No. 12-16752

IN THE

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PULASKI & MIDDLEMAN, LLC, et al.,

Plaintiffs-Appellants,

v.

GOOGLE INC., a Delaware Corporation,

Defendant-Appellee.

On Appeal from the U.S. District Court
for the Northern District of California,
Case No. 5:08-cv-3369-EJD

MOTION OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR REHEARING

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Federal Rule of Appellate Procedure 29(c)(1), counsel for *amicus curiae* the Chamber of Commerce of the United States of America states that it is not a subsidiary of any corporation, and no publicly held corporation owns 10% or more of its stock.

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

1. Pursuant to Federal Rule of Appellate Procedure 29(b) and Ninth Circuit Rule 29-2(b), the Chamber of Commerce of the United States of America hereby moves for leave to file a brief as *amicus curiae* in support of Defendant-Appellee's petition for rehearing.

2. The Chamber has sought consent for this filing from the parties. Counsel for Defendant-Appellee consents; counsel for the Plaintiffs-Appellants do not consent.

3. The Chamber believes that the petition for rehearing merits close attention and that the attached brief will aid the Court's review. The petition stresses the conflict the panel decision creates with the Supreme Court's and other Courts of Appeals' precedent. The Chamber's attached brief does not repeat those legal arguments, and instead addresses in more detail the practical consequences of the panel's ruling for businesses in this Circuit and beyond, which counsel strongly in favor of rehearing.

4. The Chamber has a direct and substantial interest in the outcome of this appeal. The Chambers' members frequently litigate the issue of class certification under Federal Rule of Civil Procedure 23(b)(3). A ruling that incorrectly dilutes Rule 23(b)(3)'s procedural safeguards subjects the Chambers' members to abusive class action litigation at extraordinary cost.

5. The Chamber is uniquely situated, by virtue of its members' considerable experience with class action litigation in general, and Rule 23(b)(3) certification in particular, to address these issues of exceptional importance.

Respectfully submitted,

/s/Pratik A. Shah

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October 29, 2015

CERTIFICATE OF SERVICE

I hereby certify that, on October 29, 2015, I electronically filed the foregoing motion with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit by using the Court's CM/ECF system.

All of the participants are registered CM/ECF users and will be served copies of the foregoing motion via the CM/ECF system.

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest business federation, representing more than three hundred thousand direct members and an underlying membership of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent its members' interests before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of national concern to American business—including cases that raise the specter of class action litigation abuse. *See, e.g.*, *Tyson Foods, Inc. v. Bouaphakeo*, No. 14-1446 (U.S.); *Comcast Corp. v. Behrend*, No. 11-864 (U.S.); *Wal-Mart Stores, Inc. v. Dukes*, No. 10-277 (U.S.).

This case presents a question of exceptional importance to members of the business community. As discussed herein, the Supreme Court has time and again stressed the importance of fully enforcing the class certification requirements of Federal Rule of Civil Procedure 23. The panel decision, however, openly flouts that admonition by allowing certification of a Rule 23(b)(3) class involving individualized damages calculations—including for plaintiffs who *benefited* from

[1] In accordance with Federal Rule of Appellate Procedure 29(c)(5), *amicus* certifies that no counsel for either party authored this brief in whole or in part, and that no party or entity other than *amicus*, its members, or its counsel made a monetary contribution intended to fund its preparation or submission.

the alleged violation of California law. This Court's further review is thus of substantial interest to the Chamber.

INTRODUCTION AND SUMMARY OF ARGUMENT

A district court may certify a class action under Federal Rule of Civil Procedure 23(b)(3) only if (among other prerequisites) "questions of law or fact common to class members predominate." FED. R. CIV. P. 23(b)(3). In *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1433 (2013), the Supreme Court overturned the certification of a class because, in that case, "[q]uestions of individual damage calculations will inevitably overwhelm questions common to the class." Yet the panel decision in this case adhered to this Court's pre-*Comast* holding in *Yokoyama v. Midland National Life Insurance Co.*, 594 F.3d 1087, 1094 (9th Cir. 2010), "that 'damages calculations alone cannot defeat certification.'" Pet. Add. 14. In addition, the panel decision papered over those individualized differences by approving Plaintiffs' one-size-fits-all proposed method of computing restitution, Pet. Add. 20—a "novel" practice that the Supreme Court rejected in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2561 (2011). For the reasons set forth in the Petition (at 9-19), the panel decision misapplied Rule 23(b)(3).

The Chamber writes separately in support of rehearing to emphasize the far-reaching consequences of permitting certification of a Rule 23(b)(3) class where individualized damages determinations are necessary. If left to stand, the panel

decision will only perpetuate abuses of class action litigation, unjustifiably raise the cost of doing business in a wide variety of industries, and burden the American economy. The Chamber therefore urges rehearing to ensure conformance with the strictures of Rule 23(b)(3).

ARGUMENT

I. RULE 23'S CERTIFICATION PROCEDURES PROVIDE ESSENTIAL SAFEGUARDS AGAINST CLASS ACTION ABUSE

As the Supreme Court has long recognized, "the class issue—whether to certify, and if so, how large the class should be—will often be of critical importance to defendants." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978). That has become increasingly true over the past decades as the frequency of class actions, and the stakes of litigation, have risen steadily—for businesses large and small. *See, e.g.*, Mark A. Fellows & Roger S. Haydock, *Federal Court Special Masters: A Vital Resource in the Era of Complex Litigation*, 31 WM. MITCHELL L. REV. 1269, 1294-1295 (2005) ("There is every reason to believe that class action filings will continue to increase at a substantial rate[.]"). Today, there is widespread consensus that "in current class action litigation, the class certification hearing is the most important, significant, and outcome-determinative event." Linda S. Mullenix, *Putting Proponents to Their Proof: Evidentiary Rules at Class Certification*, 82 G.W. L. REV. 606, 637 (2014); *see, e.g.*, David L. Wallace, *A Litigator's Guide to the "Siren Song" of "Consumer Law" Class*

Actions, LJN'S PROD. LIAB. L. & STRATEGY 10 (Feb. 2009) (describing class-certification decision as "the whole shooting match").

The reasons that make the certification decision so consequential are well-known for companies of any size: for even the most baseless actions, class litigation is procedurally and substantively complex, and the very nature of allowing a class representative to sue on behalf of others magnifies potential liability. *See* Barbara J. Rothstein & Thomas E. Willging, Federal Judicial Center, *Managing Class Action Litigation: A Pocket Guide for Judges* 1-2 (2005) (stating that "[t]here is no such thing as a simple class action" because "[e]very class action has hidden hazards that can surface without warning," and recognizing "high stakes of litigation"). The cost to defend against a large class action can range from "$5 million to $100 million." Adeola Adele, Dukes v. Wal-Mart*:* *Implications for Employment Practices Liability Insurance* 1 (FINPRO Focus July 2011); *see also* Carlton Fields Jorden Burt, *Class Action Survey: Best Practices in Reducing Cost and Managing Risk in Class Action Litigation* 14 (2015) ("In 25 percent of bet-the-company class actions, companies spend more than $13 million per year per case on outside counsel. In 75 percent of such actions, the cost of outside counsel exceeds $5 million per year per case.").

Although the costs of defending against class actions are high enough to hit the bottom line of even the largest company, class actions "particularly hit[] small

business because it is the small business that gets caught up in the class action web without the resources to fight." 151 CONG. REC. 1664 (Feb. 8, 2005) (statement of Sen. Grassley); *see also* U.S. Chamber Institute for Legal Reform, *Tort Liability Costs for Small Business* 9 (July 2010) (noting that small businesses took in only 22% of total revenue but bore the brunt of 81% of business tort liability costs); *id.* at 9 n.19 (discussing NFIB National Small Business Poll data and finding that, on average, the cost of settling a legal dispute consumes ten percent of a small business owner's salary). Accordingly, the pernicious effects of the panel decision reach far beyond companies like Google. And, in addition to the direct costs of time and litigation expenses, there is the not-insignificant indirect cost to a business's reputation that comes with being embroiled in a class action. Matthew Grimsley, *What Effect Will* Wal-Mart v. Dukes *Have on Small Businesses?*, 8 OHIO ST. ENTREPRENEURIAL BUS. L.J. 99, 100-101 & n.7 (2013).

The rise of lawsuits that attempt to use Rule 23 to aggregate statutory damages has further increased the liability-magnifying effect of class actions, with an increasing number of lawsuits alleging hundreds of millions, or even billions, of dollars in damages or penalties. *See* Sheila B. Scheuerman, *Due Process Forgotten: The Problem of Statutory Damages and Class Actions*, 74 MO. L. REV. 103, 104 (2009) ("When combined with the procedural device of the class action, aggregated statutory damages claims can result in absurd liability exposure in the

hundreds of millions—or even billions—of dollars on behalf of a class whose actual damages are often nonexistent."); U.S. Chamber Institute for Legal Reform, *The Juggernaut of TCPA Litigation: The Problems with Uncapped Statutory Damages* (Oct. 2013) (charting rise in class actions under the Telephone Consumer Protection Act, including class actions seeking tens of billions of dollars in penalties).[2]

The substantial costs that class actions impose on defendants make them a "powerful tool [that] can give a class attorney unbounded leverage." S. REP. NO. 109-14, at 20 (2005) (Class Action Fairness Act). As the Supreme Court has noted, class certification "may so increase the defendant's potential damages liability and litigation costs" to the point "that he may find it economically prudent to settle and to abandon a meritorious defense." *Coopers & Lybrand*, 437 U.S. at 476. Accordingly, even the most legally surefooted class-action defendant may

[2] *See, e.g.*, *Bateman v. American Multi-Cinema, Inc.*, 623 F.3d 708 (9th Cir. 2010) (class action seeking $290 million in damages based on allegations that a movie theater chain violated the Fair and Accurate Credit Transactions Act ("FACTA") by including more than five digits of consumers' credit card numbers on electronic receipts); *Rose v. Bank of Am. Corp.*, No. 5:11-cv-02390, Dkt. No. 59-1 (N.D. Cal. Sept. 27, 2013) (class action certified under Telephone Consumer Protection Act seeking up to $35 billion in penalties); *Parker v. Time Warner Entm't Co., L.P.*, 631 F. Supp. 2d 242, 248 (E.D.N.Y. 2009) (class certified seeking "at a minimum, hundreds of millions of dollars" for technical violations of the Cable Communications Policy Act); *Kesler v. Ikea U.S. Inc.*, No. SACV 07-568 JVS (RNBx), 2008 WL 413268, at *2 (C.D. Cal. Feb. 4, 2008) (class action certified seeking $2.4 billion under FACTA from furniture retailer for including customers' credit-card expiration dates on receipts).

capitulate to what Judge Friendly aptly termed "blackmail settlements" that provide a windfall to plaintiffs and, ultimately, the plaintiffs' class-action bar. Henry J. Friendly, *Federal Jurisdiction: A General View* 120 (1973); *see also* S. REP. NO. 109-14, at 20 (discussing "frivolous lawsuits" that "essentially force corporate defendants to pay ransom to class attorneys by settling").

These concerns are anything but academic. In federal court, 90% of class actions settle once they are certified. *See* Rothstein & Willging, *supra*, at 6. Those settlements have little or nothing to do with the merits of claims, as studies bear out. *See* Ralph K. Winter, Jr., *Paying Lawyers, Empowering Prosecutors, and Protecting Managers: Raising the Cost of Capital in America*, 42 DUKE L.J. 945, 952 (1993) (explaining that "the merits of claims" are "frequently irrelevant to their initiation or settlement values"); *see also* Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Security Class Actions*, 43 STAN. L. REV. 497, 516-518 (1991) (finding that best indicator of settlement value in securities class actions is decline in stock price and available insurance coverage). In short, in many class actions, the class certification decision is "in effect, the whole case." FTC Workshop, *Protecting Consumer Interests in Class Actions* (Sept. 13-14, 2004), in *Panel 2: Tools for Ensuring that Settlements Are "Fair, Reasonable, and Adequate"*, 18 GEO. J. LEGAL ETHICS 1197, 1213 (2005).

Moreover, in the end, the practical reality is that the primary beneficiaries of

such class settlements are "the lawyers who bring the lawsuits [and] effectively control the litigation," rather than "the clients [who] are marginally relevant at best," S. REP. NO. 109-14, at 4, and settle their claims for pennies on the dollar even before paying class counsel, *see* Ellen M. Ryan & Laura E. Simmons, Cornerstone Research, *Securities Class Action Settlements: 2011 Review & Analysis* 7 (2012) (calculating that, in 2011, average settlement in securities class action was for 2.1% of claimed losses).

In addition, even where a defendant makes the risk-laden decision to defend a class action on the merits, it will face financial and practical consequences that should be countenanced only when the high bar of Rule 23 is satisfied. As has been well-documented, defending against a class action is both disruptive and costly—in large part due to the rising costs of discovery in the electronic age, the complexity of the issues, and the time it takes for class actions to be litigated. *See, e.g.*, Daniel B. Garrie & Tarique N. Collins, *E-Discovery and Class Actions: Limiting Discovery Disputes with Special Masters*, 61 FED. LAW. 70, 70 (2014) ("Class actions are often among the most explosive, costly, and challenging lawsuits faced by lawyers, courts, and litigants. This is certainly true when it comes to discovery and e-discovery issues."); Thomas E. Willging et al., Federal Judicial Center, *Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules* 23 (1996) ("In the eleven

certified class actions in the time study, judges spent, on the average, eleven times more hours than they did in the average civil action."); *see also Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 741 (1975) (explaining that in securities cases, commonly brought as class actions, that "[t]he potential for possible abuse of the liberal discovery provisions of the Federal Rules of Civil Procedure may *** exist in this type of case to a greater extent than they do in other litigation").

The destructive consequences of unwarranted class actions do not end with individual companies; they inevitably are "passed along to the public." *SEC v. Tambone*, 597 F.3d 436, 452-453 (1st Cir. 2010) (Boudin, J., concurring) ("No one sophisticated about markets believes that multiplying liability is free of cost."). Where a company is pressured to settle a meritless class action, it will pass some of that cost onto innocent consumers in the form of higher prices. But the economy as a whole may suffer as well: abusive class actions can reduce a defendant company's equity value, *see* Anjan V. Thakor, U.S. Chamber Institute for Legal Reform, *The Unintended Consequences of Securities Litigation* 14 (2005) (finding average securities class action to diminish equity value by 3.5%); interfere with the functioning of capital markets by "affect[ing] the willingness of corporate managers to disclose information to the marketplace" for fear of exposing a company to litigation, *see* H.R. CONF. REP. NO. 04-369, at 42 (1995); and steer investors away from American capital markets, *see* Michael R. Bloomberg &

Charles E. Schumer, *Sustaining New York's and the U.S.' Global Financial Services Leadership* 101 (2007) ("[F]oreign companies [are] staying away from US capital markets for fear that the potential costs of litigation will more than outweigh any incremental benefits of cheaper capital[.]").

II. WHETHER INDIVIDUALIZED DAMAGES CALCULATIONS ARE RELEVANT TO RULE 23(b)(3)'S PREDOMINANCE REQUIREMENT IS AN ISSUE OF EXCEPTIONAL IMPORTANCE

The panel decision's misapplication of Rule 23(b)(3)'s predominance requirement would severely exacerbate the foregoing concerns. Ignoring individualized damages inquiries when applying the predominance requirement allows plaintiffs to artificially inflate the size of a certified class, and thus their settlement leverage. That result not only runs headlong into *Comcast* as a legal matter, but also defies commonsense.

The panel decision in no way disputed the district court's observation that "many advertisers *** have no legal claim to restitution because they derived direct economic benefits from ads placed on parked domains and error pages." Pet. Add. 8. Yet it reasoned that class certification was required because "'damages calculations alone cannot defeat certification.'" *Id.* at 14. In so holding, the panel ignored that certifying class actions with complex individual damages issues will inevitably lead to one of two scenarios, both of which are plainly improper.

On the one hand, a district court, after certifying such a class, might engage in a "trial by formula" that ignores the individualized damages issues. That approach plainly would violate the holding of *Wal-Mart Stores*, 131 S. Ct. at 2561. It would provide an improper windfall to class members that were uninjured (or in fact profited) from Google's services. It would convert the procedural mechanism of Rule 23 into an improper expansion of substantive rights. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 612-613 (1997) ("Rule 23's requirements must be interpreted in keeping with Article III constraints, and with the Rules Enabling Act, which instructs that rules of procedure 'shall not abridge, enlarge or modify any substantive right,' 28 U. S. C. § 2072(b)."). And it would violate due process by depriving Google of its right to "an opportunity to present every available defense" to each class member's claims. *See Lindsey v. Normet*, 405 U.S. 56, 66 (1972).

On the other hand, a district court, following certification, might theoretically attempt to resolve each of the individual damages issues in a class action. Yet that task, as Google showed in the district court, *see* Pet. Add. 8-9, would likely be entirely impractical. As such, the purported Rule 23(b)(3) action is likely to devolve into a series of individualized mini-trials on damages—subjecting the defendant to the cost and inconvenience of litigating each plaintiff's claim both separately and collectively. More realistically, that approach would force most defendants to settle for pennies on the dollar simply to avoid the massive costs of a

large class action that cannot be litigated in any practical fashion. That is precisely the type of cumbersome and inefficient litigation the certification inquiry generally, and Rule 23(b)(3)'s predominance requirement specifically, is meant to prevent. *See* FED. R. CIV. P. 23 advisory committee's note (2003) ("A critical need [at the class-certification stage] is to determine how the case will be tried.").

At a minimum, a court determining whether to certify a class must *consider* the possibility that individualized damages will have this result. The panel decision simply closed its eyes to this likelihood, reasoning instead that individualized damages issues can *never* preclude certification.

CONCLUSION

As the Supreme Court stressed yet again in *Comcast*, "[t]he class action is an exception to the usual rule that litigation is conducted by and on behalf of individual named parties," and is appropriate only where a party "affirmatively demonstrate[s] his compliance with Rule 23." 133 S. Ct. at 1432 (citations and internal quotation marks omitted). Because Rule 23(b)(3) is "an adventuresome innovation *** designed for situations in which class-action treatment is not as clearly called for," courts are duty-bound "to take a close look at whether common questions predominate over individual ones." *Id.* (citation and internal quotation marks omitted). Rather than fulfill that role, the panel decision refused to abandon superseded Circuit precedent diluting Rule 23(b)(3)'s procedural safeguards,

increasing the substantial likelihood that plaintiffs will profit by pressuring defendants to settle meritless class claims or incur unwarranted costs. The Court should grant the petition for rehearing to align this Court's precedent with the Supreme Court's class-action jurisprudence.

Respectfully submitted,

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