UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ISAAC HARRIS, et al., Plaintiffs, v. MEDICAL TRANSPORTATION MANAGEMENT, INC., Defendant.	Civil Action No. 1:17-cv-01371 (APM)

PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO AMEND AND CERTIFY ORDER OF AUGUST 6, 2021 FOR INTERLOCUTORY APPEAL PURSUANT TO 28 U.S.C. SECTION 1292(b)

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September 13, 2021

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INTRODUCTION

Defendant Medical Transportation Management, Inc. (MTM) has requested that the Court amend its order denying decertification of the Fair Labor Standards Act (FLSA) collective action to certify that the order meets the criteria for interlocutory appeal under 28 U.S.C. § 1292(b). ECF No. 189. Because MTM fails to show that the order satisfies any of the three requirements for certification pursuant to 28 U.S.C. § 1292(b), MTM's request for certification for interlocutory appeal should be denied.

BACKGROUND

MTM provides non-emergency medical transportation services to Medicaid participants in the District of Columbia, through contracts with the District. MTM does not employ drivers directly, but rather subcontracts with transportation-service providers that directly employ the drivers required to fulfill MTM's contracts. Plaintiffs are drivers who allege that MTM is their joint employer and a general contractor and, as such, is liable for the underpayment of the drivers' wages under federal and D.C. wage laws.

On July 17, 2018, the Court conditionally certified plaintiffs' FLSA minimum wage and overtime claims as a collective action and ordered that notice be sent to potential party plaintiffs.[1] One-hundred fifty-five current and former drivers joined the FLSA collective. On December 7, 2020, MTM moved to decertify the collective action. ECF No. 180. The Court denied MTM's motion on August 6, 2021. Mem. Op. & Order 14, ECF No. 187. The Court held that the named and party plaintiffs are "similarly situated" under section 216(b) of the FLSA. The Court carefully considered other authority interpreting the meaning of "similarly situated," and it concluded that

[1] As this Court recognized, the FLSA does not use the terms "original" or "opt-in" plaintiffs, but rather "refers to *all* plaintiffs in a collective action as 'party plaintiff[s].'" Mem. Op. & Order 6 n.2 (quoting *Campbell v. City of Los Angeles*, 903 F.3d 1090, 1104 (9th Cir. 2018)).

the approach set forth in *Campbell v. City of Los Angeles*, 903 F.3d 1090, was the "superior" one, "as it is the most in tune with the text and purpose of section 216(b)." Mem. Op. & Order 8. Applying the *Campbell* standard, the Court held that the plaintiffs "have demonstrated that they are similarly situated as to … whether MTM is a joint employer." *Id.* 14. The Court explained that "the antecedent question of whether MTM qualifies as Plaintiffs' joint employer" "*is* potentially dispositive," *id.* 10, that "MTM is likely to be a joint employer for all drivers or for none at all," *id.* 11, and that "[a]lthough a common policy or practice might be *sufficient* to show party plaintiffs are similarly situated, this case illustrates why a common policy or practice is not *necessary*," *id.* 13. In the same memorandum opinion and order, the Court certified a Rule 23(c)(4) issues class to resolve the common issues of whether MTM is a joint employer or general contractor. *Id.* 23–24.

MTM filed a Rule 23(f) petition in the D.C. Circuit seeking permission to pursue an interlocutory appeal of this Court's certification of an issue class under Rule 23(c)(4). In its petition, MTM argued that if the Rule 23(f) petition is granted, the Court of Appeals should also review the denial of MTM's motion to decertify the FLSA collective action. MTM's Rule 23(f) petition remains pending.

On the same day that it filed its Rule 23(f) petition, MTM moved in this Court to certify the following questions for interlocutory appeal under § 1292(b):

> 1. Whether the test applied in the Court's Order constitutes the proper standard for determining whether a group of plaintiffs is "similarly situated" for purposes of the FLSA collective action provision.
>
> 2. Whether a group of plaintiffs can be "similarly situated" for purposes of an FLSA collective action if they were not subject to any common FLSA-violating policy or practice.
>
> 3. Whether the existence of a dispute as to whether the members of a collective were joint employed by a defendant is sufficient to render those individuals "similarly situated" for purposes of an FLSA collective action.

> 4. Whether an FLSA collective action can be maintained as to particular issues rather than as to an FLSA claim as a whole.

Def. Mem. 2–3, ECF No. 189-1.

LEGAL STANDARD

Pursuant to 28 U.S.C. § 1292(b), a district court has discretion to certify that a non-final order involves "a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). When a district court issues a certification, a party then has ten days within which to seek permission from the Court of Appeals to pursue an interlocutory appeal. *Id.*

"Section 1292(b) 'is meant to be applied in relatively few situations and should not be read as a significant incursion on the traditional federal policy against piecemeal appeals.'" *Tolson v. United States*, 732 F.2d 998, 1002 (D.C. Cir. 1984) (citation omitted). Thus, "the law is clear that certification under § 1292(b) is reserved for truly exceptional cases." *In re Vitamins Antitrust Litig.*, No. 99-197 (TFH), 2000 WL 673936, at *2 (D.D.C. Jan. 27, 2000). "A party seeking certification pursuant to § 1292(b) must meet a high standard to overcome the 'strong congressional policy against piecemeal reviews, and against obstructing or impeding an ongoing judicial proceeding by interlocutory appeals.'" *Judicial Watch, Inc. v. Nat'l Energy Policy Dev. Grp.*, 233 F. Supp. 2d 16, 20 (D.D.C. 2002) (quoting *United States v. Nixon*, 418 U.S. 683, 690 (1974)). "A movant must do more than show continued disagreement with the trial court's decision" to warrant certification under § 1292(b). *Graham v. Mukasey*, 608 F. Supp. 2d 56, 57 (D.D.C. 2009).

When seeking interlocutory review under section 1292(b), the movant bears the burden of showing "(1) that the issue involves a controlling question of law; (2) that substantial contrary

authority or other grounds for a difference of opinion exist; and (3) that immediate appeal would materially advance the ultimate determination of the litigation." *Virtual Def. & Dev. Int'l, Inc. v. Republic of Moldova*, 133 F. Supp. 2d 9, 22 (D.D.C. 2001). "Interlocutory appeal is only appropriate if all three requirements are satisfied." *In re Rail Freight Fuel Surcharge Antitrust Litig.*, No. CV 11-1049 (PLF), 2021 WL 2433737, at *4 (D.D.C. June 15, 2021). "Even if the movant establishes the three criteria under section 1292(b), the Court may still deny certification, as the decision to certify an order for interlocutory appeal is entirely within the district court's discretion." *Flavell v. Int'l Bank for Reconstruction & Dev*., No. CV 20-623 (CKK), 2021 WL 2366577, at *5 (D.D.C. June 9, 2021).

ARGUMENT

I. MTM has not satisfied the three requirements for certification pursuant to 28 U.S.C. § 1292(b).

A. "Under section 1292(b), a controlling question of law is one that would require reversal if decided incorrectly or that could materially affect the course of the litigation with resulting savings of the court's or the parties' resources." *In re Vitamins Antitrust Litig.*, 2000 WL 673936, at *2. "Controlling questions of law include issues that would terminate an action if the district court's order were reversed." *APCC Servs., Inc. v. Sprint Commc'ns Co.*, 297 F. Supp. 2d 90, 96 (D.D.C. 2003).

The order at issue does not meet this standard. Even if interlocutory appeal were granted and the Court of Appeals reversed this Court's certification of the FLSA collective, this case would continue, resulting in no "savings of the [C]ourt's or the parties' resources." Indeed, the purpose of maintaining the FLSA collective in this case is to save resources by determining with common evidence whether MTM is a joint employer. *See* Mem. Op. & Order 11 ("The court therefore

stands by its assessment … that '[c]ommon evidence is likely to resolve the joint employer question' under both the FLSA and the state law claims.").

Moreover, as to the first question on which MTM seeks interlocutory review—whether the court applied the proper legal standard for determining whether the party plaintiffs are "similarly situated" within the meaning of section 216(b) of the FLSA—MTM characterizes the question as "controlling" but does not explain why. *See* Def. Mem. 5–6.

As to MTM's proposed second, third, and fourth questions, they are three variations on the same legal issue: whether an FLSA collective action can be used to determine a common, threshold issue (here, whether MTM is a joint employer), even if that determination will not completely resolve liability because of the lack of a common FLSA-violating policy or practice. Although MTM asserts that the question is "dispositive," "directly impacts," or "determinative" of whether the FLSA collective may be maintained, *id.* 7, 9, 10, it neglects to recognize that decertification of the FLSA collective would neither save resources nor terminate the case. Rather, interlocutory reversal of the Court's order would result in potentially more than one hundred individual lawsuits by the party plaintiffs and require the joint-employer issue to be litigated over and over again.

In short, because interlocutory reversal would neither "terminate [the] action," *APCC Servs.*, 297 F. Supp. 2d at 96, nor result in "savings of the court's or the parties' resources," *In re Vitamins Antitrust Litig.*, 2000 WL 673936, at *2, the questions for which MTM seeks certification for interlocutory appeal are not "controlling" for purposes of section 1292(b).

B. "The threshold for establishing the substantial ground for difference of opinion with respect to a controlling question of law required for certification pursuant to § 1292(b) is a high one." *Judicial Watch*, 233 F. Supp. 2d at 19 (internal quotation marks omitted). "[M]ere disagreement, even if vehement, with a court's ruling does not establish a substantial ground for

difference of opinion sufficient to satisfy the statutory requirements for an interlocutory appeal." *Jud. Watch, Inc.*, 233 F. Supp. 2d at 20 (citation omitted); *see also In re Vitamins Antitrust Litig.*, 2000 WL 673936, at *3 ("Interlocutory review should not be used merely to provide a review of difficult rulings in hard cases." (citation omitted)).

MTM fails to satisfy the high threshold needed to demonstrate a substantial ground for difference of opinion. As to the first question, it is true that the D.C. Circuit "has not yet spoken on th[e] issue" of the standard for determining whether party plaintiffs are "similarly situated" within the meaning of the FLSA. Mem. Op. & Order 5. The mere absence of precedent on an issue, however, "does not 'require, or in this instance, justify, certification of an interlocutory appeal.'" *Washington Tennis & Educ. Found., Inc. v. Clark Nexsen, Inc.*, 324 F. Supp. 3d 128, 145 (D.D.C. 2018) (Mehta, J.); *see First Am. Corp. v. Al-Nahyan*, 948 F. Supp. 1107, 1117 (D.D.C. 1996). Were the rule otherwise, every issue on which there was no binding authority would qualify for interlocutory review.

Further, that other Circuits have applied different approaches—*i.e.*, the so-called "ad hoc" approach and the "minority approach"—does not satisfy the section 1292(b) requirement. "It is not unusual that Circuits differ with respect to the proper resolution of legal issues deemed controlling in a particular case. If interlocutory appeals were to be granted in every such instance, our system's strong preference for appeal only upon final judgment would be severely undermined." *Jud. Watch, Inc.*, 233 F. Supp. 2d at 22. Moreover, the decisions from those other Circuits are over a decade old, and different courts of appeal have more recently adopted the approach applied by this Court. *See* Mem. Op. & Order 7–8 (discussing courts of appeals decisions).

On the other questions, MTM rehashes the arguments that it made in its motion for decertification and cites the cases that it previously cited. This Court has already considered and rejected the arguments, and MTM's "vehement" disagreement with this Court's conclusions is not a basis for interlocutory review. *See Jud. Watch, Inc.*, 233 F. Supp. 2d at 20; *see, e.g.*, *Washington Tennis & Educ. Found., Inc.*, 324 F. Supp. 3d at 145 (denying motion for certification where "the lion's share of [the movant's] argument for interlocutory review … do[es] no more than show continued disagreement with the court's decision" (internal quotation marks and citation omitted)); *Nat'l Cmty. Reinvestment Coal. v. Accredited Home Lenders Holding Co.*, 597 F. Supp. 2d 120, 122 (D.D.C. 2009) (denying motion for certification where "[d]efendants have simply reiterated their position"); *Am. Soc. for the Prevention of Cruelty to Animals v. Ringling Bros. & Barnum & Bailey Circu*s, 246 F.R.D. 39, 43 (D.D.C. 2007) (same); *First Am. Corp.*, 948 F. Supp. at 1116 ("The mere claim that a decision has been wrongly decided is not enough to justify an interlocutory appeal.").[2]

MTM further contends that an out-of-Circuit, unreported district court decision issued after this Court's decision—*Hinds v. FedEx Ground Package System, Inc.*, No. 18-01431 (N.D. Cal. Aug. 18, 2021)—"demonstrate[s]" "[t]he existence of 'substantial ground for difference of opinion.'" Def. Mem. 8. *Hinds*, however, addressed certification of a Rule 23 class action, *not* a FLSA collective action. It is inapposite.

[2] *See also Jud. Watch*, *Inc.*, 233 F. Supp. 2d at 27 (denying § 1292(b) motion where "other than their interpretation of cases, and citation to cases the court has found to be inapposite, defendant[] ha[s] offered little to support their desired result and [] ha[s] not persuaded the Court that conflicting authority exists on the issue presented as applied to the relevant facts" (internal quotation marks omitted)); *In re Vitamins Antitrust Litig.*, 2000 WL 673936, at *3 (denying § 1292(b) motion because "[i]n essence, Petitioners rely on their disagreement with the Court's November 23, 1999 ruling as well as the acknowledged lack of precedent on this issue to demonstrate a substantial ground for difference of opinion").

C. To satisfy the requirement that immediate appeal would "materially advance the ultimate termination of the litigation," MTM must show that the appeal "would generate significant savings in resources for both the courts and the litigant." *Educ. Assistance Found. for the Descendants of Hungarian Immigrants in Performing Arts, Inc. v. United States*, No. CV 11-1573 (RBW), 2014 WL 12780253, at *3 (D.D.C. Nov. 21, 2014) (citation omitted). "[T]he relevant inquiry is whether reversal would hasten or at least simplify the litigation in some material way, such as by significantly narrowing the issues, conserving judicial resources, or saving the parties from needless expense." *Molock v. Whole Foods Mkt. Grp., Inc.*, 317 F. Supp. 3d 1, 6 (D.D.C. 2018). Where the interlocutory appeal "would not promote the efficient use of scarce judicial resources," but rather would "prolong and substantially delay this litigation" "at all the parties' expense," certification should be denied. *In re Vitamins Antitrust Litig.*, 2000 WL 673936, at *3. Indeed, section 1292(b) "certification [is] improvidently granted" where a decision on the certified issue "will not materially advance the ultimate termination of the litigation." *Van Meter v. Barr*, 976 F.2d 1, 1 (D.C. Cir. 1992).

Despite bearing the burden to prove this element, MTM barely discusses it. The entirety of MTM's argument regarding this element hinges on its mistaken assertion that decertification of the FLSA collective action would mean that this case would "revert to an action involving only three plaintiffs." Def. Mem. 10. In fact, however, if MTM were to prevail in an interlocutory appeal and secure decertification of the collective, the result would be individualized trials for both the three named plaintiffs *and* for up to the more than one-hundred fifty party plaintiffs in the FLSA collective action. As this Court explained, "there can be no doubt that permitting this case to proceed as a collective action on the issue of whether MTM is a joint employer will benefit

individual plaintiffs and the judicial system by the efficient resolution in one proceeding of a common issue of law and fact." Mem. Op. & Order 13.

Thus, interlocutory appeal of this Court's decision would substantially prolong and delay this litigation at great expense. Indeed, this case will proceed to summary judgment and trial regardless of the outcome of an interlocutory appeal. Section 1292(b) certification is not appropriate in these circumstances. *See United States ex rel. Pogue v. Diabetes Treatment Ctrs. of Am.*, 576 F. Supp. 2d 128, 133 (D.D.C. 2008) (denying § 1292(b) certification because "regardless of the outcome of interlocutory appeal, trial of the case would still have to occur to reach the litigation's 'ultimate termination'"). Furthermore, MTM's speculative assertion that decertification of the collective "has the potential to significantly impact the likelihood" of settlement, Def. Mem. 10, does not justify interlocutory review. "A possible impact on case strategy … is too intangible a repercussion on the progress of a case to justify certification of an interlocutory appeal." *Keystone Tobacco Co., Inc. v. U.S. Tobacco Co.*, 217 F.R.D. 235, 239 (D.D.C. 2003) (rejecting the argument that interlocutory appeal was warranted because it might "materially affect the parties' approach [] to settlement").

* * * *

Interlocutory review pursuant to section 1292(b) is reserved for "exceptional circumstances" that "warrant disruption of the favored process of appellate review following final judgment." *Jud. Watch*, *Inc.*, 233 F. Supp. 2d at 20. Here, the Court's order on the FLSA collective action satisfies none of the three elements required to justify section 1292(b) certification. Thus, MTM's motion for certification for interlocutory appeal should be denied.

II. The collateral order doctrine does not provide a basis for interlocutory review under 28 U.S.C. § 1292(b).

MTM invokes the collateral order doctrine to support its request for certification pursuant to section 1292(b), but the collateral order doctrine is "an alternative mechanism for interlocutory appeal" that is distinct from section 1292(b). *See Educ. Assistance Found. for the Descendants of Hungarian Immigrants in Performing Arts, Inc.*, 2014 WL 12780253, at *2 (citing *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 111 (2009)); *see also In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 761 (D.C. Cir. 2014) (describing § 1292(b) as an "avenue" for interlocutory appeal distinct from the collateral order doctrine). Indeed, where the collateral order doctrine applies, district court certification is not required because the order is reviewed "as a 'final decision' under 28 U.S.C. § 1291, not as an interlocutory order under § 1292(b)." *DRG Funding Corp. v. Sec'y of Hous. & Urb. Dev.*, 76 F.3d 1212, 1220 (D.C. Cir. 1996) (Ginsburg, J., concurring); *see Sierra Club v. USDA*, 716 F.3d 653, 657 (D.C. Cir. 2013) (explaining that the collateral order doctrine "is a 'practical construction' of § 1291" (quoting *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 867 (1994)). In short, as the Supreme Court has explained, an interlocutory appeal pursuant to section 1292(b) is a "potential avenue[] of review *apart from* collateral order appeal." *Mohawk*, 558 U.S. at 110 (emphasis added).

MTM contends that the collateral order doctrine is "[c]onsistent" with its request for interlocutory review pursuant to section 1292(b), and it cites the standard for an appeal pursuant to the collateral order doctrine. Def. Mem. 11 (quoting *APCC Servs.,* 297 F. Supp. 2d at 95). The collateral order doctrine, however, does not support MTM's request for section 1292(b) certification. Indeed, as discussed above, granting section 1292(b) certification has three requirements, none of which is satisfied in this case. Moreover, MTM—correctly—does not suggest that the Court's order on FLSA certification would be appealable as a "final decision"

under the collateral order doctrine, and it does not satisfy the standard for collateral order appeal in any event. "In order to be immediately appealable [under the collateral doctrine], the order must: (1) conclusively determine the disputed question; (2) resolve an important issue completely separate from the merits of the action; and (3) be effectively unreviewable on appeal from a final judgment." *Doe v. Exxon Mobil Corp.*, 473 F.3d 345, 349 (D.C. Cir. 2007) (internal quotation marks omitted). "In applying this three-factor test, the Supreme Court has *repeatedly* emphasized the narrowness of the collateral order doctrine," explaining that "[t]he narrow exception *should stay that way* and never be allowed to swallow the general rule ... that a party is entitled to a single appeal, to be deferred until final judgment has been entered, in which claims of district court error at any stage of the litigation may be ventilated." *Id.* (quoting *Digital Equip. Corp.*, 511 U.S. at 868 (internal quotation marks omitted)). Here, the Court's decision denying decertification of the FLSA collective does not resolve an issue completely separate from the merits, because the very issue on which the FLSA collective is premised *is* the merits question of whether MTM is a joint employer. Further, contrary to MTM's suggestion, this Court's order on FLSA certification would be appealable following final judgment, just as other class-certification orders are appealable following final judgment. *See, e.g.*, *Bouaphakeo v. Tyson Foods, Inc.,* 765 F.3d 791 (8th Cir. 2014) (appeal after final judgment of the district court's certification of an FLSA collective action), *aff'd* 577 U.S. 442 (2016).

CONCLUSION

For the foregoing reasons, MTM's motion to amend and certify this Court's order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b) should be denied.

Dated: September 13, 2021

Respectfully submitted,

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[PROPOSED] ORDER

Upon consideration of Defendant's Motion to Amend and Certify Order of August 6, 2021 for Interlocutory Appeal Pursuant to 28 U.S.C. Section 1292(b), and the entire record herein, it is hereby

ORDERED that Defendant's Motion to Amend and Certify Order (Doc. 189) is DENIED.

SO ORDERED.

Dated: _____, 2021

_____
AMIT P. MEHTA
United States District Judge