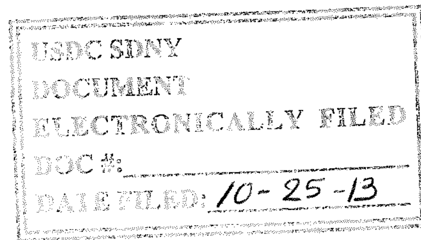


UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
--X
MAXCIMO SCOTT and JAY ENSOR, on behalf of themselves and all others similarly situated,

Plaintiffs,

-against-

CHIPOTLE MEXICAN GRILL, INC.,

Defendant.
--X

12 Civ. 8333 (ALC)(SN)

ORDER DENYING MOTION FOR INTERLOCUTORY APPEAL AND STAY PENDING APPEAL

ANDREW L. CARTER, JR., United States District Judge:

Defendant Chipotle Mexican Grill, Inc. moves this Court for partial reconsideration of its June 20, 2013 Order granting conditional certification of the proposed collective action, as well as for certification of an interlocutory appeal to the Second Circuit and a stay of proceedings pending the certification and resolution of the appeal. On September 10, 2013, the parties entered into a stipulation thereby resolving Defendant's motion for partial reconsideration, which was subsequently withdrawn. Remaining before the Court are Defendant's applications for certification of an interlocutory appeal and a stay pending certification. For the reasons set forth herein, Defendant's motions are DENIED.

A party seeking an interlocutory appeal must satisfy the requirements of 28 U.S.C. § 1292(b). "The District Court may certify a matter for interlocutory appeal when: (1) the Order appealed from presents a controlling question of law, (2) as to which there is a substantial ground for difference of opinion, and (3) an immediate appeal from the Order may materially advance the ultimate termination of litigation." Ferreira v. Modell's Sporting Goods, Inc., No. 11 Civ. 2395 (DAB), 2013 WL 1344697, at *2 (S.D.N.Y. Mar. 28, 2013) (citing 28 U.S.C. § 1292(b)). "The Second Circuit 'urge[s] the district courts to exercise great care in making a § 1292(b) certification,' because it is a 'rare exception to the final judgment rule that generally prohibits piecemeal appeals.'" Id. (internal citations omitted).

Further, "[t]he decision whether to grant an application for interlocutory appeal rests within the sound discretion of the trial court." Ofori v. Cent. Parking Sys. of N.Y., Inc., No. 06–CV–0128 (KAM), 2010 WL 335498, at *2 (E.D.N.Y. Jan. 22, 2010).

Here, Defendant has failed to persuade the Court that this case is the "rare exception to the final judgment rule." Defendant argues the Order granting conditional certification presents a controlling question of law as to which there is a substantial ground for difference of opinion because the Second Circuit can decide: (i) whether the two-step certification inquiry is appropriate, (ii) if Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011), is applicable to conditional certification of a collective action, (iii) what evidence is necessary to meet the standard it articulates for conditional certification, and (iv) if conditional certification was properly granted in this case. These issues, however, evidence neither a controlling question of law nor a substantial difference of opinion in this Circuit.

"[T]he 'question of law' must refer to a 'pure' question of law that the reviewing court 'could decide quickly and cleanly without having to study the record.'" In re World com, Inc., No. M–47 HB, 2003 WL 21498904, at *10 (S.D.N.Y. June 30, 2003). "The second prong of § 1292(b) . . . requires a 'genuine doubt as to whether the district court applied the correct legal standard in its order.' This may mean that there is 'conflicting authority on the issue' or that 'the issue is particularly difficult and is one of first impression for the Second Circuit.'" Santiago v. Pinello, 647 F. Supp. 2d 239, 243 (E.D.N.Y. 2009) (citations omitted). The issues Defendant raises are certainly not ones of first impression for the Circuit, as Defendant seemingly concedes, and lack indicia of conflicting authority. Further, the fourth and final issue of whether conditional certification was properly granted in this case is plainly not a "pure question of law" that could be decided without a careful review of the record.

In Myers v. Hertz Corp., the Second Circuit described the two-step approach to conditional certification as "sensible," where the first step involves an initial determination as to whether potential

plaintiffs are "'similarly situated' to the named plaintiffs with respect to whether a FLSA violation has occurred." 624 F.3d 537, 555 (2d Cir. 2010). During the first step, only a "modest factual showing" is necessary and the burden on plaintiffs remains "a low standard of proof[,]" though "unsupported assertions[]" will not suffice. Thus, Myers directly addresses the first and third issues articulated by Defendants. While the language in Myers may only be dicta, the district courts have continued to follow it all the same absent instructions to the contrary. See e.g. Qi Zhang v. Bally Produce, Inc., No. 12–CV–1045 (FB)(JMA), 2013 WL 1729274, at *2-3 (E.D.N.Y. April 22, 2013) (noting the analysis of the first-step of conditionally certifying a collective action was stated in dicta in Myers but diligently following the guidance of Myers); Gardner v. W. Beef Props., Inc., No. 07–CV–2345 (NGG)(JMA), 2013 WL 1629299, at *2-3 (E.D.N.Y. March 25, 2013) (same); Pippins v. KPMG LLP, No. 11 Civ. 0377(CM)(JLC), 2012 WL 19379, at *5 (S.D.N.Y. Jan. 3, 2012) (utilizing the two-step approach in Myers even though its language was "dicta" and noting the two-step approach is employed by courts in this Circuit); see also Ferreira, 2013 WL 1344697, at *2 (describing the guidance of Myers as "well-established" law); Zaniewski v. PRRC Inc., 848 F. Supp. 2d 213, 218 (D. Conn. 2012) ("As one would expect, Myers has been cited repeatedly by district courts in the Circuit. District court decisions in 2011 and 2012 evince unmistakable lines of authority and governing principles, generated or reinforced by the Second Circuit's reasoning in Myers."). In fact, Defendant cites no cases showing a departure from the process or standards in Myers, even if set forth in dicta.[1]

The only remaining argument from Defendant is that the Second Circuit should decide whether Dukes is instructive in the collective action context. While Defendant may think it useful to "provide

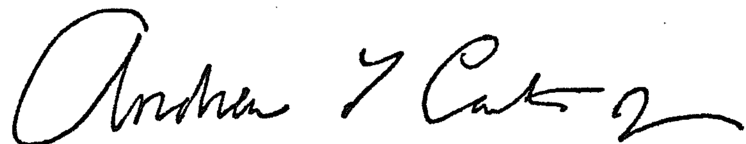
[1] Defendant's intellectually dishonest position conflates disagreement as to the controlling law with agreement on the controlling law but application of each unique set of facts to the law differently. Defendant has not provided a single case where a court in this Circuit has departed from the two-step process and standards articulated in Myers. Rather, since granting conditional certification of a collective action is a fact-intensive inquiry, Defendant essentially takes issue with the way this Court applied the facts to the law but couches its anemic argument in terms of unsettled law in need of confirmation presumably because it realizes its objections are not appropriate for an interlocutory appeal. C.f. Kuzinski v. Schering Corp., 614 F. Supp. 2d 247, 249 (D. Conn. 2009) ("Interlocutory appeals are disfavored, and, because the procedure 'was not intended as a vehicle to provide early review of difficult rulings in hard cases,' a party seeking to appeal must demonstrate 'exceptional circumstances' justifying it.") (citation omitted).

the Second Circuit with the opportunity to offer guidance concerning how Dukes impacts the certification analysis in an FLSA case[,]" this is not the standard under § 1292(b). (Def.'s Reply Mem. at 5.) Again, Defendant shows no grounds for a substantial difference of opinion *in this Circuit*, as courts here have routinely rejected the application of Dukes in conditionally certifying FLSA collective actions. See e.g. Amador v. Morgan Stanley & Co. LLC, No. 11 Civ. 4326 (RJS), 2013 WL 494020, at *7 (S.D.N.Y. Feb. 7, 2013) ("'[T]o make a modest factual showing that they were subject to a 'common policy or plan that violated the law,' [P]laintiffs need not demonstrate that they meet the commonality requirement of Rule 23[,] as articulated in Dukes.' "); Morris v. Affinity Health Plan, Inc., 859 F. Supp. 2d 611, 616 (S.D.N.Y. 2012) ("The weight of authority rejects the argument that Dukes bars certification in wage and hour cases."); Winfield v. Citibank, N.A., 843 F. Supp. 2d 397, 409 (S.D.N.Y. 2012) ("[N]umerous courts, including district courts in this Circuit, have refused to apply Dukes on motions for conditional certification under the FLSA, concluding that the Rule 23 analysis had no place at this stage of the litigation." (collecting cases)).

In sum, all of Defendant's arguments fail to satisfy at least one of the requirements listed in § 1292(b), and as such, the Court declines to exercise its discretion in granting certification in this case. Accordingly, Defendant's motion for certification of an interlocutory appeal and a stay pending certification and appeal is DENIED. The Clerk of Court is respectfully directed to terminate the motion at Dkt. No. 73.

SO ORDERED.

Dated: **New York, New York**
October 25, 2013



Andrew L. Carter, Jr.
United States District Judge