

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

DUKES, ET AL.,

No. C 01-02252 CRB

Plaintiffs,

**ORDER DENYING REQUEST FOR
CERTIFICATION FOR
INTERLOCUTORY APPEAL**

v.

WAL-MART STORES, INC.,

Defendant.

Introduction

Wal-Mart requests that this Court certify for interlocutory appeal under 28 U.S.C. § 1292(b) this Court's order denying Wal-Mart's motion to dismiss on tolling and commonality grounds. The Court finds this matter suitable for disposition without oral argument, see N.D. Cal. Local R. 7-1(b), and DENIES Wal-Mart's request because (1) immediate appeal would not, at this time, materially advance the ultimate termination of the litigation in light of the impending class certification motion, and (2) no substantial grounds for difference of opinion exist regarding the commonality issue.

I. Background

Plaintiffs sued Wal-Mart in 2001, seeking and securing certification of a nationwide class of the store's female employees allegedly subject to discriminatory employment practices. Wal-Mart appealed and, ultimately, the Supreme Court reversed, holding that no appropriate common question of law or fact held the class together. See Wal-Mart Stores,

1 Inc. v. Dukes, 131 S. Ct. 2541, 2555-56, 2561 (2011). The parties then stipulated under
2 Federal Rule of Civil Procedure 15(a)(2) to the filing of a Fourth Amended Complaint, which
3 sought to certify a narrower version of the class the Supreme Court rejected. Dkt. 766, 769.

4 Wal-Mart moved to dismiss or strike the class allegations in the Fourth Amended
5 Complaint, arguing in relevant part that the statute of limitations barred the claims of putative
6 class members, and that as a matter of law the newly proposed class failed Rule 23's
7 commonality requirement as elaborated in the Supreme Court's opinion in this case. This
8 Court denied Wal-Mart's motion, holding that the claims of putative class members
9 continued to benefit from so-called American Pipe tolling, Order (dkt. 812) at 9-11, and that
10 the Fourth Amended Complaint stated allegations that could, if supported by evidence at the
11 class certification stage, satisfy Rule 23, id. at 8-9. The Court ordered Plaintiffs to submit
12 their class certification motion by January 11, 2013. Id. at 14.

13 Wal-Mart now doubles down on its position that Plaintiffs' motion for class
14 certification does not deserve to see the light of day, asking this Court to certify for
15 interlocutory appeal under 28 U.S.C. § 1292(b) this Court's order denying Wal-Mart's
16 motion to dismiss. See Req. for Cert. (dkt. 814) ("Mot.").

17 **II. Legal Standard**

18 Congress provided a limited exception to the historic federal policy against piecemeal
19 appeals in 28 U.S.C. § 1292(b), which provides that district courts may certify for immediate
20 appeal orders where:

- 21 (1) the order involves a controlling question of law
- 22 (2) as to which there is substantial ground for difference of opinion, and
- 23 (3) an immediate appeal from the order may materially advance the ultimate
termination of the litigation, he shall so state in writing in such order.

24 Id. The court of appeals may, but need not, accept and rule on an appeal certified under
25 § 1292(b). Id. A district court's denial of § 1292(b) request is not itself appealable. Credit
26 Suisse v. U.S. Dist. Court for the Cent. Dist. of Cal., 130 F.3d 1342, 1346 (9th Cir. 1997).

28 **III. Discussion**

1 Certification under § 1292(b) should be used “only in extraordinary cases where
2 decision of an interlocutory appeal might avoid protracted and expensive litigation.” U.S.
3 Rubber Co. v. Wright, 359 F.2d 784, 785 (9th Cir. 1966). It “was not intended merely to
4 provide review of difficult rulings in hard cases.” Id.; see also In re Cement Antitrust Litig.
5 (MDL No. 296), 673 F.2d 1020, 1026 (9th Cir. 1982); Lear Siegler, Inc. v. Adkins, 330 F.2d
6 595, 598 (9th Cir. 1964).

7 **A. Controlling Question of Law**

8 To be “controlling,” a question need not finally determine once and for all who wins
9 on the merits. In re Cement, 673 F.2d at 1026; see also Kuehner v. Dickson & Co., 84 F.3d
10 316, 318-19 (9th Cir. 1996). Rather, “all that must be shown in order for a question to be
11 controlling is that resolution of the issue on appeal could materially affect the outcome of the
12 litigation in the district court.” In re Cement, 673 F.2d at 1026; see also Reese v. BP
13 Exploration (Alaska) Inc., 643 F.3d 681, 688 (9th Cir. 2011) (standard met where answer
14 “may materially advance” the litigation).

15 Though the statute specifically references questions of law, the Ninth Circuit has
16 accepted § 1292(b) certifications for mixed questions involving application of law to a
17 particular set of facts where the attendant legal conclusion was sufficiently important. See
18 Steering Comm. v. United States, 6 F.3d 572, 575-76 (9th Cir. 1993); cf. In re Text
19 Messaging Antitrust Litig., 630 F.3d 622, 625-27 (7th Cir. 2010) (Posner, J.) (explaining that
20 § 1292(b) certification request regarding application of law to facts was appropriate where
21 the controlling legal standard was in ferment).

22 **1. Tolling**

23 Wal-Mart argues, and Plaintiffs agree, see Opp. (dkt. 818) at 3, that the tolling issue is
24 a controlling of question of law because it determines whether this is a case about the
25 experiences of five named plaintiffs or a class-action testing of the practices of the nation’s
26 largest private employer as they affect over one hundred thousand employees. This Court
27 has little difficulty agreeing that as a practical matter resolving that question would
28 “materially advance” the litigation.

1 **2. Commonality**

2 Plaintiffs contend that only so-called “pure questions of law” are “controlling
3 questions of law” suitable for interlocutory review under § 1292(b), and that as a mixed
4 question of law and fact bound up in the unique allegations in this case, the commonality
5 issue should not be certified. Some circuits have expressed skepticism at the wisdom of
6 certifying fact-bound questions, e.g., McFarlin v. Conseco Servs., LLC, 381 F.3d 1251,
7 1257-58 (11th Cir. 2004), and Plaintiffs cite several district courts in the Ninth Circuit
8 adopting a similar position, e.g., Simmons v. Akanno, No. 1:09-CV-00659-GBC (PC), 2011
9 WL 1566583, at *3 (E.D. Cal. Apr. 22, 2011).

10 But not all fact-bound questions are created equal. The kinds of factual inquiries that
11 courts typically find inappropriate for § 1292(b) certification are routine exercises in
12 scouring the record for a genuine issue of material fact, and “the application of settled law to
13 fact.” McFarlin, 381 F.3d at 1258. Neither party has cited to this Court a case where Ninth
14 Circuit has endorsed the “no fact-bound question” position; on the contrary, in at least one
15 case the Ninth Circuit approved of the use of § 1292(b) certification for a question involving
16 the application of law to a unique set of facts. See Steering Comm., 6 F.3d at 575-76.

17 The question here involves neither routine combing of the record nor application of
18 settled law to fact. The Supreme Court’s opinion in this case unsettled the standard for Rule
19 23 commonality, much like pleading standards in the wake of Twombly and Iqbal, see In re
20 Text Messaging, 630 F.3d at 625-27. Accordingly, the Court finds that the commonality
21 issue presents a controlling question of law for purposes of § 1292(b).

22 **B. Substantial Ground for Difference of Opinion**

23 A substantial ground for difference of opinion exists “where the circuits are in dispute
24 on the question and the court of appeals of the circuit has not spoken on the point, if
25 complicated questions arise under foreign law, or if novel and difficult questions of first
26 impression are presented.” Couch v. Telescope, Inc., 611 F.3d 629, 633 (9th Cir. 2010)
27 (internal quotation marks omitted). On the other hand, “a party’s strong disagreement with
28 the Court’s ruling is not sufficient for there to be a “substantial ground for difference,” nor is

1 the possibility that “settled law might be applied differently.” Id.

2 **1. Tolling**

3 The parties dispute whether a split of authority exists on the relevant question. No
4 circuit court has ruled on whether tolling is available where a class has been rejected or
5 decertified but plaintiffs in the same case are permitted to amend their complaint and seek to
6 certify a new class. The only circuit-level case cited to this Court that directly addressed the
7 question, albeit in *dicta*, was Catholic Social Services, Inc. v. I.N.S., 232 F.3d 1139, 1146,
8 1149 (9th Cir. 2000) (en banc), which stated that tolling would be available. However, the
9 Ninth Circuit has not yet had to resolve a case solely on those grounds, and how much
10 weight a subsequent Ninth Circuit panel would give to Catholic Social Services’ dicta is
11 unclear.¹

12 Wal-Mart cites a line of circuit cases holding that “American Pipe tolling does not
13 extent to subsequent class actions seeking to relitigate the denial of class certification,” Mot.
14 at 9 & n.3, which is fine as far as it goes. That does not answer the question posed in this
15 case; indeed, at least one of the cases Wal-Mart cites explicitly allowed for the possibility of
16 a distinction between subsequently-filed class actions and continuations of the original
17 action. See Andrews v. Orr, 851 F.2d 146, 150 (6th Cir. 1988). Wal-Mart explains at length
18 why it believes this Court was wrong in concluding that a meaningful distinction exists
19 between a subsequently filed class action and a follow-on class action in the same case, but
20 that “strong disagreement” with this Court’s conclusions does not advance its § 1292(b)
21 cause.

22 At the district court level, the parties have identified a two-one split among courts
23 confronting the question. Compare In re Initial Pub. Offering Sec. Litig., 617 F. Supp. 2d
24 195, 199-200 (S.D.N.Y. 2007), and Coleman v. GMAC, 220 F.R.D. 64, 96-97 (M.D. Tenn.
25 2004), with Fleck v. Cablevision VII, Inc., 807 F. Supp. 824, 827 (D.D.C. 1992). The split in
26 non-binding authority cuts in both directions and weighs little in the Court’s analysis; any

27 ¹ Plaintiffs also suggest that two Supreme Court cases, see Smith v. Bayer, 131 S. Ct. 2368 (2011);
28 Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431 (2010), support their
position, but the issues decided in those cases are sufficiently distinct from those presented here that
little can be reliably inferred from their holdings.

1 split suggests that reasonable minds might disagree on the point, but three of the four district
2 courts agree with this Court’s conclusion, and this Court’s previous order explained why it
3 did not find the reasoning of the fourth court persuasive.

4 On balance, no circuit has yet ruled—as opposed to commented—on this issue, and the
5 district courts are split. The Court finds that the tolling issue thus presents a novel and
6 difficult legal question of first impression and that substantial grounds for difference of
7 opinion exist.

8 2. Commonality²

9 In Wal-Mart’s view, substantial grounds for disagreement exist regarding this Court’s
10 reading of Dukes. Specifically, Wal-Mart says this Court was wrong when it said that “the
11 Supreme Court’s decision in Dukes rested not on a total rejection of plaintiffs’ theories, but
12 on the inadequacy of their proof.” Order at 8-9. Wal-Mart argues that other courts have held
13 that “an employer’s policy of granting its supervisors discretion to make personnel decisions
14 can’t be the subject of a class action against the employer by employees complaining of
15 discrimination by the supervisors.” Mot. at 11 (quoting Gschwind v. Heiden, 692 F.3d 844,
16 848 (7th Cir. 2012). But this Court’s statement and Wal-Mart’s supposedly contrary
17 interpretation do not actually conflict.

18 The Supreme Court’s decision foreclosed claims that delegated discretion—alone—is
19 sufficient to state a common question for purposes of Rule 23. It does not follow that any
20 time a plaintiff alleges that a company has a policy involving some amount of delegated
21 discretion, the plaintiff is precluded from showing a classwide pattern or practice of
22 discrimination or a common mode of exercising delegated discretion susceptible to classwide
23 relief. That is why the Supreme Court reached the question whether the plaintiffs had
24 evidence on those points sufficient to establish a common question under Rule 23.

25 _____
26 ² Wal-Mart also somewhat confusingly injects challenges to this Court’s conclusion that the mandate
27 rule does not bar further litigation into its discussion of both the tolling and commonality issues.
28 Mot. at 7-8, 14; Reply at 4. Wal-Mart’s characterization of this Court’s position on the mandate
issue as conflicting with the Supreme Court’s opinion is a clever attempt to shoehorn mere
disagreement with this Court’s conclusion into the § 1292(b) factors—but if Wal-Mart were correct,
then substantial grounds for disagreement would exist any time a litigant thought a court had
violated the mandate rule, which cannot be correct.

1 On those issues, the Supreme Court held that the plaintiffs had failed to offer
2 “significant proof that Wal-Mart operated under a general policy of discrimination,” Dukes,
3 131 S. Ct. at 2553, and also that the plaintiffs lacked sufficient evidence of a “common mode
4 of exercising discretion that pervade[d] the entire company,” id. at 2554-55. On this narrow
5 question of what the Court held regarding the record in front of it, no substantial grounds for
6 disagreement exist; the Supreme Court’s opinion is published and it says what it says.

7 To the extent Wal-Mart’s argument rests on a characterization of the Fourth Amended
8 Complaint as relying on a theory that the mere existence of delegated discretion creates a
9 common question, that characterization does not withstand scrutiny. Wal-Mart says that
10 “Plaintiffs have not alleged that any manager in any store made adverse decisions against
11 employees based on these alleged views [of gender bias], much less that every such manager
12 did.” Mot. at 12. Actually, that is exactly what Plaintiffs allege. See Fourth Amended
13 Compl. ¶¶ 71-81 (alleging, under the heading “Wal-Mart Managers Rely on Discriminatory
14 Stereotypes,” that “Wal-Mart’s managers rely on discriminatory stereotypes and biased
15 views about women in making pay and promotion decisions in the California Regions and
16 Districts”).

17 Wal-Mart next faults Plaintiffs for the lack of detail regarding any supposed “common
18 mode of exercising discretion.” But the record is devoid of evidence and detail on that point
19 on account of Wal-Mart's insistence on litigating (and relitigating) class certification prior to
20 a motion for class certification. The lack of evidence in the record on the commonality
21 question has everything to do with the premature nature of Wal-Mart's motion and nothing to
22 do with the viability of Plaintiffs' class claims.

23 The Court is accordingly at a loss to understand Wal-Mart's position that Plaintiffs
24 have "made no attempt to replace [the sociological evidence rejected by the Supreme Court]
25 with any new evidence or allegations that could provide the necessary 'glue.'" Mot. at 13.
26 Plaintiffs may or may not have sociological evidence in support of their allegations to
27 supplement what the Supreme Court found inadequate; no one will know until a class
28 certification motion is filed.

1 That other courts have read the Supreme Court’s opinion in Dukes as barring other
2 class actions sheds little light on whether the allegations in the Fourth Amended Complaint
3 state a claim. This Court finds that no substantial grounds for difference of opinion exist
4 regarding (1) whether the Supreme Court’s opinion rested in part on the plaintiffs’ lack of
5 evidence and (2) whether the Fourth Amended Complaint adequately alleged that it plugged
6 the evidentiary holes.

7 **C. Immediate Appeal Beneficial**

8 Simply put, if “present appeal promises to advance the time for trial or to shorten the
9 time required for trial, appeal is appropriate.” 16 Federal Practice & Procedure § 3930 at
10 n.39 (2d ed.); see also In re Cement, 673 F.3d at 1027. On the other hand, immediate appeal
11 may be inappropriate where “there is a good prospect that the certified question may be
12 mooted by further proceedings.” Id. at n.40 (citing In re City of Memphis, 293 F.3d 345, 351
13 (6th Cir. 2002); Oneida Indian Nation of N.Y. State v. Oneida County, 622 F.2d 624, 628-29
14 (2d Cir. 1980); United States v. Rent-A-Homes Sys. of Ill., Inc., 602 F.2d 795, 797 (7th Cir.
15 1979)). The ultimate question is whether permitting an interlocutory appeal would
16 “minimiz[e] the total burdens of litigation on parties and the judicial system by accelerating
17 or at least simplifying trial court proceedings.” Id.

18 The parties spend almost no time on this factor; Wal-Mart essentially repeats the
19 arguments it made under the “controlling question” heading, emphasizing that appellate
20 resolution of the question could eliminate the class-action aspect of the case, and Plaintiffs
21 affirmatively concede that this factor is met for both the tolling and commonality issues. See
22 Opp. at 3, 10 n.5.

23 The Court disagrees. At this point in the litigation, an interlocutory appeal could
24 dispose of Plaintiffs’ class claims—but so could the class certification motion set to be
25 submitted in January, which would have the added benefit of developing the record on the
26 Rule 23 commonality issue. The Supreme Court itself noted that Rule 23 is no “mere
27 pleading standard,” and that in ruling on class certification it “may be necessary for the court
28 to probe behind the pleadings.” Dukes, 131 S. Ct. at 2551.

1 This Court could stay the class certification proceedings while an interlocutory appeal
2 proceeded, though it is far from clear—and in the Court’s view doubtful—whether the “total
3 burdens of litigation on parties and the judicial system” would be lessened by such a course.
4 Where the issue of relative efficiency is a toss-up, this Court sees no value in encouraging
5 parties to litigate requests for interlocutory appeal when the resolution of a motion the Court
6 has already set for hearing in the near future may well, as a practical matter, lead to the same
7 result. The Court accordingly finds that, at this time, immediate appeal would not materially
8 advance the ultimate termination of the litigation.³

9 **IV. Conclusion**

10 The Court DENIES Wal-Mart’s request for interlocutory appeal under § 1292(b) on
11 the grounds that (1) immediate appeal would not, at this time, materially advance the ultimate
12 termination of the litigation in light of the impending certification motion, and (2) no
13 substantial grounds for difference of opinion exist regarding the commonality issue.

14 **IT IS SO ORDERED.**

15
16 Dated: December 10, 2012



17 CHARLES R. BREYER
18 UNITED STATES DISTRICT JUDGE

19
20
21
22
23
24
25
26
27
28 ³The Court would be open to a similar motion on the tolling issue in the event Plaintiffs
succeeded at the class certification stage, to the extent that issue would not otherwise be immediately
appealable under Federal Rule of Civil Procedure 23(f).