No. ____

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

RONALD SHAVER, WILLIAM WHITNEY, JOE FEDELE, RALPH RIBERICH AND ANTHONY KATZ, ON BEHALF OF THEMSELVES AND OTHERS SIMILARLY-SITUATED,
Plaintiffs-Respondents,

v.

SIEMENS CORPORATION, SIEMENS WESTINGHOUSE RETIREMENT PLAN FOR UNION EMPLOYEES, and SIEMENS WESTINGHOUSE RETIREMENT PLAN,
Defendants-Petitioners.

On Petition for Interlocutory Appeal from an Order of the United States District Court for the Western District of Pennsylvania

Honorable David S. Cercone
Case No. 02-1424

PETITION FOR INTERLOCUTORY APPEAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and Third Circuit LAR 26.1, Defendant-Petitioners makes the following disclosures:

(1) *For non-governmental corporate parties please list all parent corporations:*

Siemens Corporation is an affiliate of Siemens AG, a publicly-held company with no parent company (NYSE: SI).

(2) *For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock:*

No publicly-held company holds 10% or more of the stock of Siemens Corporation or Siemens AG.

(3) *If there is a publicly held corporation which is not a party to the proceeding before this Court but which has as a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests:*

Defendant-Petitioners identify the following interested entities not parties to this suit: Siemens Industry, Inc. (as successor to Siemens Energy & Automation, Inc.) and Siemens Energy, Inc. (formerly known as Siemens Power Generation, Inc.). The foregoing are Siemens Corporation affiliates who formerly employed members of the plaintiff class in this case.

This is not a bankruptcy appeal.

Signed: _____ Dated: _____

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INTRODUCTION

In this case, a class of approximately 230 former employees of Siemens Westinghouse Power Generation, Inc. and Siemens Energy & Automation, Inc. allege that they are entitled to "permanent job separation" benefits under certain retirement plans established and sponsored by Siemens Corporation ("Siemens"); they claim that, in denying these benefits, Siemens violated the Employee Retirement Income Security Act ("ERISA"). Whatever the merit to their underlying claims, however, there is undisputed evidence that the great majority – over 200 – of the class members executed releases of any claims they may have to any ERISA-protected retirement benefits in exchange for severance packages individually worth tens, and in some cases hundreds, of thousands of dollars.

In the proceedings below, the district court (in an opinion resolving a complicated and difficult question of first impression under ERISA) ruled for the 20 plaintiffs who did *not* waive their benefits. It subsequently entered a final judgment as to those plaintiffs. Siemens is filing a notice of appeal from that judgment concurrently with this petition.

In addition, the district court – again resolving a complicated question of first impression – ruled that the remaining plaintiffs *could* waive their entitlement to those same ERISA benefits, but that whether they in fact did so could not be resolved on summary judgment; the district judge reversed the magistrate judge's contrary finding on the latter point. The district court decided instead that, in light

of its interpretation of the federal common law, substantial additional factual development was necessary to determine whether the waivers had been "knowing and voluntary." The district court has now certified that decision for interlocutory appeal pursuant to 28 U.S.C. § 1292(b), posing two questions: whether claims to permanent job separation benefits "can be knowingly and intelligently waived"; and, if so, "which party bears the burden of proof and what must be shown to establish a valid waiver of such claims/benefits." Oct. 15, 2010 Cert. Order at 1-2 (App. A).

This Court should grant permission to appeal. As the district court recognized, its denial of summary judgment as to the more than 200 waiving plaintiffs implicates two important and complex legal issues of first impression, as to which there are substantial grounds for a difference of opinion (as the disagreement between the magistrate judge and the district court shows). Both issues also present controlling questions of law whose resolution by this Court would materially advance the termination of the litigation. Indeed, if the Court accepts the view of the magistrate judge (or, for that matter, the contrasting view of plaintiffs that waiver of ERISA benefits is *never* permissible), litigation as to the remaining 200-plus plaintiffs would be either ended altogether or substantially limited. Consequently, we understand that the plaintiffs also are seeking interlocutory review of the certified questions.

What is more, because an appeal of the district court's grant of final judgment as to the 20 non-waiving plaintiffs is certain to go forward now, permitting an immediate appeal of the district court's denial of summary judgment as to the 200-plus waiving plaintiffs would *promote*, rather than undermine, judicial economy by preventing an unnecessary division of the questions presented across multiple appeals. Interlocutory review is thus plainly warranted.

BACKGROUND

A. Statement of Facts

Siemens Power Generation, Inc., an affiliate of Siemens, purchased the power generation business unit of Westinghouse Electric Corporation ("Westinghouse") more than twelve years ago. As part of this transaction, various Siemens affiliates hired several thousand Westinghouse employees who had previously been covered by the Westinghouse Pension Plan. As part of the transaction, Siemens established new pension plans for those employees: the Siemens Westinghouse Retirement Plan and the Siemens Westinghouse Retirement Plan For Union Employees (the "Siemens Plans"). Here, a class of approximately 230 legacy Westinghouse employees contend that they were entitled under ERISA to certain retirement plan benefits, known as permanent job separation ("PJS") benefits, when they lost their jobs due to layoffs and plant closings with a Siemens affiliate. PJS benefits were provided in the Westinghouse Pension Plan for Westinghouse em-

ployees who lost their jobs under such circumstances, but were never included any pension plan that Siemens established for the legacy Westinghouse employees.

As relevant here, the district court divided the class members into two groups. Twenty class members, who were hourly employees, were not required to sign written releases in exchange for severance pay at the time of their separation from the Siemens affiliate with by which they had been employed (the "Non-Release Plaintiffs"). But more than 200 remaining class members *did* execute written releases in exchange for severance payments (the "Release Plaintiffs").

The separation agreements signed by the Release Plaintiffs follow several basic forms. Although there are slight variations in these forms, all Release Plaintiffs agreed to waive all claims arising out of their employment, or the termination of their employment, with Siemens. Report and Recommendation ("R&R") at 41 (App. E). In some of the separation agreements the Release Plaintiffs also expressly agreed to waive any claims they may have had under ERISA. *Id.* at 42. The Release Plaintiffs received severance payments as consideration for their waivers ranging from approximately $10,000 to over $200,000 per class member, depending on the salary and years of service of the affected employee.

The class contends that the Westinghouse Pension Plan had transferred liabilities to the Siemens Plans and that the Siemens Plans were "spinoffs" of the Westinghouse Pension Plan within the meaning of ERISA Section 208 (29 U.S.C. § 1058). They argue that the Siemens Plans were, therefore, required to provide the

same benefits as the Westinghouse Pension Plan, including PJS benefits, for the legacy Westinghouse employees. R&R at 2 (App. E). The class further contends that the Siemens Plans illegally cut back PJS benefits in violation of ERISA's anti-cutback provision (29 U.S.C. § 1054(g)) when Siemens implemented the Siemens Plans without including PJS benefits. R&R at 2 (App. E). The class asserts that when their employment with an affiliate of Siemens was terminated, it triggered their entitlement to PJS benefits. *Id.*

The Defendants have asserted multiple defenses, including that (1) there was no spin off within the meaning of Section 208 because there was no transfer of assets or liabilities and no merger or consolidation between the Siemens Plans and the Westinghouse Pension Plan; (2) Siemens had the right under ERISA to determine what, if any, pension benefits it wished to provide its new affiliate employees; (3) the asset purchase agreement between Siemens Power Generation Corporation and Westinghouse Electric Corporation did not require Siemens to provide PJS benefits in any event because, at the time the Siemens Plans became effective, the Westinghouse Plan contained no such benefit; (4) Siemens did not cut back PJS benefits because they never existed in the Siemens Plans in the first place; and (5) the majority of the class members took large severance payments in exchange for voluntarily releasing their claims for any pension benefits under ERISA, which would include any claim for any PJS benefits.

B. Procedural History

1. The parties filed cross-motions for summary judgment, and on December 13, 2005, the magistrate judge issued her Report and Recommendation. On the issue of liability, the magistrate judge opined that Siemens had improperly cut back PJS benefits when it implemented pension plans not containing PJS benefits for legacy Westinghouse employees. R&R at 32 (App. E).

With respect to the waivers signed by the Release Plaintiffs, the magistrate judge found that Defendants had raised the releases as an affirmative defense and therefore that they had the initial burden of proving the existence of the waivers. *Id*. at 39. The magistrate judge found, however, that the Defendants had met that burden by producing the signed agreements.[1] *Id.* at 40. Observing that "[t]he Court of Appeals for the Third Circuit has not expressly addressed the burden of proof" in such cases, she determined that the burden then shifted to "the party challenging the validity of the release, Plaintiffs here." *Id.* Applying this standard, the magistrate judge determined that the class members failed to carry their burden because "[t]he only evidence Plaintiffs have produced to challenge the validity of the releases consists of nine sample releases and the names of the individuals who signed them" (*id*.), and all of the releases, although varying in some particulars, "unambi-

[1] The magistrate judge permitted Defendants to serve only limited requests for admissions regarding these release agreements. These requests established that the releases were authentic, that the class members had executed them, and that the class members had received the consideration contained in the release and severance agreements. All other discovery relating to individual class members was stayed.

guously waived all ERISA claims against Siemens." *Id.* at 42; *see id.* at 43 ("these releases are unambiguous and the class members who signed them waived their rights to pursue an ERISA claim"). She accordingly recommended the grant of summary judgment to the Defendants with respect to the Release Plaintiffs.

2. The parties filed cross-objections to the magistrate judge's R&R. The district court subsequently issued a Memorandum Order in which it adopted the R&R's holding on liability as to the Non-Release Plaintiffs, but "chart[ed] a different course" on the enforceability of the waivers as to the Release Plaintiffs. March 30, 2007 Mem. Order at 9 (App. D). In this portion of its Order, the district court rejected the class members' argument that waivers are categorically ineffective under ERISA. *Id*. at 9-15. Instead, the district court – adopting a "federal common law" approach announced in *Lynn v. CSX Transp., Inc.*, 84 F.3d 970 (7th Cir. 1996) – held that ERISA claims for benefits predicated upon an instrument or transaction *outside* the ERISA plan itself may be waived through a voluntary, knowing relinquishment of the claim. *Id.* at 18-19. Applying this test, the court held that the class members' claims could be waived because the Release Plaintiffs had not relied on the terms of the Siemens Plans themselves to establish their claims. *Id*. Rather, they relied on the prior Westinghouse Plan and supported their claims through "an interpretation of and an argument surrounding the legal effect of the" agreement between Siemens and Westinghouse. *Id*. at 18.

While the district court thus held that the Release Plaintiffs' claims were capable of being waived, it also concluded that additional procedures were necessary to determine whether the plaintiffs had, in fact, knowingly and voluntarily released their claims. For this inquiry, the district court adopted the test set forth in *Finz v. Schlesinger*, 957 F.2d 78, 82 (2d Cir. 1992), which identified six factors to ascertain whether a waiver is knowing and voluntary: (1) the education and business sophistication of plaintiffs; (2) the roles of the employer and employee in determining the content of the waiver; (3) the clarity of the agreement; (4) the amount of time the plaintiff was given to consider the agreement; (5) whether independent advice, such as that of counsel, was available to the plaintiff; and (6) the amount of consideration received in exchange for the release or waiver. March 30, 2007 Mem. Order at 19-20 (App. D). The court described the process of considering these factors as a "fact-intensive exercise" and, as a result, held that summary judgment was categorically inappropriate on the waiver question. *Id*. at 21. The court did not set a procedure for conducting discovery or taking evidence on the issue whether the Release Plaintiffs had knowingly and voluntarily waived their claims. *Id*.

3. After issuing its March 30, 2007 Memorandum Order, the district court directed the parties to brief all issues related to remedies available to the 20 Non-Release Plaintiffs. The court subsequently issued a Memorandum Opinion and order on March 28, 2008, addressing those remedies. March 28, 2008 Mem. Op.

(App. C). On October 15, 2010, the district court issued an order revising the March 28, 2008, ruling to provide for awards to the Non-Release Plaintiffs totaling over $2 million, and entering final judgment for the Non-Release Plaintiffs under Fed. R. Civ. P. 54(b). Oct. 15, 2010 Revised Final Judgment Order (App. B).

In another order issued the same day, the district court certified for interlocutory appeal its order denying summary judgment to Defendants as to the Release Plaintiffs. The court found in this order that the issues certified for immediate review satisfied the standard established in 28 U.S.C. § 1292(b) and addressed in *Katz v. Carte Blanche Corp.*, 496 F.2d 747 (3d Cir. 1974) (en banc). Oct. 15, 2010 Cert. Order at 2 (App. A).

QUESTIONS PRESENTED

This case presents two questions for interlocutory review:

1. Whether claims to an accrued pension benefit may be knowingly and intelligently waived; and,
2. If so, which party bears the burden of proof and what must be shown to establish such a waiver.

RELIEF SOUGHT

Defendants seek interlocutory review and reversal of the district court's order denying summary judgment with respect to the Release Plaintiffs.

REASONS TO ALLOW THE APPEAL

The waiver question, which affects the great majority of class members in this case, turns on hotly debated questions of federal statutory and common law. Resolution of the questions presented in Defendants' favor through application of the approach recommended by the magistrate judge would bring an immediate end to this lawsuit, avoiding expensive and extremely burdensome litigation. By the same token, accepting plaintiffs' view that waiver is categorically *impermissible* also would substantially pretermit further proceedings. And because the district court entered a final and appealable judgment under Rule 54(b) as to the Non-Release Plaintiffs on the same day that it certified its order as to the Release Plaintiffs, granting review here would *avoid* piecemeal appellate litigation and *promote* judicial efficiency, rather than the other way around. This Court should accordingly grant the petition.

A. The Questions Presented Satisfy all Three Statutory Criteria for Interlocutory Review.

The standard governing § 1292(b) petitions is familiar: a district court may certify an order for interlocutory appellate review if it is "of the opinion that such order involves a [(1)] controlling question of law [(2)] as to which there is substantial ground for difference of opinion and [(3)] that an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b); *see also Katz*, 496 F.2d at 754 (same). Once a district court has certified

an order for immediate review, the court of appeals "may thereupon, in its discretion, permit an appeal to be taken from such order." 28 U.S.C. § 1292(b).

This Court's discretion to accept a case for review under § 1292(b) is broad. *See, e.g., Coopers & Lybrand v. Livesay*, 437 U.S. 463, 475 (1978); *In re Convertible Rowing Exerciser Patent Litig.*, 903 F.2d 822 (Fed. Cir. 1990). Thus, the statute permits the Court "to inject an element of flexibility into the technical rules of appellate jurisdiction established for final judgment appeals under § 1291 and for interlocutory appeals under § 1292(a)." 16 Charles A. Wright, *et al.*, *Federal Practice and Procedure* § 3930, at 415 (2d ed. 1996). The three statutory factors accordingly "should be treated as guiding criteria rather than jurisdictional requisites," and "should be viewed together as the statutory language equivalent of a direction to consider the probable gains and losses of immediate appeal." *Id*. at 415-416. Of particular importance, § 1292(b) review was designed, and therefore is "especially suitable," for use in "exceptionally complex" lawsuits like this one, where immediate appellate review might avoid "protracted and expensive litigation." *Id*. § 3929, at 367. Here, all of these considerations favor granting the petition.

1. Both issues presented are controlling questions of law. An issue is "controlling" if it is one that, if wrongly decided by the district court, "would be reversible error on final appeal" following the conclusion of trial court proceedings. *Katz*, 496 F.2d at 755; *see also In re Cement Antitrust Litig.*, 673 F.2d 1020, 1026 (9th Cir. 1982) ("[A]ll that must be shown in order for a question to be 'control-

ling' is that resolution of the issue on appeal could materially affect the outcome of litigation in the district court."). Against this standard, the district court was plainly correct that "[t]he identified portion of the Memorandum Order involves a controlling question of law." Oct. 15, 2010 Cert. Order at 2 (App. A).

With respect to the first issue, the district court concluded that "the plaintiffs' claims to the accrued [retirement] benefits can be waived under appropriate circumstances." *Id*. Although we agree with that conclusion, a contrary holding by this Court on appeal from final judgment would require setting aside any determination by the district judge that particular Release Plaintiffs *had* waived their claims. On the other hand, as to the second question – concerning the burden of proof and standard governing waiver – a conclusion by this Court on appeal after final judgment that the district court had applied the wrong burden or standards also would require setting aside the judgment as to particular plaintiffs; at a minimum, a different burden-shifting scheme would almost certainly "materially affect the outcome of litigation in the district court." *Cement Antitrust Litig.*, 673 F.2d at 1026. Each legal determination underlying the district court's order is accordingly a controlling question of law within the meaning of § 1292(b).

2. There are also substantial grounds for difference of opinion with respect to the questions presented. The district court set out in some detail the statutory and case-law authority relied upon by the plaintiffs in support of their argument that claims of entitlement to vested pension benefits may not be waived under any cir-

cumstances (March 30, 2007 Mem. Order at 9-19 (App. D)); although rejecting that argument, the court candidly acknowledged that "substantial grounds for difference of opinion exist on [this] question and the underlying issues subsumed within it." Oct. 15, 2010 Cert. Order at 3 (App. A).

As for the standard governing such waivers, the magistrate judge found that to be "a complex issue of first impression" in the Third Circuit (R&R at 34 (App. E)), and the district court accordingly was forced to rely on Seventh Circuit precedent in developing an appropriate framework. March 30, 2007 Mem. Order at 14-20 (App. D). That alone is enough to demonstrate contestability: substantial grounds for difference of opinion are likely to exist when, as in this case, an issue is "difficult and of first impression." *Klinghoffer v. S.N.C.*, 921 F.2d 21, 25 (2d Cir. 1990); *see also Boim v. Quranic Literacy Inst. & Holy Land Found. for Relief & Dev*., 291 F.3d 1000, 1007-008 (7th Cir. 2002) ("questions of first impression" are ordinarily contestable); *Chase Manhattan Bank v. Iridium Africa Corp.*, 324 F. Supp. 2d 540, 545 (D. Del. 2004) (where a "case present[s] questions of first impression," and where a district court declines to adopt the analysis of a magistrate judge, "substantial grounds for difference of opinion are present").

3. Third, an immediate appeal of the questions presented doubtless would materially advance the ultimate termination of the litigation. In the order certified for review, the district court described a multi-factor standard governing waiver of accrued benefits under ERISA. *See* March 30, 2007 Mem. Order at 19-20 (App.

D). Because application of this standard requires consideration of a detailed range of considerations that vary according to each plaintiff's particular circumstances, extensive factual development is almost certainly necessary to sort out defendants' liability (if any) to each individual: the parties will have to gather evidence concerning the "education and business sophistication of" each affected plaintiff, the "clarity of the agreement," the "amount of time [each plaintiff was] given to consider the [releases]," "[w]hether independent advice, such as that of counsel, was available to" signatories, and "[t]he amount of consideration received in exchange for the release or waiver." *Id.* Applying its two-step burden-shifting process, the district court will then have to make individualized determinations as to whether this evidence supports a finding of waiver for each plaintiff who signed a release. And this process will have to be repeated for each of the hundreds of class members who released their ERISA claims. As a consequence, this fact-finding exercise – amounting, in practical effect, to more than 200 individual mini-trials – would be an enormous undertaking that would require the investment of massive resources by the parties and the district court.

If this Court grants the petition and adopts the magistrate judge's approach (as we advocate), or the view that the Release Plaintiffs' benefits are not waivable at all (as plaintiffs advocate), it would bring an end to the litigation for the Release Plaintiffs and avoid these tremendously burdensome proceedings altogether. On the other hand, if the Court instead denies review now and later accepts the magi-

strate judge's approach on an appeal from final judgment, or adopts some other waiver standard that departs from the one used by the district court, the district court will have conducted extensive factual proceedings that were either wholly unnecessary or badly misdirected.

This case thus presents precisely the sort of circumstance that § 1292(b) was designed to avoid. The statute's principal purpose is to guard against "a wasted protracted trial if it could early be determined that there might be no liability." *Katz*, 496 F.2d at 754. Section 1292(b) should therefore be applied to avoid "possib[le] wasted trial time and litigation expense" (*id*. at 756), with the understanding that "saving of time of the district court and of expense to the litigants was deemed by the sponsors [of the statute] to be a highly relevant factor." *Id*. at 755. Granting review in this case would plainly achieve these ends.

B. Principles that Ordinarily Counsel Against Permitting an Interlocutory Appeal Strongly Support Granting the Petition in this Case.

Apart from satisfying the statutory criteria, review of the questions presented here is particularly appropriate because an immediate appeal would *avoid*, rather than *cause*, inefficient piecemeal appellate litigation. As the Supreme Court recently explained, appeals ordinarily should "'be deferred until final judgment has been entered'" because entertaining interlocutory review generally leads to "piecemeal, prejudgment appeals," which "undermines 'efficient judicial administration' and encroaches upon the prerogatives of district court judges, who play a 'special role' in managing ongoing litigation." *Mohawk Indust., Inc. v. Carpenter*, 130 S. Ct.

599, 605 (2009) (respectively quoting *Digital Equipment Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 868 (1994) and *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981)). Here, the opposite is true.

In this case, the district court has already entered a Rule 54(b) final judgment as to the 20 Non-Release Plaintiffs, and Defendants have today filed a notice of appeal from that order. In deciding that appeal, this Court will necessarily have to grapple with many of the same facts, and much of the same law, that will govern the questions presented in this petition. The potential for substantial savings in judicial economy by granting the petition therefore is manifest: if the Court denies interlocutory review, it is virtually certain that it will be presented with a second appeal following the district court's record-intensive hearing on the voluntariness of plaintiffs' 200-plus waivers. Moreover, if this Court reverses the district court with respect to the 20 Non-Release Plaintiffs on the ground that Defendants are not liable to *any* of the plaintiffs *regardless* of the waivers, any proceedings undertaken in the district court in the meantime will have been for naught.

In certifying its order as to the Release Plaintiffs on the same day that it entered final judgment as to the Non-Release Plaintiffs, the district court indicated its clear preference that all of the difficult and pressing legal issues presented in this lawsuit be resolved in a single appeal, rather than risk wasting its limited resources on a potentially unnecessary or misguided hearing. Respect for the district court's

"'special role' in managing ongoing litigation" (*Mohawk Industries*, 130 S. Ct. at 605) thus counsels strongly in favor of *granting* review, not denying it.

In sum, this is not the typical case in which either respect for the district court's case management prerogatives or general principles of judicial efficiency would be better served by "deferring appeal until litigation concludes." *Id*. On the contrary, granting the petition would allow the Court to resolve all of the outstanding legal issues relating to all plaintiffs in a single appeal, easing the burden on the parties, the district court, and this Court. Thus, interest in judicial efficiency and prudent case management favors granting, not denying, the petition. *See Porter v. Mid-Penn Consumer Disc. Co.*, 961 F.2d 1066, 1072 (3d Cir. 1992) ("it is normally more efficient to hear all appeals in a single case together"). Review is therefore plainly warranted.

CONCLUSION

The petition for interlocutory appeal should be granted.

Respectfully Submitted,

SIEMENS CORPORATION,
SIEMENS WESTINGHOUSE RETIREMENT PLAN FOR UNION EMPLOYEES, and
SIEMENS WESTINGHOUSE RETIREMENT PLAN

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October 22, 2010

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of October, 2010, a true and correct copy of the foregoing was served, via overnight courier on:

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