

No. 23-0504

UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

**FILED**  
Sep 10, 2024  
KELLY L. STEPHENS, Clerk

In re: TIVITY HEALTH, INC., et al., )  
   )  
   )  
           Petitioners,                                   )

O R D E R

Before: SILER, LARSEN, and BLOOMEKATZ, Circuit Judges.

Defendants—Tivity Health, Inc., Tivity Chief Financial Officer Adam C. Holland, and former Tivity executives Donato Tramuto and Dawn Zier—petition for permission to appeal the district court’s class certification order in this securities action alleging violations of Sections 10(b) and 20(a) of the Securities Exchange Act of 1934 and associated Rule 10b-5 of the Securities and Exchange Commission. Lead Plaintiff Sheet Metal Workers Local No. 33, Cleveland District, Pension Fund opposes the petition. Defendants also move for leave to file a reply, which they have tendered.

We may “permit an appeal from an order granting or denying class-action certification.” Fed. R. Civ. P. 23(f). “The court of appeals is given unfettered discretion whether to permit the appeal, akin to the discretion exercised by the Supreme Court in acting on a petition for certiorari.” Fed. R. Civ. P. 23(f) advisory committee’s note to 1998 amendment. Still, “the Rule 23(f) appeal is never to be routine.” *In re Delta Air Lines*, 310 F.3d 953, 959 (6th Cir. 2002) (per curiam). “[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.” *Id.* Those factors include petitioner’s likelihood of success on the merits; whether “the certification decision turns on a novel or unsettled

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questions of law”; whether “the costs for continuing litigation for either [party] may present such a barrier that later review is hampered”; and “the posture of the case as it is pending before the district court.” *Id.* at 959–60.

At this juncture, Tivity’s primary argument—that the plaintiffs’ claim involves a novel question—is unpersuasive. *Cf. id.* at 960 (observing that novelty “weigh[s] more heavily in favor of review when the question is of relevance not only in the litigation before the court, but also to class litigation in general”). Plaintiffs’ claim appears to involve a straightforward application of *Lorenzo v. Sec. & Exch. Comm’n*, 587 U.S. 71 (2019).

Accordingly, the petition for permission to appeal the district court’s class certification order is **DENIED**. Defendants’ motion for leave to file a reply is **GRANTED**.

ENTERED BY ORDER OF THE COURT



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Kelly L. Stephens, Clerk