cir. 1982) ("[A] party successful in the district court has no right of appeal from a judgment in its favor, for the purpose of obtaining a review of findings he deems erroneous which are not necessary to support the decree.")).

[8] The Fifth Circuit's decision in Ward is instructive here. In that case, a high school student and her family challenged a school district's policy prohibiting religious readings before sporting events as a violation of the First Amendment and sought an injunction and damages. *See* Ward, 393 F.3d at 600-01. The District Court dismissed the claim for injunctive relief as moot when the district rescinded its policy, and after the district tendered to the plaintiff the maximum amount of damages that the plaintiffs could receive, dismissed the action without making findings of fact or conclusions of law. *See* id. at 602-03. On appeal, the plaintiffs argued that "without an express ruling on the constitutionality of the . . . policy, [the plaintiffs'] rights have not been vindicated." Id. at 604. They further contended that "the Civil Rights Act would be rendered ineffective if a person could not appeal from the rationale of a judgment in her favor." *See* id. The court rejected both arguments. Notwithstanding the district court's silence on the constitutional question, the court reasoned, the student had "exercised her constitutional rights and won." Id. at 605. As a result, she was "not aggrieved by the failure of the district court

(continued...)

- Fourth, plaintiffs suggest that findings are needed because in the future "evidentiary materials and resources . . . may no longer be available or accessible." (Pls. Br. at 3.) Putting aside the District's obligation to preserve evidence in light of actual or anticipated litigation, the proposed permanent relief order addresses this concern by requiring the District to preserve evidence until further order of the Court. (Proposed Order [Doc. No. 81-2], ¶¶ 8-10.)

Thus, none of these arguments warrants extending this litigation just to enable the Court to render findings of fact and conclusions of law, which are not required in any event.

B. Plaintiffs' Claimed "Need" for Class Certification Is Unfounded

Plaintiffs also argue that the entry of permanent relief would not obviate the "need" for class certification to protect the proposed class. (*See* Pls. Br. at 10-17.) Plaintiffs argue that certification is necessary for various speculative reasons, including, among other things, to protect evidence, ensure the enforceability of the relief by nonparties, and "have the full scope of the decree made explicit and unmistakable."[9] (Pls. Br. at 12-13.) This argument is flawed on several levels.

First, the proposed permanent equitable relief order would prevent any of the "problems" that plaintiffs conclusorily suggest will arise absent certification (Pls. Br. at 10). As discussed above, the proposed order, among other things, provides for the preservation of evidence, is explicitly applicable to, and enforceable by, affected nonparties, and provides "explicit and unmistakable" relief. (*See* § I(B), *supra*.)

(...continued)

to state the reasons for its entry of judgment," and the court's silence did "not weaken civil rights jurisprudence." Id. In this case, the equitable relief safeguards the constitutional rights that the Robbinses allege that the District violated.

[9] Plaintiffs list several other vague and unexplained reasons why certification is supposedly necessary, including "to expand the precedential force of the decision," "avoid[] mootness issues," and "safeguard the interests of the class." (Pls. Br. at 13.)

Second, even if plaintiffs could articulate how these concerns might arise in the absence of class certification – which they do not and cannot – the concerns are not a basis for class certification. Pursuant to In re Hydrogen Peroxide Antitrust Litigation, 552 F.3d 305 (3d Cir. 2008), plaintiffs bear a stringent legal and factual burden to meet the requirements of Rule 23. (*See* Doc. 81 at 13-15.) As the District argued in its opposition to plaintiffs' motion for class certification, the Court should deny the motion because, *inter alia*: (i) the proposed class cannot be certified under Rule 23(b)(2) because the harm against which equitable relief is sought has dissipated and certification is not in the interest of the proposed class; and (ii) and the proposed class cannot satisfy the typicality, commonality, or adequacy elements of Rule 23(a).[10] (*See* Doc. No. 81.) Plaintiffs' necessity argument here does nothing to salvage plaintiffs' deficient motion for class certification. Whether or not lack of "necessity" is a reason to ***deny*** class certification, plaintiffs cannot overcome all the reasons for denial of certification set forth in the District's opposition memorandum.

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[10] On August 27, 2010, the Third Circuit granted a petition for rehearing *en banc* and therefore vacated the panel opinion in Sullivan v. DB Investments, Inc., __ F.3d __, 2010 WL 2736947 (3d Cir. 2010). *See* 2010 WL 3374167 (3d Cir. 2010). The District cited Sullivan in support of its argument that the Court may not certify the proposed class because the possibility of future harm to the proposed class has dissipated. (*See* Doc. No. 81 at 2, 15-16.) The petition for rehearing in Sullivan raises a host of issues with respect to approval of a class action damages settlement that are not relevant here. (*See* Pet. for Reh'g filed in Sullivan on July 27, 2010, at Nos. 08-2784, et al. (3d Cir.).) Specifically with respect to the panel's factual conclusion that certification for injunctive relief had become unnecessary, the petitioners contend that the Third Circuit overstepped its bounds by acting as a fact-finder. (*See* id. at 14-15.) Thus, rehearing in Sullivan should have no effect on the District's position here. The principle that class certification is inappropriate when there is no risk of future harm to the class remains supported by other cases founded upon the well-settled mootness doctrine. (*See* Doc. No. 81 at 17-19.)

Finally, the cases rejecting a lack of necessity argument that plaintiffs cite are off point. As an initial matter, plaintiffs concede that "courts have denied class certification on the ground that individual injunctive relief would effectively benefit everyone affected by the challenged practice," but contend that the Third Circuit "has not taken a clear position on the issue." (Pls. Br. at 11.) In any event, that cases on which plaintiffs rely – none of which are from courts in the Third Circuit – presented concrete harms that would befall proposed class members absent certification. For example, in a number of the cases there was insufficient assurance that the defendants would apply the relief to nonparties. *See* Freeman v. Hayek, 635 F. Supp. 178, 181 (D. Minn. 1986) (rejecting defendant's argument that a new ordinance mooted a class certification motion because the record showed that "problems similar to those encountered by [plaintiffs] [were] still occurring"); Koster v. Perales, 108 F.R.D. 46, 54 (E.D.N.Y. 1985) (noting that, while it may be appropriate to deny certification when "a defendant affirmatively states that it would be bound by an adverse judgment issued to an individual plaintiff and actually withdraws the challenged policy," lack of necessity did not support denial of certification because defendants refused to amend the policies that gave rise to the action); Coleman v. Block, 562 F. Supp. 1353, 1358 (D.N.D. 1983) (disputing assertion that certification "would not serve a useful purpose" because defendant "[would] not change its state-wide policies if this action is limited to the named plaintiff as demonstrated in other states"); Rodriguez v. Percell, 391 F. Supp. 38, 39 (S.D.N.Y. 1975) (rejecting defendants' argument that certification was unnecessary because "defendants resist[ed] either a meaningful assurance from themselves or a declaration from the court to bar similar transgressions"). And in other cases, there were concerns about nonparties' ability to enforce an injunction. *See* Ollier v. Sweetwater Union High Sch. Dist., 251 F.R.D. 564, 566 (S.D. Cal. 2008) (rejecting lack of necessity ground

for denial of certification for enforcement purposes); Nehmer v. Veterans' Admin., 118 F.R.D. 113, 119 (N.D. Cal. 1987) (rejecting lack of necessity ground for denial of certification for enforcement purposes); Founding Church of Scientology of Washington, D.C., Inc. v. Dir., Fed. Bureau of Investig., 459 F. Supp. 748, 756 (D.D.C. 1978) (rejecting lack of necessity ground and awarding conditional certification for enforcement purposes).

In contrast to the circumstances in those cases, the District has taken numerous steps to ensure that its allegedly unlawful conduct does not happen again, with respect to plaintiffs or anyone else. Among other things, the District: immediately stopped using TheftTrack upon learning of this lawsuit; stopped using LANrev altogether a few days later and will not use it again; commissioned an extensive internal investigation; undertook a review of its pertinent policies and regulations; negotiated comprehensive agreed-upon equitable relief that plainly benefits the entire District community; adopted broad new policies and regulations to protect the privacy of students and their families with respect to the One-to-One laptop program and otherwise; and now asks the Court to make the agreed-upon relief permanent. Accordingly, even if plaintiffs met their burden for class certification under Rule 23 and Hydrogen Peroxide – which they have not and cannot – "necessity" would not weigh in favor of certification.

IV. CONCLUSION

As plaintiffs' counsel conceded more than three months ago, all the work that needs to be done to resolve the equitable part of this case in a manner that best serves the interests of District students, families, and taxpayers has been completed. Any further work that plaintiffs suggest needs to be done by the parties and the Court would be aimed solely at advancing the individual interests of plaintiffs or the very few others who may pursue damages claims against the District. For these and all the foregoing reasons, as well as those set forth in

the District's briefing on plaintiffs' motion for class certification and the District's cross-motion for entry of permanent relief, the Court should enter the permanent equitable relief order proposed by the District without requiring further proceedings to enable it to render findings of fact and conclusions of law, and deny plaintiffs' class certification motion.

Respectfully submitted,

Date: September 1, 2010

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CERTIFICATE OF SERVICE

I hereby certify that on this day I caused true and correct copies of the foregoing Defendants' Brief In Support Of Their Position That The Court Need Not Make Findings Of Fact And Conclusions Of Law To Enter Equitable Relief On A Permanent Basis to be served upon the below-listed counsel by the means indicated below:

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