

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Aug 24, 2009
LEONARD GREEN, Clerk

In re: ABERCROMBIE & FITCH CO., et al.,)
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Petitioners.)
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ORDER

Before: KENNEDY, SUTTON, and KETHLEDGE, Circuit Judges.

The defendants in this Rule 10b-5 securities fraud action petition for leave to appeal the district court’s order granting class certification. The plaintiff opposes the petition for leave to appeal.

Fed. R. Civ. P. 23(f) provides that the courts of appeals have the discretion to hear interlocutory appeals of orders granting or denying class certification. *See Reeb v. Ohio Dep’t of Rehab. and Corr.*, 435 F.3d 639, 643 (6th Cir. 2006). The following factors support the acceptance of a Rule 23(f) interlocutory appeal: 1) if the class certification ruling is the death knell of the litigation; 2) if the appeal raises a novel or unsettled question (with this factor weighing more heavily “when the question is of relevance not only in the litigation before the court, but also to class litigation in general”); 3) if the petitioner has a likelihood of success on the merits of the appeal; and 4) if the posture of the case below supports an immediate appeal. *In re Delta Air Lines*, 310 F.3d 953, 960 (6th Cir. 2002), *cert. denied*, 539 U.S. 904 (2003).

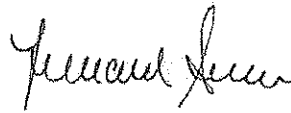
The defendants argue their petition for permission to appeal should be granted to permit the court to clarify the scope and extent of the district court’s obligation to resolve disputed factual issues in undertaking a rigorous analysis of the claims asserted as they relate to the class certification requirements. Among the issues raises by the district court’s order is the question of the standard

of proof a potential class representative must meet in demonstrating that the fraud-on-the-market presumption is applicable to the claims asserted. This court has not addressed this issue, although our sister circuits have articulated various standards to be applied. *See, e.g., In re Salomon Analyst Metromedia Litig.*, 544 F.3d 474, 883, 485-66 (2d Cir. 2008); *Oscar Private Equity Invs. v. Allegiance Telecom, Inc.*, 487 F.3d 261, 266-70 (5th Cir. 2007); *In re Polymedica Corp. Sec. Litig.*, 432 F.3d 1, 5-6 (1st Cir. 2005); *Gariety v. Grant Thornton LLP*, 368 F.3d 356, 365-66 (4th Cir. 2004).

The defendants also assert that the dramatic increase in their potential liability resulting from the certification of a class will place significant pressure on them to settle the case rather than risk the potential of a huge damage award. Moreover, because so few securities fraud class actions are litigated to conclusion, a Rule 23(f) appeal may be the best vehicle for appellate review of the class certification issues presented by the district court's ruling. *See West v. Prudential Sec., Inc.*, 282 F.3d 935, 937 (7th Cir. 2002).

The petition for permission to appeal is **GRANTED**.

ENTERED BY ORDER OF THE COURT



Leonard Green
Clerk