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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ANNE MARIE LYON, individually and
on behalf of others similarly situated,

No. C 10-00884 WHA

Plaintiff,

v.

W. W. GRAINGER INC., and
Does 1 through 50, inclusive,

**ORDER DENYING PETITION
FOR CERTIFICATION
PURSUANT TO 28 U.S.C.
1292(b) FOR
INTERLOCUTORY APPEAL
AND VACATING HEARING**

Defendants.

INTRODUCTION

In this putative employment law class action, plaintiff Anne Lyon petitions for certification of three issues pursuant to 28 U.S.C. 1292(b) for interlocutory appeal to the Court of Appeals for the Ninth Circuit. None of the issues involves a controlling question of law whose resolution could materially affect the outcome of litigation in this Court. Because this is an essential requirement for certification, plaintiff's request is **DENIED**.

STATEMENT

On January 29, 2010, plaintiff filed her complaint in the Superior Court of San Mateo. She sought the following: (1) unpaid overtime wages, (2) penalties under California Labor Code Sections 203, 210, 226.3, 558, and 1174.5, (3) attorney's fees, (4) payment of taxes owed, and (5) an injunction preventing defendant from continued violations of the California Labor Code.

1 Later, defendant removed this action based on diversity. Plaintiff then moved to remand,
2 arguing that her claims did not meet the amount in controversy necessary for diversity
3 jurisdiction. The April 29 order denying the motion found that defendant had established that
4 the amount met the jurisdictional threshold. The order found that preponderance of the evidence
5 was the standard for defendant's burden of proof, despite plaintiff's arguments for applying the
6 legal certainty standard. The order further stated that even if the legal certainty standard were
7 extended to diversity cases, the outcome would remain. Plaintiff still did not successfully allege
8 that the total amount in controversy was less than \$75,000. She did not include the financial
9 burden of taxes and injunctive relief against defendant. Penalties also should have been
10 included.

11 Using a conservative estimate as to the overtime hours per week that plaintiff worked, the
12 order found that the pay owed for overtime and missed breaks, taxes, penalties, and attorney's
13 fees amounted to about \$89,661.69. This clearly met the jurisdictional threshold. Adding in the
14 value of the injunction, moreover, placed the amount in controversy over \$100,000. The order
15 also noted that using slightly higher and less conservative estimates of overtime hours would
16 dramatically increase the amount in controversy and could possibly satisfy the threshold alone.

17 On May 7, plaintiff requested to certify one or more of the following questions for
18 interlocutory appeal:

- 19 (1) Does the "legal certainty" standard, as enunciated in
20 *Lowdermilk v. United States National Bank Association*,
21 479 F.3d 994 (9th Cir. 2007), apply in an action removed
22 solely under diversity jurisdiction pursuant to 28 U.S.C.
23 1332(a) and not removed pursuant to The Class Action
24 Fairness Act of 2005 ("CAFA"), 28 U.S.C. 1332(d), where
25 the complaint specifically limits plaintiff's "amount in
26 controversy" to less than the jurisdictional minimum?
- 27 (2) May a district court attribute a pro rata share of injunctive
28 relief as part of the "amount in controversy" where
injunctive relief is not the primary object of the litigation
(*Kanter v. Warner-Lambert Co.*, 265 F.3d 853 (9th Cir.
2001)) and plaintiff, as a former employee, does not have
standing to seek injunctive relief under Article III of the
United States Constitution?
- (3) May a district court include both the total amount of
plaintiff's potential wages and penalties, as well as the
amount of taxes plaintiff must pay from those very same

1 wages in the form of deductions, as part of an alleged
2 “amount in controversy?”

3 **ANALYSIS**

4 **1. LEGAL STANDARD.**

5 28 U.S.C. 1292(b) provides:

6 When a district judge, in making in a civil action an order not
7 otherwise appealable under this section, shall be of the opinion that
8 such order involves a controlling question of law as to which there
9 is substantial ground for difference of opinion and that an
10 immediate appeal from the order may materially advance the
11 ultimate termination of the litigation, he shall so state in writing in
12 such order. The Court of Appeals which would have jurisdiction
13 of an appeal of such action may thereupon, in its discretion, permit
14 an appeal to be taken from such order, if application is made to it
15 within ten days after the entry of the order: *Provided, however,*
16 That application for an appeal hereunder shall not stay proceedings
17 in the district court unless the district judge or the Court of
18 Appeals or a judge thereof shall so order.”

19 28 U.S.C. 1292(b). A district court must find that the certification requirements of the statute
20 have been met. These requirements are: “(1) that there be a controlling question of law,
21 (2) that there be substantial grounds for difference of opinion, and (3) that an immediate appeal
22 may materially advance the ultimate termination of the litigation.” *In re Cement Antitrust Litig.*,
23 673 F.2d 1020, 1026 (9th Cir. 1982). Even if these three requirements are satisfied, a district
24 court still has discretion in deciding whether or not to grant a party’s motion for certification.
25 The party seeking certification for interlocutory appeal has the burden of showing that
26 “exceptional circumstances justify a departure from the basic policy of postponing appellate
27 review until after the entry of a final judgment.” *Ibid.*

28 A question of law is controlling if its resolution on appeal “could materially affect the
outcome of litigation in the district court.” *Ibid.* A question may be controlling even though its
resolution does not determine who will prevail on the merits. But it is not controlling simply
because its immediate resolution may promote judicial economy.

Material advancement of the ultimate termination of the litigation has not been expressly
defined. In one case, the court determined that immediate appeal would not materially advance
the ultimate termination of litigation where the appeal might postpone the scheduled trial date.
See Shurance v. Planning Control Int’l, Inc. 839 F.2d 1347, 1348 (9th Cir. 1988).

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2. APPLICATION.

A. Plaintiff’s First Question for Certification.

Plaintiff requests to certify the following question for interlocutory appeal: Does the legal certainty standard apply in an action removed solely under diversity jurisdiction and not removed pursuant to CAFA, where the complaint specifically limits plaintiff’s amount in controversy to less than the jurisdictional minimum?

Certification is unwarranted. The April 29 order specifically stated that whether it applied the preponderance-of-the-evidence standard or the legal certainty standard, the result would be the same (Dkt. No. 30). Under both standards, plaintiff did not successfully allege on the face of the complaint that the total amount in controversy was less than \$75,000. She did not include the financial burden of taxes and injunctive relief against defendant in her calculations.¹ The ambiguity of her complaint necessarily called for the application of the preponderance-of-the-evidence standard, regardless of whether the legal certainty standard could apply to actions removed under diversity jurisdiction. The resolution of this question on appeal would not materially affect the outcome of litigation and is therefore not controlling.

Plaintiff contends that the issue is controlling because if the Ninth Circuit were to find that defendant’s burden was to show jurisdiction to a legal certainty, the action would have to be remanded to state court. She cites *Guglielmino v. McKee Foods Corp.*, 506 F.3d 696 (9th Cir. 2007), to assert that the Ninth Circuit has left this question open for another day. The question may be open, but it is irrelevant as applied here.

Plaintiff also argues that a decision by the Ninth Circuit would materially advance, if not end, the litigation in this forum. Given the reasoning in the April 29 order, this argument fails as well. The order, again, stated that the jurisdictional threshold is met under both the legal certainty and preponderance-of-the-evidence standards. Certifying this question for

¹ Plaintiff refutes the April 29 order’s finding that she did not include taxes and injunctive relief in her calculation of the “amount in controversy”. The complaint, however, only states that the amount in controversy includes “damages, restitution, penalties and pro rata share of statutory attorney fees for the named Plaintiff” not exceeding \$75,000 (Dkt. No. 43).

1 interlocutory appeal, therefore, would inevitably delay the proceedings that would take place
2 regardless of which standard is used.

3 Plaintiff further states that a substantial basis for difference of opinion exists because
4 the Ninth Circuit has not specifically ruled out the potential application of the legal certainty
5 standard to actions not removed under CAFA. Given that two-out-of-three requirements under
6 Section 1292(b) are not met, addressing this contention is unnecessary.

7 **B. Plaintiff’s Second Question for Certification.**

8 Plaintiff also requests to certify the following question: May a district court attribute a
9 pro rata share of injunctive relief as part of the amount in controversy where injunctive relief is
10 not the primary object of the litigation and plaintiff, as a former employee, does not have
11 standing to seek injunctive relief under Article III of the United States Constitution?

12 This is not a controlling question of law because it would not materially affect the
13 outcome of litigation. Although the April 29 order stated that the inclusion of a pro rata
14 share of injunctive relief in determining the amount in controversy would be proper, it found the
15 jurisdictional requirement satisfied without including this figure. Adding up just the amounts
16 owed for overtime (\$15,908.30), missed breaks (\$11,937.51), penalties (\$22,800) and attorney’s
17 fees (\$28,846.15) resulted in a total of \$79,491.96. The threshold was thus met without factoring
18 in injunctive relief.²

19 Plaintiff contends that the inclusion of injunctive relief in determining the amount
20 in controversy is improper when injunctive relief is not the primary object of the litigation.
21 She also argues that because she lacks standing to seek injunctive relief, it has no value to her
22 and should not be included. These arguments have no bearing here. Even if found true, they
23 would have no effect. The jurisdictional threshold was met without the inclusion of injunctive
24 relief, and therefore this question is not a controlling issue of law. Consideration of whether or
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² Plaintiff argues that zero dollars, rather than \$28,846.15, in attorney’s fees should have been included
28 in the amount in controversy. She asserts that doing this would reduce the amount in controversy to under
\$75,000 (Dkt. No. 43). The April 29 order explicitly rejected plaintiff’s arguments against the addition of
attorney’s fees, finding the \$28,846.15 to be reasonable (Dkt. No. 30).

1 not the question has substantial grounds for difference of opinion or would materially advance
2 litigation is unnecessary, since the first requirement for certification is not met.

3 **C. Plaintiff's Third Question for Certification.**

4 Finally, plaintiff requests that a third question be certified: May a district court include
5 both the total amount of plaintiff's potential wages and penalties, as well as the amount of taxes
6 plaintiff must pay from those very same wages in the form of deductions, as part of an alleged
7 amount in controversy?

8 The same analysis applied in Part B applies here. This is not a controlling question
9 of law because its resolution would have no material effect on the outcome of litigation.
10 As calculated above, the addition of the amounts owed for overtime and missed breaks,
11 penalties, and attorney's fees totals \$79,491.96, which meets the jurisdictional threshold without
12 the inclusion of plaintiff's taxes from her potential wages and penalties.

13 Plaintiff disputes that taxes should be included in the amount in controversy at all
14 (Br. at 11). The Ninth Circuit has ruled that taxes should be included in the amount in
15 controversy when the plaintiff requests them as a remedy, directly negating plaintiff's point.
16 *Guglielmino*, 506 F.3d at 701.

17 Moreover, plaintiff argues that the taxes defendant would pay on wages should not be
18 added on top of wages to determine the amount in controversy, but rather that those taxes should
19 be deducted from the amount plaintiff would receive as damages. Plaintiff provides no authority
20 for this contention.

21 Again, the jurisdictional threshold is met without including taxes. Resolution of
22 plaintiff's question would have no material effect on the outcome of litigation. Although
23 plaintiff asserts that both difference of opinion and potential for material advancement exist,
24 she provides no support for these claims. The absence of a controlling issue of law here is fatal
25 to her request.

26 Overall, plaintiff has failed to demonstrate exceptional circumstances justifying a
27 departure from the basic policy of postponing appellate review until after final judgment.
28 Even considered cumulatively, the questions posed do not warrant certification for interlocutory


1 appeal. Plaintiff's vague statement of the amount in controversy necessitates the application of
2 the preponderance-of-the-evidence standard, and the jurisdictional threshold is met without the
3 inclusion of injunctive relief or taxes.

4 **CONCLUSION**

5 For the foregoing reasons, plaintiff's request for an order certifying issues pursuant to
6 28 U.S.C. 1292(b) for interlocutory appeal is **DENIED**. The hearing scheduled for June 24, 2010,
7 is hereby **VACATED**.

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9 **IT IS SO ORDERED.**

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11 Dated: June 15, 2010.

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14 WILLIAM ALSUP
15 UNITED STATES DISTRICT JUDGE
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