No. 15-80180

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KARL E. RISINGER,

Plaintiff-Respondent,

v.

SOC LLC; SOC-SMG, INC.; DAY & ZIMMERMANN, INC.,

Defendants-Petitioners.

On Petition for Permission to Appeal from the
United States District Court for the District of Nevada
Case No. 2:12-cv-00063-MMD-PAL
The Honorable Miranda M. Du

MOTION FOR LEAVE TO FILE REPLY IN SUPPORT OF PETITION FOR PERMISSION TO APPEAL PURSUANT TO RULE 23(f)

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As explained in SOC's petition, Rule 23(f) review is warranted because the district court's order is manifestly erroneous and implicates novel and unsettled legal questions of broad importance. SOC seeks permission to file a reply brief in support of its petition. This Court regularly grants motions for leave to file reply briefs in support of Rule 23(f) petitions. *See, e.g.*, *Duarte v. JPMorgan Chase Bank N.A.*, No. 14-80057, Dkt. 10 (9th Cir. July 8, 2014); *Bernard v. Citimortgage Inc.*, No. 13-80214, Dkt. 6 (9th Cir. Dec. 23, 2013).

SOC believes that a short reply brief will assist the Court in its consideration of the petition. Risinger asserts that "California's reliance rule" for certain fraud claims applies in this case, even though Risinger has asserted claims under Nevada law. Dkt. 4-1 at 5. SOC's reply brief explains that the Nevada Supreme Court has refused to endorse a presumption of reliance in fraud cases, and that Risinger's attempt to import California law into this case via Rule 23 constitutes a violation of the Rules Enabling Act and *Erie*.

Risinger also mischaracterizes the record in an attempt to obscure the fact that there is no basis for inferring classwide reliance here, even if Nevada law authorized such an inference. SOC's reply brief corrects these mischaracterizations of the record, and further explains that, without this Court's intervention, this case will proceed to an unfair class trial that risks awarding substantial windfalls to absent class members, and will deprive SOC of its right to

raise defenses to individual claims, in violation of the Rules Enabling Act and due process.

Accordingly, SOC respectfully requests that the Court grant this motion and order filed the attached reply brief.

Dated: November 3, 2015

Respectfully submitted,

/s/ Theodore J. Boutrous, Jr.

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CERTIFICATE OF SERVICE

I, Theodore J. Boutrous, hereby certify that I electronically filed the foregoing Motion for Leave to File Reply in Support of Petition for Permission to Appeal Pursuant to Rule 23(f) with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. All participants in this case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Theodore J. Boutrous, Jr.
Theodore J. Boutrous, Jr.

Dated: November 3, 2015

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INTRODUCTION

The district court's unprecedented class certification order—which expressly and impermissibly uses the class action device to alter the governing substantive law—conflicts with decisions of the U.S. Supreme Court, this Court, and others, and violates Rule 23, the Rules Enabling Act, and due process. The Court should grant review and reverse.

If the over 4,000 members of the nationwide class were to file individual actions, *each* class member would have to prove at trial that SOC made *to him* an oral promise that *his* workweek as a guard on military posts in Iraq would *always* be limited to six days and a maximum of 72 hours, and that *he* relied on this representation in accepting employment. To satisfy his burden of proof, an employee would have to testify at trial about what SOC recruiters said about the required workweek. SOC would then have the ability to cross-examine the employee, including regarding the significance of the alleged promise to that particular employee, and would be allowed to defend itself by calling its own witnesses, such as recruiters. In short, each employee's reliance on an allegedly false promise would be proven (or disproven) with individualized evidence.

Yet through the application of Rule 23—a procedural device that cannot be used to enlarge or modify substantive rights, or abridge the presentation of "defenses to individual claims," *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541,

2561 (2011)—the district court has authorized a classwide trial in which *no* such individualized evidence will be required or permitted. It did so by, as Risinger admits, simply "inferr[ing] classwide reliance." Dkt. 4-1 at 7. To justify this inference, the court relied on a case applying California's rule of inferred reliance for fraud claims, even though in Nevada "[f]raud is never presumed; it must be clearly and satisfactorily proved." *J.A. Jones Const. Co. v. Lehrer McGovern Bovis, Inc.*, 120 Nev. 277, 291 (2004) (quotation marks and citation omitted).

The district court's shortcut of inferring reliance here was manifestly erroneous, and warrants this Court's review *now*, before the parties proceed to a fundamentally flawed and unfair classwide trial at which SOC will be deprived of its right to present defenses to individual claims in violation of the Rules Enabling Act and due process, and class members will potentially be able to recover in excess of $50,000 each without ever proving key elements of their claims. This case also presents this Court with an opportunity to clarify when, if ever, claims involving individual reliance can be permissibly certified under Rule 23(b)(3), and to address the proper scope of its decision in *In re First Alliance Mortgage Co.*, 471 F.3d 977 (9th Cir. 2006). The Court should grant review under Rule 23(f).

ARGUMENT

A. The District Court Manifestly Erred When It Replaced Individualized Adjudication with an Inference of Classwide Reliance

As SOC has explained, it is well-established that Rule 23(b)(3)'s

predominance requirement is not satisfied where, as here, individual reliance must be proven for class members to establish their claims. Indeed, the Supreme Court has repeatedly held that the need to "prove reliance on an individual basis . . . mean[s] that individual issues would predominate over common ones." *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2406 (2014). For this reason, as the district court itself recognized, courts are generally "reluctant to certify" fraud-based claims as class actions because they tend to involve "materially different representations" and "individualized questions about whether a potential plaintiff's reliance was justified." APP 0392.

Risinger denies none of this. Nevertheless, he attempts to pass off the district court's certification order as unexceptional by claiming that (a) even where the underlying claims are asserted under Nevada law, "[t]he Ninth Circuit follows California's reliance rule in deciding whether to certify class actions," Dkt. 4-1 at 5–7, and (b) "California's reliance rule" permits an inference of reliance here because SOC supposedly made "common misrepresentations" to all class members, *id.* at 11–13. Neither is true.

1. Importing California Substantive Law Under the Guise of Rule 23 Violates the Rules Enabling Act and *Erie*

Although it is beyond dispute that claims requiring individual reliance are inherently ill-suited for class treatment, for some types of claims, some courts have endorsed, as a matter of substantive law, either inferring or presuming reliance

under certain factual circumstances. *See, e.g.*, Allan Erbsen, *From "Predominance" to "Resolvability": A New Approach to Regulating Class Actions*, 58 Vand. L. Rev. 995, 1012–13 (2005) (noting practice of courts creating "substantive and evidentiary shortcuts" that facilitate class certification, including "presumptions to avoid having to consider individualized questions of fact on legal elements such as reliance"). The most familiar example is the "fraud-on-the-market" presumption, which is "a substantive doctrine of federal securities-fraud law." *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1193 (2013). Some courts, such as the Second Circuit in *In re U.S. Foodservice Inc. Pricing Litig.*, 729 F.3d 108 (2d Cir. 2013)—a case the district court relied on below, APP 0392—have applied a similar presumption of reliance to certain types of RICO claims. And, as Risinger emphasizes, the California Supreme Court has endorsed inferring reliance for some types of common law fraud claims. *See, e.g.*, *Occidental Land, Inc. v. Superior Court*, 18 Cal. 3d 355, 363 (1976) ("[A]n inference of reliance arises if a material false representation was made to persons whose acts thereafter were consistent with reliance upon the representation.").

The Nevada Supreme Court, however, has chosen a different path. It has held that "[f]raud is never presumed; it must be clearly and satisfactorily proved." *J.A. Jones Const. Co.*, 120 Nev. at 291 (quotation marks and citation omitted). It has also instructed that, "[a]s a general proposition, it is fair to state that a class suit

to recover damages for fraud allegedly practiced upon numerous persons is not warranted." *Johnson v. Travelers Ins. Co.*, 89 Nev. 467, 472 (1973); *see also Cummings v. Charter Hosp. of Las Vegas, Inc.*, 111 Nev. 639, 644 (1995). The Nevada Supreme Court has also made clear that the need to *prove*, rather than *presume*, fraud includes the element of "[j]ustifiable reliance," which "must be established by clear and convincing evidence in order to establish a claim for relief." *Lubbe v. Barba*, 91 Nev. 596, 600 (1975).

Yet while Risinger has asserted claims in a Nevada court and under Nevada law, he remarkably cites not even a single Nevada case in his Answer. Instead, Risinger claims that *California* cases endorsing an inference of reliance for certain fraud claims govern here, even though he has never asserted that his claims arise under California law. *See* Dkt. 4-1 at 5–7. This approach ignores that in "diversity jurisdiction cases, such as this one, [a federal court] appl[ies] the substantive law of the forum in which the court is located." *First Intercontinental Bank v. Ahn*, 798 F.3d 1149, 1153 (9th Cir. 2015) (quotation marks and citation omitted).

Risinger nevertheless claims that California's substantive law trumps Nevada's distinct substantive law because, according to Risinger, "[t]he Ninth Circuit follows California's reliance rule in deciding whether to certify class actions." Dkt. 4-1 at 5. But this Court has not incorporated (nor could it) California's presumed reliance rule into Rule 23—which is merely a procedural

"one-size-fits-all formula for deciding the class-action question." *Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1437 (2010) (plurality op.). To do so would contravene *Erie*, *see, e.g.*, *Goldberg v. Pac. Indem. Co.*, 627 F.3d 752, 755 (9th Cir. 2010), and impermissibly "abridge, enlarge or modify" a "substantive right" in violation of the Rules Enabling Act, 28 U.S.C. § 2072(b). Indeed, the Supreme Court has instructed that "Rule 23's requirements must be interpreted in keeping with . . . the Rules Enabling Act," *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613 (1997), and has specifically warned that the "Rules Enabling Act underscores the need for caution" in interpreting Rule 23 due to potential "tension" with "state law that must govern [a] diversity action," *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 845 (1999); *see also Dukes*, 131 S. Ct. at 2561.

Risinger attempts to justify his use of California law in his defense of the district court's inference of classwide reliance by citing this Court's decision in *First Alliance* and a single district court case interpreting *First Alliance*, *Iorio v. Allianz Life Insurance Co. of North America*, No. 05CV633 JLS CAB, 2008 WL 8929013, at *28 (S.D. Cal. July 8, 2008). Dkt. 4-1 at 6. Neither decision stands for the erroneous proposition that Rule 23 incorporates one particular state's substantive law. Significantly, unlike here, both *First Alliance* and *Iorio* involved claims asserted under California law. And *First Alliance* made clear that because "the merits of the [plaintiffs'] fraud claim are grounded in state law," "whether or

not a [plaintiff's] reliance on misrepresentations was justified" in that case involving California fraud claims "depend[ed] on California law." 471 F.3d at 992. In addition, while Risinger notes that the court in *Iorio* stated that "California's reliance rule applies in determining whether to certify a class action pursuant to FRCP 23," he ignores that *Iorio* later clarified that California's reliance rule applies *only* when a court is deciding whether to "certify[] a class action involving *California fraud claims*." 2008 WL 8929013, at *28 (emphasis added).

There is thus no support for Risinger's flawed interpretation of *First Alliance*, but the district court apparently agreed with Risinger's view of the law, as it cited *First Alliance* (and thus its application of California substantive law), rather than any Nevada authority, to justify its classwide inference of reliance. APP 0392. This holding, in addition to being manifestly erroneous, demonstrates confusion surrounding whether California's reliance rule applies to cases not involving California substantive law, and thus highlights the need for this Court's review. *See Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 959–61 (9th Cir. 2005) (per curiam). This Court should grant review to clarify both its holding in *First Alliance*, and when, if ever, claims involving individual reliance can be certified.

2. Even Assuming It Were Permissible Under Nevada Law, There Is No Factual Basis for Inferring Classwide Reliance Here

Although there is no legal basis to infer reliance under Nevada law, even assuming that "California's reliance rule" applied here, it was also not properly

invoked by the district court in this case because, as SOC has explained, Risinger failed to prove that uniform representations were made to all class members. *See* Dkt. 1-1 at 16–20. Risinger repeatedly suggests otherwise in his Answer, claiming that SOC engaged in a "common scheme" and made "common misrepresentations." Dkt. 4-1 at 11–12. There is no evidence, however, that *all* class members were exposed to the same representations regarding the maximum length of a workweek, and thus there is no basis for any inference of classwide reliance. In short, Risinger failed to satisfy his burden to *prove* that the requirements of Rule 23 were satisfied and that there was "some glue" to bind together the thousands of members of the class. *Dukes*, 131 S. Ct. at 2551–52.

Risinger presented evidence that recruiters used an outline, which referred to the number of days and hours guards "usually" would work, during communications with him when he was recruited in 2010. APP 0100, 0237. The district court, however, certified a class reaching back to 2006, APP 0368, 386, and there is no evidence whatsoever that such a script even existed in 2006, 2007, or 2008. In fact, when asked when the script was created, the recruiter who created it testified "I honestly have no idea." APP 0228; *see also* APP 0363 ("[I]nitially, there was no script."). Therefore, potentially hundreds of class members were never recruited using the script that the district court used to justify a classwide inference of reliance. Further, even for those class members recruited

when the script was used, there is no evidence in the record that the relevant portion of the script was actually followed consistently, and thus no justification for inferring reliance across the entire class. In fact, even Risinger himself testified at his deposition that he could not recall the content of the telephone conversations he had with recruiters, or recall "specifically" when or where the alleged workweek representation was made. APP 0158–61.[1]

It would thus be impossible to ascertain, without unmanageable "individualized fact-finding or mini-trials," *Carrera v. Bayer Corp.*, 727 F.3d 300, 307 (3d Cir. 2013), which employees, if any, were recruited with representations regarding a six day workweek and thus allegedly suffered the "same injury" as Risinger, *Dukes*, 131 S. Ct. at 2550. The district court's use of a classwide inference of reliance to mask these problems warrants review and reversal.

B. The District Court's Manifestly Erroneous Approach to Certification Will Lead to Substantial Windfalls for Absent Class Members

As a result of the district court's improper inference of reliance, uninjured

[1] The lack of evidence of a common representation made to all class members also impacts Risinger's contract claim. The district court held that common questions predominated as to the contract claim because the "employment agreements given to class members were standardized." APP 0392. Those agreements, however, did not contain any express promise regarding the required workweek; instead, the court held that a term in the contract (regarding "customary" duties and responsibilities) was ambiguous and could be interpreted to incorporate recruiters' statements to recruits about the required workweek. APP 0377–78. But as demonstrated above, the recruiter statements were anything but "standardized."

class members who indisputably have no valid claim against SOC now stand to potentially recover significant windfalls—which may exceed $50,000[2]—solely because they have been swept into the overbroad certified class. This is a clear violation of the principle that "[n]o class may be certified that contains members lacking Article III standing," *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 594 (9th Cir. 2012) (quotation marks and citation omitted), and that "treating unsubstantiated claims of class members collectively significantly alters substantive rights," *In re Hotel Tel. Charges*, 500 F.2d 86, 90 (9th Cir. 1974).

To make matters worse, because the district court has simply eliminated the issues of whether class members were exposed to and relied on the alleged representations through the use of an irrebuttable inference, at trial SOC will be forced to litigate against a "fictional composite," *Broussard v. Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 345 (4th Cir. 1998), and, in violation of the Rules Enabling Act and due process, will have no ability to defend itself by showing that certain class members have no entitlement to relief, *see Dukes*, 131 S. Ct. at 2561; *Lindsey v. Normet*, 405 U.S. 56, 66 (1972).

CONCLUSION

The Court should grant permission to appeal under Rule 23(f).

[2] SOC denies that Risinger or any members of the class are entitled to any damages, but Risinger has asserted in this action that his damages "are at least $54,992.36." D. Nev., No. 2:12-cv-00063-MMD-PAL, Dkt. 116-20 at 3.

Dated: November 3, 2015

Respectfully submitted,

/s/ Theodore J. Boutrous, Jr.

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Dated: November 3, 2015