

No. 20-0501

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED Jul 23, 2020 DEBORAH S. HUNT, Clerk
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In re: TIVITY HEALTH, INC.; DONALD)
TRAMUTO; GLEN HARGREAVES; ADAM)
HOLLAND,)
))
Petitioners.)

ORDER

Before: SUTTON, COOK, and WHITE, Circuit Judges.

In this securities fraud litigation, Defendants Tivity Health, Inc. and three of its officers (collectively “Tivity”) petition under Federal Rule of Civil Procedure 23(f) for permission to appeal the district court’s order certifying a class action. Lead Plaintiff Oklahoma Firefighters Pension & Retirement System (“Plaintiff”) opposes the petition. Tivity replies.

Under Rule 23(f) we are authorized to permit an appeal from the grant or denial of a motion for class certification. “[W]e eschew any hard-and-fast test in favor of a broad discretion to evaluate relevant factors that weigh in favor of or against an interlocutory appeal.” *In re Delta Air Lines*, 310 F.3d 953, 959 (6th Cir. 2002) (per curiam). There are four specific factors that guide our consideration of a petition to appeal under Rule 23(f). First, the “death-knell” factor recognizes “that the costs of continuing litigation for either a plaintiff or defendant may present such a barrier that later review is hampered.” *Id.* at 960. Second, if the case “raises a novel or unsettled question,” it “may also be a candidate for interlocutory review.” *Id.* Third, “the likelihood of the petitioner’s success on the merits is a factor” to be considered. *Id.* Fourth, “the posture of the case as it is pending before the district court is of relevance.” *Id.*

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Tivity argues that the district court applied the wrong legal standard for determining whether the presumption of reliance was rebutted. According to Tivity, it rebutted the presumption by showing that information revealing the alleged fraud was within the public domain prior to the corrective disclosure and that some investors were likely aware of such information during the putative class period. Tivity asserts that if the district court had applied the correct reasoning, it would have denied class certification. But plaintiff makes a convincing argument that it was not the district court's reasoning but its view of the evidence that determined the outcome in this case. The court recognized that a defendant is not required to establish the merits of its defense at the class certification stage. It ruled as it did because it found no evidence to support Tivity's assertion that investors were likely to have known about the entry of its competitor into the market prior to the actual disclosure. Speculation alone does not defeat predominance. See *Bridging Cmty. Inc. v. Top Flite Fin. Inc.*, 843 F.3d 1119, 1125 (6th Cir. 2016); *In re HCA Holdings, Inc.*, No. 14-0511, 2015 WL 10575861, at *1-2 (6th Cir. Feb. 26, 2015).

Having reviewed the district court's order, Tivity's petition, Plaintiff's response, and Tivity's reply, we find that an interlocutory appeal is not warranted. We trust that the district court will attentively resolve the defendants' concerns about class members' reliance on the allegedly fraudulent statements in deciding whether to decertify the class or certify subclasses, as appropriate.

The defendants' petition for permission to appeal the class certification decision is **DENIED.**

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

Deborah S. Hunt
Clerk

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Re: Case No. 20-501, *In re: Tivity Health, Inc., et al*
Originating Case No. : 3:17-cv-01469

Dear Counsel,

The Court issued the enclosed Order today in this case.

Sincerely yours,

s/Jill E Colyer
Case Manager
Direct Dial No. 513-564-7024

cc: Ms. Lisa R. Bugni
Mr. Kirk L. Davies
Mr. Benjamin Andrew Gastel
Mr. Brandon R. Keel

Enclosure

No mandate to issue