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

HOWARD P. STRAIN,	)	
	)	
Plaintiff,	)	**Civ. Action No.: 04-1581**
	)	
	)	**Judge: Gary L. Lancaster**
vs.	)	
	)	**Magistrate: Francis X. Caiazza**
BOROURGH OF SHARPSBURG, PENNSYLVANIA, a Municipal Entity, and RICHARD C. PANZA, JOSEPH P. PANZA, LARRY STELITANO, EILEEN RAPINO, VINCENT F. SACCO, ALBERT "PAT" ASTORINO, MARIO FERRARO, ROXANE MAGNELLI and ROBERT STAPF, in their official and individual capacities,	)	**Jury Trial Demanded**
	)	
Defendants.	)	

Brief in Support of Plaintiff's Motion for Certification of Interlocutory Appeal Under 28 U.S.C. § 1292(b)

I. Introduction

This Court has entered an order precluding Plaintiff from recovering back and front pay on his § 1983 Equal Protection claim, and has expressed the view that Plaintiff cannot recover back and front pay on his § 1983 Abuse of Process claim.[1] As a result of the Court's ruling, the economic damages Plaintiff may seek at trial have dropped from $997,321.00 to $212,319.00. Plaintiff believes the Court's ruling is reversible error; Defendants believe it is not.

[1] Plaintiff's Motion for Certification will become moot if the Court either (1) grants Plaintiff's pending motion for reconsideration and permits Plaintiff to seek back and front pay on Plaintiff's Equal Protection claim, or (2) resolves the issue of whether Plaintiff can recover back and front pay on his Abuse of Process claim in Plaintiff's favor. Plaintiff requests a ruling on the instant motion if but only if the Court resolves the foregoing issues against Plaintiff.

The measure of damages on Plaintiff's constitutional claims is a controlling question in this litigation, and reasonable minds could differ as to the correctness of the Court's order. An immediate appeal will materially advance the ultimate termination of the case. Indeed, because of the vast difference in the damages potentially recoverable on Plaintiff's constitutional claims, this case cannot settle or be finally resolved until the issue is heard by the Third Circuit. A trial under such circumstances would not be an efficient use of judicial resources.

For these reasons, the Court should certify for interlocutory appeal under 28 U.S.C. § 1292(b) the Court's order precluding Plaintiff from recovering the make-whole remedies of back pay and front pay on his Equal Protection and Abuse of Process claims under 42 U.S.C. § 1983.

II. Summary of the Facts and Case History

Prior to Defendant Lawrence Stelitano's ascension to Borough Council, Plaintiff's 30-year tenure in the Department of Public Works was marked by three promotions, numerous awards and commendations, steady raises and no discipline of any kind. The Mayor, the former President of Borough Council, several of the individual Defendants, and others who worked with Mr. Strain over the years testified that Mr. Strain was a courteous, diligent, thoughtful and hardworking employee whose services were greatly appreciated and who always performed his work at a level above the Borough's expectations.[2]

In 2003, newly elected Councilman Lawrence Stelitano, who "hated" Mr. Strain and publically declared that "Strain better get some Vaseline because I am going to screw him," filed a laundry list of 70 false "personnel violations" against Mr. Strain in a six-week period, for

[2] See, e.g., Ferraro Tr. at 9:18 – 11:15; 15:18 – 16:20 ("I never got a no from him." Strain was "always cooperative"); Rapino Tr. at 30:6-17; 32:4-24, 37:22 – 38:2; 66:20 – 68:2 (Strain was "always responsive, approachable and polite."); Stapf Tr. at 30:23 – 31:22; Kozlowski Dec. at ¶ 14; Astorino Tr. at 133:12 – 134:12. Daniher Dec. at ¶ 5; Giuffre Dec. at ¶ 3.

matters dating back years before Stelitano was elected to Council, for which Mr. Strain had not been disciplined, and for which the former President of Borough Council testified no discipline was merited. Councilman Stelitano's admitted objective in filing this laundry list was to secure Plaintiff's termination from employment. Stelitano's laundry list was so plainly spiteful and discriminatory that Defendants actually moved to exclude it from trial (Defendants' motion was denied).

After filing his laundry list of 70 "personnel violations," Stelitano filed criminal charges against Plaintiff for theft and solicitation, criminally accusing Mr. Strain of "stealing" an abandoned, inoperative and scrapped lawn tractor that the Allegheny County Health Department, the Mayor, the Chairman of Borough Council's Street Committee and the Borough's insurance carrier had ordered Mr. Strain to discard from the Water Plant. Stelitano then twice threatened to file new and additional criminal charges for "fraud" against Mr. Strain, and to cause Borough Council to terminate Plaintiff's employment. Stelitano perpetrated his threats through the office of the Borough Solicitor, who, despite their patent illegality, ratified them and memorialized them in threatening correspondence to Mr. Strain.

The price Councilman Stelitano and his confederates demanded to forbear from their extortionate threats was Plaintiff's separation from employment, a waiver of his vested employment benefits and a release from liability. After coercing Plaintiff into offering his resignation under duress, Defendants refused to accept it, and voted instead to terminate Plaintiff's employment as of February 2, 2004. The sole excuse Defendants offered for their decision was the laundry list of 70 sham "personnel violations" and the criminal charges.

At trial, Plaintiff will prove that but-for Defendant Stelitano's manufacturing and extortionate use of the sham criminal charges and personnel violations, Plaintiff's employment

record over 30-years was exemplary and highly decorated, and that he would have chosen to continue working for the Borough. Plaintiff and his witnesses will testify that the *only* reason Plaintiff is not employed as Sharpsburg's Water Plant Supervisor is because of Defendants' serial violations of the Constitution which ultimately resulted in Plaintiff's termination from employment.

Plaintiff seeks compensation for what he has lost as the result of Defendants' conduct – his wages and benefits, his name and reputation, and his peace of mind. With respect to his remedies, Plaintiff demanded back and front pay in his pleadings. *See, e.g.*, Second Amended Complaint ("SAC") at ¶ 50(b) and at the Wherefore Clause. During discovery, Plaintiff again expressly advised Defendants that he was seeking back and front pay on his constitutional claims.

At the summary judgment stage, despite being on notice of the scope of relief Plaintiff was seeking, Defendants "swung for the fences," and sought a complete exculpation from *liability* on all of Plaintiff's claims. However, Defendants did not move for summary judgment on the scope of Plaintiff's *remedies*. Defendants' arguments were:

> I. The official capacity claims … should be dismissed
>
> II. Defendants are entitled to summary judgment on Plaintiff's substantive due process and equal protection claims
>
> A. Defendants [have not] developed and/or utilized any unconstitutional policies, practices or procedures
>
> B. Plaintiff has [not] … establish[ed] a denial of any right protected under substantive due process
>
> C. Plaintiff's equal protection claim fails as a matter of law
>
> IV. *Sic., should be III.* Defendants are entitled to summary judgment as a matter of law on Plaintiff's § 1983 Malicious Prosecution claim

> IV. Defendants are entitled to summary judgment as a matter of law on Plaintiff's § 1983 Abuse of Process
>
> V. Defendants are entitled to summary judgment as a matter of law on Plaintiff's claim of Breach of Fiduciary Duty
>
> VI. Plaintiff has failed to establish that the had a contract … that would entitle him to … employment benefits
>
> VIII. *Sic., should be VII.* [T]he individual Defendants … [have] federal qualified immunity.

See, Defendants' Memorandum of Law in Support of Motion for Summary Judgment at pp. 4-6, 8, 13, 16, 17, 19, 21, 23. *Defendants neither argued that Plaintiff's remedies should be limited, nor proposed an Order of Court seeking to limit those remedies. Consequently, there is no language in the Amended Report and Recommendation "precluding," "excluding," "limiting" or "quashing" Plaintiff from recovering back and front pay.*

The opposite is true. Magistrate Caiazza expressly recognized that Plaintiff sought make-whole relief for losses resulting from *the totality of Defendants' conduct*, not simply their spiteful refusal to pay Plaintiff his vested benefits. *See,* Amended Report and Recommendation, Docket No. 116, at pp. 2, 7-8, 20, 22 (observing that Plaintiff had alleged that "Defendants … schemed to *deprive him of his job*…" "pursue theft charges…*to force him to resign,***"** and that *"Council voted to terminate Strain's employment…*"). (emphasis added). Magistrate Caiazza expressly observed that in addition to the denial of his vested benefits, Plaintiff based his claims on the sham criminal charges, the Defendants' acts of extortion, the 70 bogus personnel violations, the 30-day unpaid suspension, the extortionate termination of Plaintiff's employment, the interference with Plaintiff's PMRB pension, and similar acts that the Borough never perpetrated against any other employee. *Id.* at pp. 1-9.

Contrary to Defendants' false assertions otherwise, *the Magistrate never found that Plaintiff had foregone his wage remedies. Nor did the Magistrate enter an order precluding*

Plaintiff from those remedies. Plaintiff thus retains all remedies to which he is entitled at law and equity – including back and front pay – for the violations of his constitutional rights.

III. Legal Standard for Certification Under 28 U.S.C. § 1292(b)

28 U.S.C. § 1292(b) permits a district court to certify for interlocutory appeal its Order on an issue that involves a controlling question of law as to which there is ground for difference of opinion, where an immediate appeal from the Order may materially advance the ultimate termination of this litigation. "Controlling" questions of law include every order that would be reversible error on final appeal. *Katz v. Carte Blanche Corporation*, 496 F.2d 747, 755 (3rd Cir. 1974). However, "controlling" questions need not be determinative of the plaintiff's claims on the merits. *Id.* Nor need a reversal of the district court's order terminate the litigation before the order involves a "controlling" question. *Id.* Rather, "controlling" means "serious to the litigation, either practically or legally. *** And on a practical level, saving of time of the district court and of expense to the litigants [is]…a highly relevant factor." *Id.*

"Substantial grounds for difference of opinion" exist when there is genuine doubt as to the correct legal standard. *Russ-Tobias v. PA. Bd. Of Probation and Parole*, 2006 WL 516771 * 33 (E.D.Pa. 2006). A consistent and intensely litigated dispute by the parties, across multiple stages of the litigation, on a controlling question is strong evidence that "substantial grounds for difference of opinion" exist. *Id.* In assessing the requirement of a likelihood of materially advancing the ultimate termination of the litigation, "[t]he district court's opinion about settlement possibilities, about the potential length of a possibly avoidable trial or retrial, and similar matters" afforded strong weight. *Katz*, 496 F.2d at 754.

IV. Argument

A. Plaintiff's entitlement to the remedies of back and front pay on his constitutional claims is a controlling question.

1. In all cases where a constitutional violation proximately causes a loss of wages, a § 1983 plaintiff may seek back and front pay as equitable remedies.

a. § 1983 draws heavily from the common law of torts and mirrors the remedies afforded by Title VII, the ADEA and other civil rights laws.

"[W]hen § 1983 plaintiffs seek damages for violations of constitutional rights, the level of damages is ordinarily determined according to principles derived from the common law of torts." *Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 306 (1986); *see also Allah v. Al-Hafeez*, 226 F.3d 247, 250 (3d Cir. 2000) ("It is well settled that compensatory damages under § 1983 are governed by general tort-law compensation theory.").[3] Among the tort concepts incorporated into § 1983 is proximate cause. "[A] § 1983 plaintiff must demonstrate that the defendant's actions were the proximate cause of the violation of his federally protected right." *Rivas v. City of Passaic*, 365 F.3d 181, 193 (3d Cir. 2004); *see also, Hedges v. Musco*, 204 F.3d 109, 121 (3d Cir. 2000) ("It is axiomatic that '[a] § 1983 action, like its state tort analogs, employs the principle of proximate causation.'"). Therefore, where a § 1983 plaintiff proves that a defendant's constitutional violation has proximately caused the loss of wages and benefits, an award of back and front pay and benefits is appropriate.

[3] Compensatory damages in a Section 1983 case "include not only out-of-pocket loss and other monetary harms, but also such injuries as 'impairment of reputation ..., personal humiliation, and mental anguish and suffering.'" *Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 307 (1986) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974)).

b. Back and front pay is necessary to restore Mr. Strain to the position he would have occupied absent the violation of his constitutional rights.

Mr. Strain will prove at trial that but-for Defendant Stelitano's manufacturing and extortionate use of the sham criminal charges and personnel violations, Plaintiff would still be working for the Borough. The Third Circuit has long held that both back pay and front pay are critical to ensure that constitutional tort victims who lose wages are made whole. *Gurmankin v. Costanzo*, 626 F.2d 1115, 1122 (3d Cir. 1980) ("[B]ackpay [is] an integral aspect of equitable relief to be awarded in a suit brought under § 1983"); *Squires v. Bonser*, 54 F.3d 168, 172 (3d Cir. 1995); *Feldman v. Philadelphia Housing Authority*, 43 F.3d 823, 831 (3d Cir. 1994) ("When reinstatement is not [feasible], front pay is the alternate remedy.").

In *Costanzo*, the Third Circuit held that the availability of back and front pay under § 1983 is coextensive with that of Title VII. The plaintiff, a blind school teacher, was denied employment in violation of her due process rights under the 14th Amendment. *Costanzo*, 626 F.2d at 1117. The district court denied back pay for several of the years that the plaintiff would have been working but for the defendant's constitutional violation. *Id*. at 1119. The district court refused to import remedies from Title VII because it believed that the policies served by the statutes differed. *Id.* The plaintiff appealed, challenging the district court's refusal to award back pay as an abuse of discretion. *Id.*

Finding that the Supreme Court had "charged the district courts and court of appeals to give potent relief [for violations of federal rights], such as retroactive seniority and back pay," the Third Circuit reversed the district court and ordered it to award the plaintiff her full back pay. *Costanzo*, 626 F.2d at 1126. The Court held:

> *There is no distinction in the law of equitable remedies between suits brought under Title VII and suits brought in reliance on 42 U.S.C. § 1983,*

> *or directly on the Fourteenth Amendment.* *** Title VII precedent instructs us that the normative principle of relief…is the award of back pay. The award of such relief is made not solely to deter would be discriminators…but also to provide meaningful relief to the victims….
>
> The district court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future. And where a legal injury is of an economic character, the general rule is that when a wrong has been done, and the law gives a remedy, the compensation shall be equal to the injury. ***
>
> The necessity of adopting a standard of relief which would restore the victim as fully as possible to the economic position in which s/he would have been in … has been recognized by this court which has, in numerous cases, adopted the "make whole" standard. *The make whole standard of relief should be the touchstone for the district courts in fashioning both legal and equitable remedies…. Victims of discrimination are entitled to be restored to the economic position they would have occupied but for the intervening unlawful conduct* of employers. ***
>
> *[T]hese principles do not differ when the basis of the underlying right is the Constitution rather than a statute such as Title VII. Indeed, it would be ironic were we to hold that relief for a constitutional violation involving employment discrimination stands on a lesser ground than relief for a violation of a statutory right.* Persuasive precedent establishes that there can be no effective constitutional right without a corresponding remedy.[4]

Costanzo, 626 F.2d at 1121 (emphasis added) (internal citations omitted). Back pay was required, the Third Circuit reasoned, to "return the plaintiff[] to the position [she] held before the alleged unconstitutional failure [to hire]. An inextricable part of the restoration to prior status [was] the payment of back wages…." *Id.* at 1123.

[4] *Costanzo* thus puts to rest Defendants' baseless contention that back and front pay are unavailable because "this is not a discrimination case" under Title VII. *Id. See also, Squires v. Bonser*, 54 F.3d 168, 172 (3rd Cir. 1995) ("Because of the consonance of the underlying policy considerations, the framework of analysis governing [equitable remedies] in Title VII actions also governs in § 1983 actions…."). In both Title VII and § 1983 cases, the court's decision regarding what remedies a plaintiff may seek must always be guided by the twin goals of make-whole relief and deterrence. *Squires*, 54 F.3d at 172. Any decision that Mr. Strain cannot seek back and front pay will undermine both goals.

The same is true here for Mr. Strain. At trial, Mr. Strain will prove that the Defendants concocted false criminal charges and personnel violations against him, extorted Plaintiff into signing a letter purporting to resign from employment, and then, despite Plaintiff's involuntary capitulation, terminated Plaintiff's employment and denied his vested benefits. Plaintiff will further prove that as the direct result of Defendants' extortion, he lost substantial wages and benefits. If the jury returns a verdict in Mr. Strain's favor, then under the binding law of *Costanzo*, this Court will have a **duty** to restore Mr. Strain to the economic position he would have occupied but for the Defendants' unconstitutional actions, which will require an award of back and front pay.

c. Lost wages are a required remedy to compensate for any constitutional violation that causes a wage loss.

In *Brooks v. Andolina*, 826 F.2d 1266 (3rd Cir. 1987), the Third Circuit held that § 1983 affords lost wages as a remedy for any constitutional violation that causes a loss of wages. *Brooks*, 826 F.2d at 1270-71. The plaintiff prison inmate in Brooks was placed in segregation after writing a letter complaining about a prison official. *Id.* at 1267. At his administrative hearing, the plaintiff was denied the opportunity to call witnesses. *Id.* at 1268. The plaintiff sued under § 1983, asserting violations of his rights under the 1st and 14th Amendments to the United States Constitution. *Id.* The plaintiff testified that as a direct result of his placement in segregation, he was unable to work his usual prison job and lost wages. *Id*. at 1269-70. The district court disregarded the Plaintiff's testimony regarding his lost wages and awarded him nominal damages only. The Third Circuit reversed, finding that the plaintiff had demonstrated actual injury under § 1983 for which he could recover lost wages. *Id.*

> Our review of the record convinces us that Brooks demonstrated that he suffered actual injury as a result of his placement in punitive segregation for thirty days in violation of his constitutional rights. At the hearing before the

> magistrate, *Brooks testified that while in punitive segregation he lost … his wages from his job. In light of this testimony, the magistrate erred in concluding that Brooks did not introduce evidence of actual injury.*
>
> Because Brooks satisfied the standard enunciated in *Memphis Community School District* for recovery of compensatory damages, we conclude that the district court erred in awarding Brooks only nominal damages for the unwarranted punitive segregation.

Brooks, 826 F.2d at 1270 (internal citations omitted).

In a similar § 1983 case where the defendant sought to exclude wage loss evidence, the District Court for the Middle District of Pennsylvania relied on *Brooks* in denying the defendant's motion. In *Cimino v. Borough of Dunmore*, 2005 WL 3488419 (M.D.Pa. 2005), the plaintiff was transferred out of her position with the defendant Borough in violation of her Equal Protection rights. The defendant moved for summary judgment, arguing that the plaintiff could not recover lost wages because she was not discharged from employment. *Id.* at *13. Citing to *Brooks*, the district court forcefully rejected the defendant's argument:

> *[Defendant's] argument that plaintiff cannot recover lost wages against him because she was not constructively discharged is equally meritless. A § 1983 plaintiff can recover lost wages as part of the actual damages caused by a constitutional violation. See, Brooks v. Andolina*, 826 F.2d 1266, 1269-70 (3rd Cir. 1987). [Plaintiff] has produced evidence that as a result of [defendant's] harassment, she was transferred out of the Borough, thus diminishing her wages. Therefore, we will deny [defendant's] motion for summary judgment on [plaintiff's] claim for lost wages.

Cimino, 2005 WL at *13 (emphasis added).

Neither *Brooks* nor *Cimino* were "wrongful discharge" cases. Rather, they were § 1983 cases in which the constitutional injury - i.e., the First Amendment and Due Process violations in Brooks, and the Equal Protection violation in Cimino - caused the plaintiff to lose wages. In both cases, the plaintiff was allowed to recover lost wages as a remedy under § 1983. So too in

this case. Defendants' abuse of process[5] and unequal treatment of Plaintiff caused Plaintiff to lose wages. Accordingly, Plaintiff must be allowed to recover his past and future lost wages as a remedy at trial.

d. Plaintiff may recover for Abuse of Process without showing a deprivation of property.

In *General Refractories Co. v. Fireman's Fund Ins. Co.*, 337 F.3d 297 (3rd Cir. 2003) the Third Circuit held that a plaintiff can recover for abuse of process without proving that he was deprived of property. *Id.* at 307. The Third Circuit cited to *McGee v. Feege*, 535 A.2d 1020, 1026 (Pa. 1987), where the Pennsylvania Supreme Court held that "*a seizure or deprivation of property is not an indispensible element of the tort of abuse of process." McGee,* 535 A.2d at 1026 (Emphasis added). The court explained:

> [T] he tort of abuse of process is concerned with a perversion of the legal process. When the legal process is perverted and directed toward a victim for a purpose other than that for which the process was designed, a cause of action for abuse of process exists without the necessity of a seizure of property. We will not countenance the use of the legal process as a tactical weapon to coerce a desired result that is not the legitimate object of the process, whether or not a seizure of property is a part of that process.

McGee, 535 A.2d at 1026 (Emphasis added).

Magistrate Caiazza inadvertently overlooked this point of law when he tied Plaintiff's ability to recover for abuse of process to the existence of a contract for Plaintiff's post-employment benefits. *See, Amended Report and Recommendation* at p. 23, n.11. Plaintiff's abuse of process claim does not depend upon any contract or deprivation of property, but arises independently from Defendants' extortionate use and threats to use criminal process to obtain

[5] In the Third Circuit, "an abuse of process is by definition a denial of procedural due process." *Jennings v. Shuman*, 567 F.2d 1213, 1220 (3rd Cir. 1977). Decisions by public officials to refrain from criminal prosecution may not be made on the basis of a citizen's willingness to accede to extortionate demands. *Id.*

Plaintiff's separation from employment and waiver of his vested benefits. Plaintiff's abuse of process claim lies irrespective of a contract for post-employment benefits.

2. Mr. Strain's status as an at-will employee does not diminish his entitlement to back and front pay.

Defendants have argued that permitting Plaintiff to recover lost wages and benefits on his constitutional claims would frustrate the doctrine of at-will employment. This argument is meritless. The Third Circuit has repeatedly rejected efforts to mount an "at-will" defense to civil rights claims involving a termination from employment. *See, Gagliardo v. Connaught Laboratories, Inc.*, 311 F.3d 565, 572 (3rd Cir. 2002); *Pivirotto v. Innovative Systems, Inc.*, 191 F.3d 344, 350 n.2 (3rd Cir. 1999). The logic is not difficult to understand. In nearly all civil rights cases, the aggrieved employee is employed at-will, and could have been fired for any legal reason or no reason. The central question in such cases is not whether the plaintiff *could* have been fired, but whether the plaintiff *would have been* fired but for the defendant's illegal animus or conduct. Because Mr. Strain's at-will status is irrelevant to whether the Defendants abused process or violated the Equal Protection clause, the Court cannot prohibit Mr. Strain from recovering lost wages and benefits merely because he was employed at-will.

3. Rule 54(c) guarantees Plaintiff all remedies to which he is entitled at law and equity, including back and front pay.

Mr. Strain expressly demanded the remedies of lost back and front pay and benefits in his pleadings. *See*, SAC at ¶ 50(b) and at the Wherefore Clause. But even if Plaintiff had not requested those remedies in his pleadings, the Court would still have no discretion to deny them because Fed. R. Civ. P. 54(c) guarantees litigants all remedies to which they are entitled. Rule 54(c) provides in pertinent part:

> Every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleadings.

(Fed.R.Civ.P. 54(c) (emphasis added).

Courts have long construed Rule 54(c) to require the award of damages even when a complaint did not separately plead for them, so long as it alleges facts to support the award. *See, e.g., Guillen v. Kuykendall*, 470 F.2d 745, 748 (5th Cir. 1972); *Scutieri v. Paige*, 808 F.2d 785, 792 (11th Cir. 1987) (district court "commits reversible error in not instructing the jury" on damage item "[i]f the complaint alleges conduct that would support a claim...and if evidence is presented creating a jury question.").

Here, the SAC pleads facts that, if proven, would support an award of damages for past and future losses of wages and benefits. SAC at ¶¶ 11-15, 17, 31, 50 (alleging that Defendants caused Plaintiff to be terminated on unconstitutional grounds and that Plaintiff suffered past and future wage and benefit loss as a result). Because Plaintiff has pled facts that, if proven at trial, support an award of back and front pay and benefits, Plaintiff is entitled to recover those remedies if the jury finds in his favor on liability.

4. Courts routinely certify under § 1292(b) orders that limit the plaintiff's remedies at trial.

Wright and Miller observe that "[interlocutory] appeal … is suitable with respect to orders that define the issues that remain to be tried, so long as present appeal may forestall unnecessary … duplication of proceedings after reversal for trial of issues that should not have been dismissed." 16 Wright and Miller et al., Federal Practice and Procedure § 3931 (2nd ed. 2004). District courts do not hesitate to certify orders that limit remedies available at trial, particularly where, as here, the plaintiff has been substantially, adversely affected, and intends to appeal the court's order following trial. *See, e.g., Calhoun v. Yamaha Motor Corp.*, 40 F.3d 622,

625-26 (3rd Cir. 1994) (question of remedies available in wrongful death case certified for interlocutory appeal); *Grace v. City of Detroit,* 216 Fed. Appx. 485 **1 (6th Cir. 2007) (question of remedies available in § 1983 case certified for interlocutory appeal); *Obron v. Union Camp Corp.*, 477 F.2d 542, 543 (6th Cir. 1973) (question of remedies available in antitrust case certified for interlocutory appeal).

This Court's Order precluding the equitable remedies of back and front pay on Mr. Strain's constitutional claims is ideally suited for interlocutory review. If the Court erred, then it is far more efficient to resolve the issue now, rather than consuming resources to prepare for and try the case, appealing, and then conducting a second trial on remedies if the appellate court reverses.

B. There is a substantial basis for difference of opinion as to the correctness of Court's order, and resolving the remedies issue now will materially lead to the termination of the litigation.

It is clear from the docket in this case that the parties strongly disagree as to the availability of back and front pay on Plaintiff's constitutional claims. It is also clear that disposition of the remedies issue will materially move the case toward termination, because the parties' respective risks, gains and exposures from trial will become more pronounced and identifiable.

V. Conclusion

As a result of the Court's ruling precluding Plaintiff from seeking back and front pay on his constitutional claims, the economic damages Plaintiff may seek at trial have dropped from $997,321.00 to $212,319.00. Plaintiff believes the Court's ruling is reversible error; Defendants believe it is not.

The remedies available on Plaintiff's constitutional claims is a controlling question in this litigation, and reasonable minds could disagree with the correctness of the Court's order precluding back pay and front pay from trial. An immediate appeal will materially advance the ultimate termination of this litigation. Because of the vast difference in the damages potentially recoverable on Plaintiff's constitutional claims, it is extremely unlikely that this case can settle or be finally resolved until the issue is heard by the appellate court. A trial under such circumstances would not be an efficient use of judicial resources.

For these reasons, the Court should certify for interlocutory appeal under 28 U.S.C. § 1292(b) the Court's order precluding Plaintiff from recovering the make-whole remedies of back pay and front pay on his § 1983 claims for Abuse of Process and the denial of the Equal Protection of the law.

Respectfully submitted,

s/ Charles A. Lamberton
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CERTIFICATE OF SERVICE: I, Charles A. Lamberton, certify that a copy of this paper has been served electronically upon counsel for the Defendants via the Court's ECF/CM system as of the date this paper was filed.

s/ Charles A. Lamberton