

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

FILED
United States Court of Appeals
Tenth Circuit

December 8, 2015

Elisabeth A. Shumaker
Clerk of Court

DAVID K. DOWNES; MATTHEW P.
FINK; PHILLIP A. GRIFFITHS; MARY
F. MILLER; JOEL W. MOTLEY;
RUSSELL S. REYNOLDS, JR.; JOSPEH
M. WIKLER; PETER I. WOLD;
OPPENHEIMER CALIFORNIA
MUNICIPAL FUND; CLAYTON K.
YEUTTER; KENNETH A. RANDALL;
ROBERT G. GALLI; BRIAN F.
WRUBLE,

Petitioners,

v.

ROBERT RIVERA; STEPHEN LOWE;
FRANK TACKMANN; KENNETH
MILHEM; JOSEPH STOCKWELL,

Respondents.

OPPENHEIMERFUNDS, INC; JOHN V.
MURPHY; OPPENHEIMERFUNDS
DISTRIBUTOR, INC.; BRIAN W.
WIXTED; RONALD H. FIELDING;
DANIEL G. LOUGHRAN; SCOTT S.
COTTIER; TROY E. WILLIS;
MASSACHUSETTS MUTUAL LIFE
INSURANCE COMPANY,

Petitioners,

v.

ROBERT RIVERA; STEPHEN LOWE;
FRANK TACKMANN; KENNETH

No. 15-705
(D.C. No. 1:09-MD-02063-JLK-KMT)
(D. Colo.)

No. 15-706
(D.C. No. 1:09-MD-02063-JLK-KMT)
(D. Colo.)

MILHEM; JOSEPH STOCKWELL,

Respondents.

ORDER

Before **LUCERO, HOLMES, and BACHARACH**, Circuit Judges.

These matters are before the court on the Petition of the Oppenheimer California Municipal Fund and Independent Trustees for Permission to Appeal Order Granting Class Certification (No. 15-705) and the Petition for Permission to Appeal from Order Granting Class Certification (No. 15-706). The lead plaintiff, Joseph Stockwell, filed a joint response to both petitions. The petitioners in No. 15-706 filed a motion to file a reply brief and submitted a proposed reply brief. The petitioners in No. 15-705 filed a motion to join in the reply, should the court accept it for filing.

These are the second set of petitions arising from an order granting class certification. The first two petitions resulted from the district court's minute order granting class certification. We granted those petitions. In summary proceedings, we vacated and remanded the matter to the district court. On remand, the district court directed the parties to file additional briefs and called the parties to a hearing to address the issue of class certification. The district court again granted class certification, but the second time entered a formal written order. It is this second order certifying a class that the instant petitions seek leave to appeal.

Because no appeal as of right exists from a district court's class certification order, the only avenue for a party seeking immediate challenge to a district court order granting class certification is through a petition for permission to appeal. Vallario v. Vandehey, 554 F.3d 1259, 1261-62 (10th Cir. 2009); see also Fed. R. App. P. 5. Whether to grant a petition is within the circuit court's discretion. Fed. R. Civ. P. 23(f).

As a general matter, interlocutory review of a class certification order is strongly disfavored, as it disrupts and delays the trial court proceedings. Carpenter v. Boeing Co., 456 F.3d 1183, 1189 (10th Cir. 2006). Accordingly, "[w]e should exercise restraint in accepting Rule 23(f) petitions and will not accept such petitions as a matter of course." Vallario at 1262 (quotations omitted).

This court has declined to define any test for which appeals to accept, but it has "set forth a set of principles that may prove useful in evaluating the merits of a Rule 23(f) petition." Id. at 1263. First, appeal might be permitted when the class certification decision sounds the "death-knell" for the entire case. Id. Second, appeal may be appropriate when the class certification order implicates unresolved legal issues and may facilitate development of the law. Id. Third, a court may grant permission to appeal when the district court's decision is manifestly erroneous. Id. The court should not use this category to "micromanage class actions," but may invoke it where "the deficiencies of a certification order are both significant and readily ascertainable." Id. at 1263-64.

Collectively, the petitioners assert that this court should grant their petitions under all three principles stated in Vallario. The petitioners in No. 15-705 contend that class certification here could force settlement of the plaintiff's claims regardless of the merits

of those claims, sounding the so-called “death-knell,” largely because of the sizable damages for which the petitioners could be held liable. These petitioners also assert that immediate review of the district court’s certification of this class of plaintiffs making these kinds of securities fraud claims will facilitate development of the law both in this case and in this circuit generally. Separately, the petitioners in No. 15-706 argue that the district court’s certification of this class was manifestly erroneous, in part because they believe the district court ignored their evidence disputing the suitability of the plaintiff’s claims for resolution as a class action.

We have carefully considered the district court’s written class certification order, the parties’ well-presented arguments, the applicable legal authority, and the record as a whole. Initially, we find that the district court conducted the required “rigorous analysis” before granting class certification and presented its reasoning adequately in the certification order. See CGC Holding Co., LLC v. Broad & Cassel, 773 F.3d 1076, 1086 (10th Cir. 2014) (citing Comcast Corp. v. Behrend, -- U.S. --, 133 S. Ct. 1426, 1432 (2013) (Rule 23(b)); Wal-Mart Stores, Inc. v. Dukes, -- U.S. --, 131 S. Ct. 2541, 2551 (2011) (Rule 23(a))). But we do not find that the petitioners have established that class certification will cause the petitioners to settle the case independent of the merits of the plaintiff’s claims, that immediate review is necessary to develop class action case law in this circuit, or that the district court’s certification order was manifestly erroneous.

Consequently, both petitions for permission to appeal are denied.

We grant the petitioners’ motion in No. 15-706 to file a reply brief and deem the reply brief that was attached to the motion filed as of the date it was received. Since we

have accepted the reply brief for filing, we also grant the petitioners' motion in No. 15-705 to join in the reply brief filed in No. 15-706.

Entered for the Court
ELISABETH A. SHUMAKER, Clerk

A handwritten signature in cursive script that reads "Lara Smith".

by: Lara Smith
Counsel to the Clerk