IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LISA PIAZZA, individually and on behalf of all others similarly situated, Plaintiff, v. NEW ALBERTSONS, INC., JEWEL FOOD STORES, INC, and AMERICAN DRUG STORES, LLC d/b/a JEWEL-OSCO, Defendants.	Case No. 20-cv-03187 Judge Mary M. Rowland

ORDER

Defendants have moved to certify a question for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). (Dkt. 62). They seek to appeal this Court's order conditionally certifying a collective action under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 216(b). For the reasons stated herein, this motion is denied.

BACKGROUND

The FLSA allows employees to sue employers who fail to pay them minimum wage or overtime compensation required by law. 29 U.S.C. § 216(b). Individual employees "do not have to go it alone" as the FLSA authorizes collective actions brought by "similarly situated" employees. *Hannah v. Huntington Nat'l Bank*, No. 18-CV-7564, 2020 WL 2571898, at *5 (N.D. Ill. May 21, 2020). The FLSA "does not specify the details of how collective actions are to proceed, and thus, the management of these actions has been left to the discretion of the district courts." *Id.* (citing *Jirak v. Abbott*

Labs., Inc., 566 F. Supp. 2d 845, 847 (N.D. Ill. 2008)). For decades now, the vast majority of courts, in this district and around the country, have adopted a two-step process for conditionally certifying collectives. *Id.* (citations omitted). At step one, conditional certification is granted if a plaintiff can make a "modest factual showing sufficient to demonstrate that they and potential plaintiffs together were victims of a common policy or plan that violated the law." *Id.* (citations omitted). After conditional certification, notice is sent to other employees who are then able to opt into the collective action. *Id.* That allows the court and the parties to determine the extent of the collective. Step two comes "after any opt-ins have appeared and discovery has been finished." *Id.* (citing *Bergman v. Kindred Healthcare, Inc.*, 949 F. Supp. 2d 852, 855 (N.D. Ill. 2013)). At step two defendants can move for decertification of the collective action. *Id.*

Plaintiff Piazza alleges that she and similarly situated employees were misclassified as exempt from the FLSA's overtime requirements when they worked as Assistant Store Directors ("ASD") at the grocery store chain Jewel-Osco. (Dkt. 1). Piazza filed for conditional certification of a collective action of similarly situated ASDs in August of 2020. (Dkt. 38). Defendants moved for discovery before conditional certification was granted, (Dkt. 42), and pursuant to well-established case law the Court denied their motion. (Dkt. 46 at 2) (denying discovery request because at step one courts do not "resolve factual disputes or decide substantive issues going to the

merits.") (citations omitted). The Court granted Piazza's motion for conditional certification in February of 2021.[1] (Dkt. 57).

In January of 2021 the Fifth Circuit decided *Swales v. KLLM Transp. Servs., L.L.C.*, 985 F.3d 430, 441 (5th Cir. 2021), rejecting the two-step process. Based on *Swales*, Defendants filed the instant motion for certification of an appeal. (Dkt. 62). Defendants ask the Court to certify two questions for appeal: (1) "what evidence must be considered when determining whether the putative collective is similarly situated to the named Plaintiff such that notice of the suit should be issued," and (2) "whether discovery should be permitted if it would aid in the determination of whether the putative collective is similarly situated to the named plaintiff." (Dkt. 63 at 1–2).

LEGAL STANDARD

The parties agree that district courts may certify a non-final order in a civil case for interlocutory appeal if the order involves a "controlling question of law," about which there is "substantial ground for differences of opinion," and "immediate appeal…may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). "Four statutory criteria" must be met to satisfy § 1292(b): "there must be a question of *law*, it must be *controlling*, it must be *contestable*, and its

[1] In support of her motion to certify, Plaintiff submitted, *inter alia*, affidavits from four ASDs, two ASD job descriptions, Jewel-Osco's policies and procedures, and Jewel-Osco's employee handbooks. (Dkt. 39). Defendants asked the Court to consider the affidavits of several other ASDs and Store Directors who stated they had more responsibilities than the Plaintiff and opt-ins, undercutting Plaintiff's assertions that she was similarly situated to other ASDs and that the ASD position was misclassified. (Dkt. 49, Exs. 1–11). The Court declined to consider these contradictory affidavits because step one is not the time to "weigh evidence, determine credibility, or specifically consider opposing evidence presented by a Defendant". (Dkt. 57 at 16, citing *Bergman*, 949 F. Supp. 2d at 855–56).

resolution must promise to *speed up* the litigation."[2] *Ahrenholz v. Bd. of Trustees of Univ. of Illinois*, 219 F.3d 674, 675–76 (7th Cir. 2000) (emphasis original). Because "[t]he criteria are conjunctive, not disjunctive" all four must be satisfied for an interlocutory appeal to be certified. *Id.* at 676. Interlocutory appeals are generally "frowned on in the federal judicial system," *Sterk v. Redbox Automated Retail, LLC*, 672 F.3d 535, 536 (7th Cir. 2012), and are granted "sparingly lest interlocutory review increase the time and expense required for litigation." *Asher v. Baxter Int'l Inc.*, 505 F.3d 736, 741 (7th Cir. 2007).

ANALYSIS

A. Question of Law

The first question posed by the Defendants ("what evidence courts should consider") does not present a question of law. The Seventh Circuit has repeatedly held that "district courts have *wide discretion* in managing class and collective actions." *Weil v. Metal Techs., Inc.*, 925 F.3d 352, 357 (7th Cir. 2019) (emphasis added); *see also Alvarez v. City of Chicago*, 605 F.3d 445, 449 (7th Cir. 2010) ("A district court has wide discretion to manage collective actions."). FLSA actions are filed by various employees who work for different sorts and sizes of employers. It is not a matter of law, "what evidence" should be considered in determining whether to certify a

[2] There is one additional nonstatutory requirement: "the petition must be filed in the district court within a reasonable time after the order sought to be appealed." *Ahrenholz*, 219 F.3d at 676. Plaintiff concedes that this nonstatutory requirement has been satisfied.

collective action.[3] *See Bigger v. Facebook,* 947 F.3d 1043, 1047 (7th Cir. 2020) (district court *sua sponte* certifying the narrowly tailored legal question: "whether a court may authorize notice to individuals who allegedly entered mutual arbitration agreements, waiving their right to join the action.")

To the contrary, it could be argued the second question: whether "discovery should be permitted if it would aid in the determination of whether the putative collective is similarly situated to the named plaintiff" presents a question of law. For sake of this motion, the Court will assume Defendants' second question poses a question of law.

B. Controlling

A question of law is "controlling" for purposes of § 1292(b) if its "resolution is quite likely to affect the further course of the litigation, even if not certain to do so." *In re Ocwen Fed. Bank FSB Mortg. Servicing Litig.*, 04 CV 2714, MDL No. 1604, 2006 WL 1371458 at *2 (N.D. Ill. May 16, 2006) (citing *Sokaogon Gaming Enter. Corp. v. Tushie-Montgomery Assocs., Inc.*, 86 F.3d 656, 659 (7th Cir. 1996)). Controlling means "serious to the conduct of the litigation, either practically or legally." *Johnson v. Burken*, 930 F.2d 1202, 1206 (7th Cir. 1991) (quotation marks omitted).

[3] *See Watson v. Jimmy John's, LLC*, No. 15 C 6010, 2015 WL 8521293, at *5 (N.D. Ill. Nov. 30, 2015) (denying interlocutory appeal because defendant's challenge to "the adequacy of plaintiff's evidentiary showing that he is 'similarly situated' with others in the putative class [. . .] plainly is not a legal issue."); *Lillehagen v. Alorica, Inc.*, 2014 WL 2009031 (C.D.Cal. May 15, 2014) (whether the "two-step process" and the "lenient" standard at step one were appropriate not a controlling question of law or a question about which there was substantial grounds for difference of opinion); *Craig v. Rite A id Corp.*, No. 08–cv–2317, 2010 WL 1994888, at * 3 (M.D.Pa. Feb. 4, 2010) (question about the "appropriate quantum and type of evidence to consider in evaluating the propriety of conditional certification" did not involve a question of law, so motion for interlocutory appeal was denied); *Coan v. Nightingale Home Healthcare, Inc.*, No. 1:05-CV-0101, 2006 WL 1994772, at *2 (S.D. Ind. July 14, 2006) (declining to certify interlocutory appeal about organizing a collective action into four subclasses because it was "a nest of questions relevant to highly discretionary case-specific decisions about how best to manage a complex case").

Defendants posit that if the Seventh Circuit permits or mandates pre-certification discovery and requires consideration of Defendants' evidence[4] "this case could proceed directly to the merits, avoid a lengthy collective discovery and decertification process, and potentially result in early settlement." (Dkt. 63 at 6). The Court disagrees. First, Defendants have access to the majority of the potentially discoverable information about ASDs and their duties. They have access to their own Store Directors (who supervise the ASDs), timecards, and handbooks. They have the contact information of every ASD, past and present, and can interview many of them. Defendants sought to depose the named Plaintiff and the three ASDs who had opted in at that time. (Dkt. 43 at 2–4). But allowing this discovery would require allowing Plaintiffs to depose Defendants' witnesses and discover pertinent documents. Defendants' proposal does not avoid lengthy collective discovery. Rather, it allows for extensive discovery prior to notifying the ASDs about the litigation they have the right to join.[5]

Second, Defendants can move to decertify the collective action. Many courts have determined this renders determinations at step one not controlling questions of law. *Long v. CPI Sec. Sys., Inc.*, No. 3:12-CV-396-RJC-DSC, 2013 WL 3761078, at *3

[4] The Court found the Defendants' first question concerning what evidence to consider was not a question of law. Of course, if the second question was certified and the appellate court required discovery, the trial court would have to consider evidence prior to certifying a collective action. *What* evidence to consider would clearly remain in the discretion of the trial court.

[5] In *Swales,* the parties had conducted eleven (11) depositions and exchanged 19,000 documents prior to moving for step one conditional certification. 985 F.3d at 441. The district court found "controlling questions of law .... regarding the applicable standards [of conditional certification], *especially when some discovery has occurred*." *Id.* at 439 (emphasis added).

(W.D.N.C. July 16, 2013) ("Where a court's decision is conditional and may be altered or amended before decision on the merits, the decision is not a controlling question of law to be reviewed under § 1292(b)."") (citation omitted); *Villarreal v. Caremark LLC*, 85 F. Supp. 3d 1063, 1069 (D. Ariz. 2015) (no controlling question of law given the temporary nature of the conditional step one order); *Pereira v. Foot Locker, Inc.*, No. 07-CV-2157, 2010 WL 300027, at *1 (E.D. Pa. Jan. 25, 2010); *LaFleur v. Dollar Tree Stores, Inc.,* No. 2:12-CV-00363, 2013 WL 150722, at *4 (E.D. Va. Jan. 11, 2013) ("no controlling question of law yet at issue given the temporary nature of its conditional order to certify a collective [. . .]. Defendant will have ample opportunity at the end of Phase I Discovery to seek decertification of the conditionally certified collective."); *Ellerd v. Cnty. of L.A.*, No. CV 08–4289, 2009 WL 3462179, at *6 (C.D.Cal. Oct. 22, 2009) ("The Court finds that the requirements for certification of an interlocutory appeal … are not met here, because [. . .] defendant may move for decertification upon the completion of discovery.").

"Whether discovery should be permitted if it would aid in the determination of whether the putative collective is similarly situated to the named plaintiff" is not a controlling question pursuant to § 1292(b).

C. Grounds for Difference of Opinion

District courts in the Seventh Circuit and around the country have long used the two-step conditional certification process. The Seventh Circuit has acknowledged (though never formally adopted) the process, *Bigger*, 947 F.3d at 1049 ("Some courts, including the district court here, use a two-stage procedure for determining whether

individuals are 'similarly situated' to the named plaintiff(s) … We have not required this two-stage approach, nor do we do so now. Our focus is limited to the scope of a court's discretion in facilitating notice of an FLSA action to certain employees."); and at least five federal other appellate courts have endorsed it. *See Myers v. Hertz Corp.*, 624 F. 3d 537, 555 (2d Cir. 2010) ("[T]he district courts of this Circuit appear to have coalesced around a two-step method, a method which, while again not required by the terms of FLSA or the Supreme Court's cases, we think is sensible"); *Camesi v. Univ. of Pittsburgh Med. Ctr.*, 729 F. 3d 239, 243 (3d Cir. 2013) ("Courts in our Circuit follow a two-step process"); *White v. Baptist Mem. Health Care Corp.*, 699 F. 3d 869, 882 (6th Cir. 2012) (recognizing the two-step conditional certification process used by district courts); *Campbell v. City of Los Angeles*, 903 F.3d 1090, 1110 (9th Cir. 2018) (confirming district courts should, "as a general rule" use the two-step conditional certification process); *Thiessen v. Gen. Elec. Capital Corp.*, 267 F. 3d 1095, 1105 (10th Cir. 2001) (district court did not err by implementing two-step process). The *Swales*' court rejected this two-step process. *Swales*, 985 F.3d at 441 (rejecting the two-step process "because on the one hand, its flexibility has led to unpredictability. And on the other hand, its rigidity distracts district courts from the ultimate issues before it."). Defendants argue this creates a "substantial ground for differences of opinion".

The Court disagrees. First, prior to *Swales* Defendants agreed that the two-step approach was appropriate in this case. (Dkt. 49 at 20) ("Courts in this District apply a two-part test to determine whether an FLSA claim should proceed on a collective basis. … First Plaintiff must establish that others are similarly situated by making

a modest factual showing demonstrating they together were victims of a common policy or plan that violated the law.") (quotation marks and citations omitted). The Defendants took this position because it is the well-established law in this district—and many others. *Swales* is an outlier and limited to its facts.[6] There is not a substantial "difference of opinion." *See Marcum v. Lakes Venture, LLC*, No. 319CV00231GNSLLK, 2021 WL 495857, at *1 (W.D. Ky. Feb. 10, 2021) (decided after *Swales* and finding Defendant failed to show this is one of the limited situations where an interlocutory appeal is appropriate because the Court is not alone in adopting its approach to preliminary certification of class) (Mem. Op. & Order 5-6, DN 42).[7]

Significantly, the Seventh Circuit recently considered an interlocutory appeal in an FLSA matter concerning "whether a court may authorize notice to individuals who allegedly entered mutual arbitration agreements, waiving their right to join the action." *Bigger,* 947 F.3d at 1047. The *Bigger* court reaffirmed the district court's discretion when administering collective actions but found that when the defendant raises a valid arbitration agreement the court must determine (1) whether plaintiffs contest the existence or validity of the alleged arbitration agreements as to potential recipients of the first step notice, and if so, (2) allow discovery about the alleged

[6] *Swales* noted that the truck driver employees were potentially independent contractors and that might present a potentially dispositive and a threshold issue. 985 F.3d at 443.

[7] *Marcum* involved employees who signed arbitration agreements and would not be persuasive on that basis in the Seventh Circuit after *Bigger, supra*.

arbitration agreements to prevent first step notice being sent to persons bound by valid arbitration agreements. *Id*. at 1051.

Neither *Swales* nor *Bigger* creates a substantial ground for differences of opinion with the Court's holding here.

D. Advancing Litigation

The Court need not determine whether certifying Defendants' questions for interlocutory appeal would advance the litigation.

CONCLUSION

Defendants' motion to certify a question for interlocutory appeal [62] is denied. By August 31, 2021, the parties should file a joint status report setting forth deadlines to send the opt-in notice and for completion of discovery.

E N T E R:

Dated: August 16, 2021

MARY M. ROWLAND
United States District Judge