No. 09-55108

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHAEL BATEMAN,
Plaintiff-Appellant,

v.

AMERICAN MULTI-CINEMA, INC.,
Defendant-Appellee.

Appeal From the United States District Court
for the Central District of California
Hon. Florence-Marie Cooper, Presiding
Case No. 2:07-cv-00171 (AJWx)

Motion of *Amici Curiae* Consumer Data Industry Association and Chamber of Commerce of the United States of America for Leave to File Their Brief In Support Of American Multi-Cinema, Inc.'s Petition for *En Banc* and/or Panel Rehearing

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The Consumer Data Industry Association ("CDIA") and the Chamber of Commerce of the United States of America ("Chamber"), pursuant to Fed. R. App. P. 29(b) and Circuit Rule 29-2, move this Court for leave to file their brief of *amici curiae* in support of petitioner, American Multi-Cinema, Inc.'s ("AMC") Petition for *En Banc* and/or Panel Rehearing. In support of this motion, *amici* state as follows:

1. CDIA previously filed a brief of *amicus curiae* in this appeal prior to the panel's decision which is the subject of AMC's petition.[1] This court has also previously granted CDIA leave to file *amicus* briefs in support of petitions for rehearing and rehearing *en banc* in the following appeals that, like this appeal, involved the interpretation of the Fair Credit Reporting Act ("FCRA") and the consideration of other issues affecting the consumer reporting industry:

   a. *Gorman v. Wolpoff & Abramson, LLP et al.*, No. 06-17726 (Mar. 17, 2009 order granting leave to CDIA and other *amici*); and

   b. *Pintos v. Pacific Creditors Ass'n, et al.*, No. 04-17485 (Aug. 27, 2009 ordering granting leave to CDIA).[2]

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[1] *Bateman v. American Multi-Cinema, Inc.*, 2010 U.S. App. LEXIS 19934 (9th Cir. 2010) (identifying CDIA as *amicus curiae*).

[2] CDIA also participated as *amicus curiae* in cases involving the FCRA in the other federal courts of appeals, *see, Premium Mortgage Corp. v. Equifax, Inc., et al.*, 583 F.3d 103 (2nd Cir. 2009) (identifying CDIA as *amicus curiae*); *Taylor v. Acxiom Corp.*, 612 F.3d 325 (5th Cir. 2010) (same); *Picard v. Credit Solutions, Inc.*, 564 F.3d 1249 (11th Cir. 2009) (same), and been granted leave to participate as *amicus curiae* by the U.S. Supreme Court. *See, Radian Guaranty, Inc. v. Whitfield, et al.*, 553 U.S. 1091 (2008) (granting CDIA's motion for leave to file a brief of *amicus curiae*).

2. CDIA is an international trade association, founded in 1906, and headquartered in Washington, D.C. As part of its mission to support companies offering consumer credit and other information reporting services, CDIA establishes industry standards, provides business and professional education for its members, including a manual entitled *How to Comply with the Fair Credit Reporting Act*, and produces educational materials for consumers describing consumer credit rights and the role of consumer reporting agencies ("CRAs") in the marketplace.

3. CDIA is the largest trade association of its kind in the world. Its membership includes more than 200 consumer credit and other specialized CRAs operating in the United States and throughout the world.

4. In its more than 100-year existence, CDIA has worked with the United States Congress and the State legislatures to develop laws and regulations governing the collection, use, maintenance, and dissemination of consumer credit and other consumer information. In this role, CDIA participated in the legislative efforts that led to the enactment of the FCRA in 1970 and its subsequent amendments, including the 2003 amendments under the Fair and Accurate Credit

Transactions Act[3] that plaintiff Michael Bateman relies upon in support of the claims for which he seeks class treatment under Fed. R. Civ. P. ("Rule") 23(b)(3).

5. The Chamber is the world's largest not-for-profit business federation, representing 300,000 direct members and indirectly representing the interests of over 3,000,000 businesses and business associations. An important function of the Chamber is to represent these interests in important matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the nation's business community.[4]

6. CDIA's member CRAs, and the Chamber's members that obtain and use consumer report information to make business risk decisions, or furnish their transaction and experience information to CRAs, are all subject to claims under the FCRA's statutory damages provisions. The Chamber's members are also subject to other federal laws that, like the FCRA, include statutory damages provisions subjecting them to liability to a plaintiff class that is not required to prove actual injury in order to recover.

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[3] Fair and Accurate Credit Transactions Act of 2003, Pub. L. 108-159, 117 Stat. 1952 (2003).

[4] Included among the cases in which the Chamber has participated as *amicus curiae* are *Safeco Ins. Co. of America v. Burr, et al.*, 551 U.S. 47 (2007) and *Soualian, et al. v. Int'l Coffee and Tea, et al.*, No. 07-56377 (9th Cir.) (appeal voluntarily dismissed on Sept. 16, 2008).

7. Prior to the panel's decision, this circuit's precedent made clear that part of a district court's "superiority analysis" when considering a plaintiffs' petition for class certification, under Rule 23(b)(3), of claims seeking statutory damages without any proof of actual injury, included a consideration of the enormity of the damages a defendant may be required to pay as well as the proportionality of those damages when compared to the plaintiffs' injuries, if any.[5] Because the panel's decision holds that such considerations are an abuse of a district court's discretion, CDIA and the Chamber are vitally interested in the rehearing of this appeal.

8. Unless a rehearing is granted, *amici's* members may be deprived of a valuable shield (the district court's rigorous analysis of whether class treatment is superior to other available methods, including individual actions, for fairly and efficiently adjudicating the controversy)[6] against abusive class actions that seek to compel settlements in cases involving claims for enormous statutory damages where there has been little or no consumer injury.

9. An *amicus* brief from CDIA and the Chamber is desirable in this case because they can provide the court with the consumer reporting industry's unique perspective on the consequences of the panel's decision as applied to the FCRA's statutory damages provision[7] as well as the perspective of the business community

[5] *Kline v. Coldwell Banker & Co.*, 508 F.2d 226, 233 (9th Cir. 1974).
[6] Fed. R. Civ. P. 23(b)(3).
[7] 15 U.S.C. § 1681n.

that will have to respond to plaintiffs' class certification petitions under the panel's erroneous Rule 23(b)(3) superiority analysis.

10. In addition, the brief submitted by CDIA and the Chamber is desirable because it includes arguments not contained in AMC's petition that explain the exceptional importance of the issues presented in this appeal to the businesses that have relied upon this court's decades-old precedent governing the application of Rule 23(b)(3).[8]

WHEREFORE, *amici curiae*, the Consumer Data Industry Association and the Chamber of Commerce of the United States of America pray for leave to file their brief in support of American Multi-Cinema, Inc.'s Petition for *En Banc* and/or Panel Rehearing.

[8] *Kline*, 508 F.2d at 234.

Dated: October 18, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 18, 2010, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF System.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF System.

Signature: /s/ A. James Chareq

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, *amici* state that the Consumer Data Industry Association is an industry trade association that has no parent corporation and no publicly held corporation owns 10% or more of its stock. The Chamber of Commerce of the United States of America is a not-for-profit corporation that has no parent corporation and no publicly held corporation owns more than 10% of its stock.

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IDENTITY, INTEREST AND AUTHORITY OF *AMICI CURIAE*

The Consumer Data Industry Association ("CDIA") and the Chamber of Commerce of the United States of America (“Chamber”), submit their brief in support of the petitioner, American Multi-Media, Inc. (*hereinafter*, “AMC”) because the petition raises issues of exceptional importance, including whether this court will maintain the uniformity of its decisions in this circuit.

If AMC’s petition is granted, this court will decide whether it is an abuse of discretion for a district court to hold, under Fed. R. Civ. P. (“Rule”) 23(b)(3), that class treatment is not superior to other available methods for resolving a controversy when the claim alleges a technical violation of a statute that subjects the defendant to the possibility of enormous, and even ruinous, statutory damages, there has been little or no actual injury, and each putative class member may pursue an individual claim to recover actual damages, or statutory damages, costs, reasonable attorneys’ fees, and even punitive damages as allowed by the court.

CDIA is an international trade association, founded in 1906, and headquartered in Washington, D.C. As part of its mission to support companies offering consumer credit and other information reporting services, CDIA establishes industry standards, provides business and professional education for its members, including a manual entitled *How to Comply with the Fair Credit Reporting Act*, and produces educational materials for consumers describing consumer credit

rights and the role of consumer reporting agencies ("CRAs") in the marketplace. CDIA is the largest trade association of its kind in the world. Its membership includes more than 200 consumer credit and other specialized CRAs operating in the United States and throughout the world.

In its more than 100-year existence, CDIA has worked with the United States Congress and the State legislatures to develop laws and regulations governing the collection, use, maintenance, and dissemination of consumer credit and other consumer information. In this role, CDIA participated in the legislative efforts that led to the enactment of the Fair Credit Reporting Act ("FCRA") in 1970 and its subsequent amendments, including the 2003 amendments under the Fair and Accurate Credit Transactions Act[1] ("FACTA") that appellant Michael Bateman (*hereinafter* "plaintiff" or "Bateman") relies upon in support of a claim, for which he seeks class treatment, where no consumer has been harmed, and where AMC is exposed to a potential damages award of up to $290 million.

The Chamber is the world's largest not-for-profit business federation, representing 300,000 direct members and indirectly representing the interests of over 3,000,000 businesses and business associations. An important function of the Chamber is to represent these interests in important matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files

[1] Fair and Accurate Credit Transactions Act of 2003, Pub. L. 108-159, 117 Stat. 1952 (2003).

amicus curiae briefs in cases that raise issues of vital concern to the nation's business community.

CDIA's member CRAs, and the Chamber's members that obtain and use consumer report information to make business risk decisions or furnish their transaction and experience information to CRAs, are all subject to claims under the FCRA statutory damages provisions. In addition, many of these businesses are subject to claims under other federal laws which, like the FCRA, include statutory damages provisions subjecting them to liability to a plaintiff class that is not required to prove actual injury in order to recover.

Until the panel's decision, CRAs and other businesses could rely on the district courts in this circuit and the district courts in the Second, Sixth, Tenth, and Eleventh Circuits, to exercise their broad discretion, under Rule 23(b)(3), to deny class certification to claims alleging technical violations of statutory requirements when:

1. The defendant's total potential damages would be grossly disproportionate to any consumer harm;

2. The purpose of the statute upon which plaintiffs' claims were based would not be furthered by class certification;

3. The putative class members retained their ability to seek individual redress against the defendants under a fee shifting statute that does not discourage the filing of individual claims; and

4. Certifying the class would promote the filing of abusive class actions that compel defendants to settle dubious claims or bet the survival of

> their companies on the outcome of a trial involving millions of putative class members.

Left uncorrected, the panel's decision reverses this court's established precedent and jeopardizes the near uniformity of decisions in other circuits on the class certification issues presented in AMC's petition. Moreover, because the panel's decision will govern the consideration of any class certification request under Rule 23(b)(3), the decision may deprive defendants facing statutory damages claims of even the opportunity to avoid "blackmail" settlements.

Because the panel's uncorrected decision will affect every business that may be sued under a statutory damages provision that does not *expressly prohibit* class treatment, *amici* believe that their respective roles in the development of the FCRA, and as an advocate for businesses that will be directly affected by the panel's decision, make them uniquely qualified to assist the court as it considers the important issues presented in AMC's petition.

Amici have not obtained the consent of all parties to the filing of their brief. Therefore, *amici* have moved for leave to file their brief.[2]

[2] Fed. R. App. P. 29(a); Circuit Rule 29-2(a). CDIA previously filed a brief of *amicus curiae* in this appeal prior to the panel's decision which is the subject of AMC's petition. *See, Bateman v. American Multi-Cinema, Inc.*, 2010 U.S. App. LEXIS 19934 (9th Cir. 2010) (identifying CDIA as *amicus curiae*).

ARGUMENT

CDIA and the Chamber agree with and join in the arguments of AMC that the panel's decision directly conflicts with this court's prior precedent and the decisions of four other federal circuit courts of appeal.[3] *Amici* also agree that the panel's creation of an express intent of Congress test – where a class must be certified under Rule 23(b)(3) *unless* Congress has expressly prohibited class treatment[4] - represents an unwarranted and radical departure from the Rule 23(b)(3) superiority analysis previously applied by this court and almost every district court in this circuit to consider similar class certification issues where no actual harm is alleged.[5] *Amici* provide their additional comments to bring the concerns of thousands of businesses to the attention of this court.

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[3] AMC's Petition at 7-16 (discussing *Kline v. Coldwell Banker & Co.*, 508 F.2d 226 (9th Cir. 1974); *Klay v. Humana, Inc.*, 382 F.3d 1241, 1271 (11th Cir. 2004); *Parker v. Time Warner Entm't Co., L.P.*, 331 F.3d 13, 22 (2nd Cir. 2003); *Watkins v. Simmons & Clark, Inc.*, 618 F.2d 398 (6th Cir. 1980); *Wilcox v. Commerce Bank of Kan. City*, 474 F.2d 336, 346-47 (10th Cir.1973)).

[4] AMC's Petition at 10.

[5] *Bateman v. Am. Multi-Cinema, Inc.*, 2010 U.S. App. LEXIS *13-14 (9th Cir. 2010) (citing the "vast majority" of district court decisions in the Ninth Circuit that have considered the proportionality between the potential statutory damages and the plaintiffs' actual harm when considering class certification under Rule 23(b)(3) (citations omitted)).

I. Rehearing Is Required Because The Panel's Decision Represents A Radical Departure From This Court's Established Rule 23(b)(3) Precedent That May Deprive Businesses Of An Important Shield Against Abusive Class Actions.

The panel concedes that, thirty-six years ago in *Kline v. Coldwell, Bank & Co.*,[6] this court held that it was an abuse of discretion for a district court conducting a Rule 23(b)(3) "superiority analysis" to *fail to consider* "the amount of damages that might be imposed" on defendants in a putative class action under a statutory damages provision permitting the aggregation of damages in "staggering" or "outrageous" amounts.[7] The failure, in *Kline*, to consider this "economic reality,"[8] which the panel acknowledges was a "significant concern," was one of only three reasons this court *reversed* a district court's decision *granting* class certification.[9] Given the *Kline* decision, it is not surprising, as the panel also concedes, that the "vast majority of district courts within this circuit" have denied class certification to claims like those alleged by plaintiff under FACTA.[10]

The panel's decision, nonetheless, explicitly turns this court's established Rule 23(b)(3) superiority analysis on its head. For thirty-six years, it has been an abuse of discretion for a district court in this circuit to *fail to consider* the enormity of the potential damages a defendant may be required to pay and the disproportionality

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[6] *Kline v. Coldwell Banker & Co.*, 508 F.2d 226 (9th Cir. 1974).
[7] *Bateman.*, 2010 U.S. App. LEXIS at *16.
[8] *Kline*, 508 F.2d at 233.
[9] *Id.*, at 236.
[10] *Bateman*, 2010 U.S. App. LEXIS at *13-14.

between that amount and the harm, if any, sustained by the putative class. Under the panel's decision, such considerations now constitute "reliance on an improper factor" and are, therefore, an abuse of discretion.[11]

The panel's radical departure from established precedent on this crucial and recurring question is deserving of review.

A. The panel erroneously substituted *presumed* "Congressional intent" for the requirements of Rule 23(b)(3).

Before a class may be certified, plaintiffs bear the burden of establishing all of the elements Rule 23(a) and at least one of the elements of Rule 23(b). No plaintiff is entitled, as a matter of right, to the certification of their claims for class treatment. A proposed class may only be certified *after* the district court's rigorous analysis to determine whether the plaintiff has met each of the Rule 23 requirements.[12] The panel appears to agree with this straight-forward application of the Rule – "We therefore must decide whether *a plaintiff satisfies Rule 23's requirements.*…"[13]

However, when a plaintiff relies upon Rule 23(b)(3) for the "certification of a class [that] would threaten to impose liability disproportionate to the harm caused," the panel creates a presumption *in favor of* class treatment *unless* the language of the statute upon which the claims are based, or its legislative history, demonstrates

[11] *Id.* at *9-10.
[12] *Gen. Tel. Co. of the SW v. Falcon*, 457 U.S. 147, 161 (1982).
[13] *Bateman*, 2010 U.S. App. LEXIS at *23.

that Congress intended to prohibit class treatment for such claims. For the panel, "the touchstone of this determination is whether *denying* class certification on this ground is consistent with congressional intent."[14] Absent affirmative evidence of congressional intent, the disproportionality of potential damages – which has been a significant concern and well-established part of this circuit's class certification superiority analysis since *Kline* - may no longer be considered.

The panel's created presumption that class treatment is superior to all other available methods for fairly and efficiently adjudicating controversies involving statutory damages claims - regardless of the disproportionality between potential damages and consumer harm - leads the panel on a search for some indication of congressional intent in FACTA, the FCRA's statutory damages provision, or the related legislative history.[15] The panel searches specifically for a statement of Congress' intent to *prohibit* class treatment of claims seeking the recovery of statutory damages under the FCRA when there is no actual consumer harm. The panel finds none ("the congressional record is silent").[16] Although the finding of congressional silence on the question should return the panel to a consideration of Rule 23(b)(3)'s requirements, it does not. Rather, from the finding of congressional silence, the court invents a presumption in favor of class treatment that leads it to

[14] *Id.* at *23 (emphasis added).
[15] *Id.* at *18-22.
[16] *Id.* at *24.

conclude the district court abused its discretion when it "considered the proportionality of the potential damages to the actual harm alleged in its Rule 23(b)(3) superiority analysis."[17] The harm that will flow from the panel's error cannot be overstated.

B. The panel's error invites forum shopping by class action counsel seeking to compel settlements in cases involving claims for enormous statutory damages where there has been no consumer injury.

Rule 23(b)(3) requires a court to consider the impact of class certification on the forum.[18] The panel concedes that such determinations in this circuit include an inquiry from the point of view of the judicial system and the defendant into whether class treatment is superior.[19]

AMC has noted the exponential growth of class action filings in the Ninth Circuit during the last decade ("between 2001 and 2007, the Ninth Circuit led the way among all Courts of Appeals with a '560% increase' in class action filings….").[20] The panel's decision will, necessarily, increase the pace and volume of such filings.

In addition, the panel's class certification superiority analysis gives no consideration to the effect of certification from the defendant's perspective,

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[17] *Id.* at *34.
[18] Rule 23(b)(3)(C).
[19] *Bateman*, 2010 U.S. App. LEXIS at *10 (*quoting Kamm v. Cal. City Dev. Co.*, 509 F.2d 205, 212 (9th Cir. 1975)).
[20] AMC's Petition at 16.

including its ability to litigate its defenses on the merits. In particular, the panel – disagreeing with many other courts - concludes that a district court may not, as part of its superiority analysis, consider the enormous pressure on defendants to settle a case if class treatment is granted.[21] The panel purports to rely on this court's decision in *Blackie v. Barrack* for this proposition,[22] but *Blackie* held only that the settlement pressure created by certification could not make class certification an appealable "final" decision; it said nothing about whether such pressure – and, in particular, its effect in preventing defendants from litigating the case on the merits – was relevant to assessing the "superiority" of class treatment under Rule 23.[23]

Amici do not suggest that the consideration of settlement pressure *alone* should preclude class certification under Rule 23(b)(3), but do contend that, consistent with this court's prior precedent, the Rule 23(b)(3) superiority analysis must include an evaluation of such pressure, at least when the potential recovery: (i) would shock the conscience or be outrageous given the absence of injury, or only minimal injury; or (2) would result in a "blackmail" settlement that precludes the defendant's ability to litigate on the merits.

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[21] *Bateman*, 2010 U.S. App. LEXIS at *34-35.

[22] *Id.* at *35 (quoting *Blackie v. Barrack*, 524 F.2d 891, 899 (9th Cir. 1975) ("We have held, however, that '[t]he fairness of the pressure i.e., the sociological merits of the small claims class action[,] is not a question for us to decide.'").

[23] *Blackie*, 524 F.2d at 899 ("we doubt the propriety of an attendant judicial alteration of the final decision rule which immediately (and uniquely) subjects redress of class plaintiffs' claims to the delay and cost of an appeal.").

The panel's decision again conflicts with *Kline* where this court held that, although the "amount of recovery in a lawsuit is *not ordinarily of concern* where a wrong has been inflicted *and an injury suffered*,[24] it may be considered when outrageous amounts are sought in cases seeking statutory damages.[25] Other circuit courts of appeal have made clear that the potential for coercing a "blackmail" settlement from a defendant – thereby preventing the defendant from litigating even meritorious defenses – is a proper consideration for district courts evaluating the superiority of class treatment.[26] These circuits, moreover, are correct under the plain language of Rule 23: a class action cannot be said to be the superior method of "fairly and efficiently adjudicating the controversy,"[27] when one of the parties is deprived of any realistic ability to litigate the case on its merits. Indeed, this is no different from the well-accepted principle that the *plaintiffs'* practical ability to litigate their claims on the merits – in particular, the question of whether plaintiffs will have sufficient incentive to pursue low-value claims in individual actions - is relevant to the superiority analysis.

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[24] *Kline*, 508 F.2d at 234 (emphasis added).
[25] *Id.* (citing *Ratner v. Chemical Bank of New York Trust Co.*, 54 F.R.D. 412 (S.D.N.Y. 1972).
[26] *Newton v. Merryl Lynch, et al.*, 259 F.3d 154, 168 (3rd Cir. 2001); *Castano v. The American Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996); *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1299 (7th Cir. 1995).
[27] Rule 23(b)(3).

Further, although the panel holds that it is an abuse of discretion under Rule 23 to consider the settlement pressure on the defendant, or the disproportionality of the potential damages, the panel does just that to create a new, virtually insurmountable, disproportionality standard.

This circuit's established disproportionality considerations focus on the amount of potential damages a class may recover when compared to the harm the class may have suffered.[28] For the panel, if the potential damages are going to be considered at all, this is the wrong comparison. Rather, the panel compares the total potential damages that may be recovered by the plaintiff class against the defendant's *gross revenues* over the course of many years *or total assets*.[29] Only if the potential class recovery is so large that it will result in the defendant's actual bankruptcy, should a court even consider the disproportionality issues.[30] The panel offers no explanation, however, of why disproportionality – or the "blackmail" effect of a potentially staggering damages award – matters only when it will result in the defendant's bankruptcy.

Moreover, the application of the panel's new disproportionality standard in this case alone demonstrates that the panel's standard will never be met by a defendant

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[28] *Kline*, 508 F.2d at 234; *Ratner v. Chemical Bank New York Trust Co.*, 54 F.R.D. 412, 416 (S.D.N.Y. 1972).

[29] *Bateman*, 2010 U.S. App. LEXIS at *39-40 (noting that AMC's revenues for 2006 were approximately $1.68 billion and that its assets were worth approximately $4 billion).

[30] *Id.* at *39.

opposing class certification under Rule 23(b)(3). Based on information provided by the plaintiff, the panel explains that AMC's revenue for 2006 was $1.68 billion and that its costs and expenses were $1.66 billion.[31] From that information, it cannot have escaped the panel's attention that the remaining "profit" would be $20 million. The panel recognizes that AMC's potential liability to the putative class could equal $290 million,[32] or approximately fifteen *years* of its *total* annual profit. For the panel such an outcome would not be sufficiently "ruinous" to meet its new standard.

To the extent the panel's new disproportionality standard is not corrected, and becomes the law in this circuit, it is unlikely that any claim will be denied class treatment under Rule 23(b)(3) on disproportionality grounds. Certainly *amici's* members could not devote fifteen years of their total profit to fund a class action verdict and remain in business. Because the panel has reserved judgment on what level of liability would be sufficiently ruinous to warrant the denial of class certification under Rule 23(b)(3),[33] it is unclear just how many years of a defendant's total profits would cause the panel to conclude that the potential class recovery was so large that the claims should not be given class treatment.

[31] *Id.* at *40.
[32] *Id.* at *39.
[33] *Id.* at *40.

Unless the panel's decision is corrected, plaintiffs' counsel seeking guaranteed class certification for their statutory damages claims under Rule 23(b)(3) will continue to make the district courts of this circuit the home for the vast majority of their filings. Such an outcome cannot benefit "the judicial system … the public at large … [or] the defendants…."[34]

II. The Panel's Decision Presents A Question Of Exceptional Importance Because It Deprives Defendants Of Their Opportunity, Under 23(b)(3), To Obtain The Fair Adjudication Of Plaintiffs' Claims Seeking Aggregated Statutory Damages In Class Actions Involving No Harm To Plaintiffs.

The panel's decision harms potential defendants, and misconstrues the requirements of Rule 23(b)(3), because it erroneously excludes factors relating to the defendant (*e.g.*, the enormity of the damages, the proportionality of damages to harm, and the defendants' good faith compliance with the law) from the superiority analysis – except to hold that such considerations are an abuse of discretion.[35]

Although the FCRA does not require that consumer claims be certified for class treatment, the panel's superiority analysis may lead to that result – contrary to the Rule 23(b)(3) requirement that classes should be certified only when "superior to other available methods for fairly and efficiently adjudicating the controversy." The panel concludes that the statutory damages of between $100 and $1,000 that

[34] *Bateman*, 2010 U.S. App. LEXIS at *10 (identifying some of the factors a court should consider when considering the certification of a plaintiffs' claims for class treatment).
[35] *Id.* at *9-10.

are available under the FCRA, without proof of the plaintiff's injury, constitute only a "modest" amount.[36] The implication is that a consumer who has been affected by an alleged violation of the FCRA will be unwilling or unable to bring such a claim unless it is aggregated with thousands of other claims. The panel holds this is necessary to deter future violations.[37]

The statutory damages provisions upon which the panel relies demonstrate its error. In addition to damages of between $100 and $1,000, the statute specifically permits the recovery of attorney's fees and, if the courts allow, punitive damages.[38] In a successful action, plaintiffs *will* – not "might" - be awarded their reasonable attorneys' fees.[39] The prospect of recovering fees in a class action is not necessary to entice counsel to bring well-founded FCRA claims. Moreover, the deterrent effect of paying attorneys' fees in thousands of individual lawsuits should be self-evident.

The panel ignores the statute's mandatory attorneys' fees provision to speculate that the denial of class certification will "allow the largest violators of FACTA to escape the pressure of defending class actions and, in all likelihood, to escape

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[36] *Id.* at *25-26.
[37] *Id.* at *27-28.
[38] 15 U.S.C. § 1681n(a).
[39] If the defendant is found liable, the plaintiff will recover his attorneys fees (a person who willfully violates the FCRA "*is liable*" to the plaintiff for an amount which includes "the costs of the action together with reasonable attorney's fees as determined by the court."). 15 U.S.C. § 1681n(a)(3).

liability for most violations."[40] For the panel, the prospect of enormous damages, out of all proportion to any possible plaintiffs' injuries is desirable for its "overdeterence" value.[41] Other courts, applying the same superiority analysis relied upon by this court in *Kline*, have found in similar circumstances that "individual suits, rather than a single class action, are the superior method of adjudication."[42]

The panel's decision ignores the defendants' interests in claims brought under statutes that permit the award of attorneys' fees to the prevailing plaintiffs. Such claims give defendants an opportunity to present their defenses to specific plaintiffs' claims without the risk of incurring staggering damages in a class action. Under the panel's superiority analysis, a defendant may face this enormous risk, even for a technical violation causing no harm to plaintiffs, because class treatment will be superior to individual actions if a district court must hold that even those statutes that permit the recovery of statutory damages *and* attorneys' fees are insufficient to incentivize an individual lawsuit.[43]

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[40] *Bateman*, 2010 U.S. App. LEXIS at *28.
[41] *Id.* at *26.
[42] *Klay*, 382 F.3d at 1271.
[43] *E.g.*, *Castano v. The American Tobacco Co.*, 84 F.3d 734, 748 (5th Cir. 1996) ("The most compelling rationale for finding superiority in a class action – the existence of a negative value suit – is missing in this case."). When a successful plaintiff can recover damages and attorneys' fees, the *Castano* court explained that class treatment may not be superior. *Id.*

The very purpose of statutes permitting plaintiffs to recover statutory damages and attorneys' fees is to encourage the filing of individual claims.[44] The panel, concerned as it purports to be with congressional intent, entirely misses the intent expressed in the very language of the civil liability statute it considered.[45] In holding that the district court abused its discretion, the panel explains that "it is not appropriate to use procedural devices to undermine laws of which a judge disapproves."[46] *Amici* agree.[47] The panel should not, by prohibiting the denial of class certification for reasons that have been the established law of this circuit for nearly four decades, undermine the FCRA's civil liability provisions, which are intended to encourage the filing of individual claims, simply because the panel believes that allowing a district court to give effect to these provisions will permit defendants to "escape liability."[48]

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[44] *See*, *Coleman v. GMAC*, 296 F.3d 443, 449 (6th Cir. 2002) ("Class treatment of claims is most appropriate where it is not economically feasible for individuals to pursue their own claims.").
[45] 15 U.S.C. § 1681n(a).
[46] *Id.* at *27.
[47] *See*, *also*, Advisory Comm. Note to Proposed Rule 23(b)(3), *reprinted in* 39 F.R.D. 69, 102-103 (1966) ("Subdivision (b)(3) encompasses those cases in which a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, *without sacrificing procedural fairness or bringing about other undesirable results*.") (emphasis added).
[48] *Id.*

CONCLUSION

This court should grant AMC's Petition for *En Banc* and/or Panel Rehearing to avoid the intra-circuit, and inter-circuit, conflicts created by the panel's decision and to address the exceptionally important issues presented in this appeal.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the foregoing brief, exclusive of those materials referred to in FRAP 32, contains 4,092 words.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief was prepared in a proportionally spaced typeface using Microsoft WORD 2003. The typeface is Times New Roman 14-point. The word count was determined by using the program's "word count" feature.

/s/ A. James Chareq

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I hereby certify that on October 18, 2010, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF System.

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