No. 17-80074

United States Court of Appeals for the Ninth Circuit

RAYMOND ALFRED and MARVIN BARRISH,
individually and on behalf of all others similarly situated,

Plaintiffs-Respondents,

– v. –

PEPPERIDGE FARM, INC., a Connecticut Corporation,

Defendant-Petitioner.

ON PETITION FOR PERMISSION TO APPEAL FROM THE
UNITED STATES DISTRICT COURT FOR THE CENTRAL
DISTRICT OF CALIFORNIA, CASE NO. 2:14-CV-07086-JAK-SK
THE HONORABLE JOHN A. KRONSTADT, DISTRICT JUDGE

UNOPPOSED MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF PETITION FOR PERMISSION TO APPEAL [SUBMITTED CONCURRENTLY WITH *AMICUS CURIAE* BRIEF]

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CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America is a non-profit corporation organized under the laws of the District of Columbia. It has no parent corporation. No publicly held corporation owns ten percent or more of its stock.

UNOPPOSED MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

The Chamber of Commerce of the United States of America (the "Chamber") respectfully moves for leave to file the accompanying amicus curiae brief. All parties have consented to the filing of the brief.

The Chamber is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. The Chamber represents the interests of its members in 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, including cases addressing the requirements for class certification. Many of the Chamber's members and affiliates are defendants in class actions and they have a keen interest in ensuring that courts rigorously analyze whether a plaintiff has satisfied the requirements for class certification before a class is certified.

This case presents important questions concerning district courts' responsibility to rigorously scrutinize at the class certification stage whether classwide adjudication is appropriate. Specifically, the district court certified a class after finding that the case presented one single common question, and then simply assumed that the many remaining individualized issues—both as to

elements of the plaintiffs' claims and Pepperidge Farm's affirmative defenses—could be litigated through individualized mini-trials. For the reasons stated in its proposed amicus brief, the Chamber believes that the decision below conflicts with settled Rule 23 and due-process principles. That brief will aid the court because it will offer the Chamber's broad perspective on questions important not just to the parties in this case, and not just to all defendants subject to class actions within this Circuit, but to the business and consumers who feel the effects of class litigation as well. Further, the issues addressed by the proposed amicus brief are directly relevant to the disposition of Pepperidge Farm's petition, because they underscore the importance of these issues to class-action defendants and how the district court's decision impacts their due-process rights.

No counsel for a party authored this brief in whole or in part and no person other than Amicus, its members, or counsel has made any monetary contributions intended to fund the preparation or submission of this brief.

For all the foregoing reasons, the Chamber respectfully requests that the Court grant leave to file the brief submitted concurrently with this motion.

Dated: May 2, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Motion with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit through the CM/ECF system on May 2, 2017, which will automatically serve all parties.

Dated: May 2, 2017

/s/ Anton Metlitsky
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BRIEF FOR *AMICUS CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONER

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1 Joseph M. McLaughlin, *McLaughlin on Class Actions* (13th ed. 2016) 9, 10

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INTEREST OF AMICUS CURIAE[1]

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. The Chamber represents the interests of its members in 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, including cases addressing the requirements for class certification. Many of the Chamber's members and affiliates are defendants in class actions and they have a keen interest in ensuring that courts rigorously analyze whether a plaintiff has satisfied the requirements for class certification before a class is certified.

INTRODUCTION

The Supreme Court has repeatedly recognized that unwarranted class certification can impose deeply unfair burdens on defendants, and it has construed Rule 23 in a manner that comports with due process to avoid that result. *E.g.*, *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 363 (2011). The Court has

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[1] *Amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus*, its members, or counsel has made any monetary contributions intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

recognized that class actions are an "exception to the usual rule" that cases are litigated individually, and that while the class mechanism can introduce efficiencies when legal and factual questions truly can be litigated on a classwide basis, Rule 23 demands that courts conduct a "rigorous analysis" to ensure that classwide adjudication of such issues is actually possible without sacrificing procedural fairness. *Id.* at 348 (quotations omitted).

This rigorous analysis requires the plaintiff to demonstrate "through evidentiary proof" that the class's claims "*in fact*" can be litigated on a classwide basis without the need for individualized mini-trials. *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432-33 (2013). Yet the district court here certified a class with almost no analysis at all. It articulated a single common question at an implausibly high level of generality and then simply assumed that the many remaining individualized issues—both as to elements of the plaintiffs' claims and Pepperidge Farm's affirmative defenses—could be litigated through individualized mini-trials.

The court's failure to assure that the principal factual and legal issues in the case can be resolved on a classwide basis, without the need for myriad plaintiff-specific mini-trials, fails to verify the existence of efficiencies that justify class treatment. This error makes it likely that a defendant will be deprived of the ability to present individualized defenses in one of two ways. First, because of the immense settlement pressure that necessarily follows class certification, deferring

individualized questions until a trial often means that these defenses will never be presented. It is well recognized that once a class is certified, the possibility of ruinous damage awards normally places unbearable settlement pressure on defendants. Second, even if a case does not settle, when (as here) a class is certified despite an abundance of individualized issues, the desire to avoid individualized mini-trials often leads to trial-by-formula or other forms of averaging out differences within a class, which denies defendants their due-process right to present individual defenses entirely.

Unfortunately, the district court's fundamental errors here are hardly atypical. The failure to conduct a rigorous analysis at the class-certification stage is a recurring problem in the district courts of this Circuit, and this case is an especially stark example. Such systemic errors not only contradict established precedent meant to assure that defendants' due-process rights are not ignored in the name of class-action efficiencies, but also create significant incentives for vexatious class-action suits that impose significant costs on businesses, and in turn on consumers. This Court should grant review because this case presents important issues that have divided district courts within this Circuit, Pet. 18, but also to make clear more generally that district courts cannot avoid their responsibility to conduct a rigorous Rule 23 analysis at the class-certification stage by simply assuming away individualized issues.

ARGUMENT

I. RULE 23 REQUIRES DISTRICT COURTS TO CONDUCT A RIGOROUS ANALYSIS AT THE CLASS CERTIFICATION STAGE TO DETERMINE WHETHER THERE IS A PRACTICAL AND FAIR METHOD FOR CLASSWIDE ADJUDICATION

"The class action is an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only," and to justify a departure from this ordinary rule, the class plaintiff bears the burden of showing that classwide adjudication is appropriate. *Dukes*, 564 U.S. at 348 (quotations omitted). Class treatment is appropriate only where the key questions can be resolved "in the same manner [as] to each member of the class," *Califano v. Yamasaki*, 442 U.S. 682, 701 (1979), "[f]or in such cases, 'the class-action device saves the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion.'" *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 155 (1982) (quoting *Yamasaki*, 442 U.S. at 701).

Rule 23 reflects these principles, and serves two fundamental purposes relevant here.

First, Rule 23's commonality, predominance, and superiority requirements, Fed. R. Civ. P. 23(a), (b)(3), assure that claims that exhibit the efficiencies described above can proceed through the class vehicle, but that claims that do not exhibit those efficiencies must be litigated individually. When class members'

claims cannot be adjudicated on a classwide basis but instead turn on individualized facts, in other words, a putative class action cannot satisfy the requirements of Rule 23, and may not be certified. *E.g.*, *Comcast*, 133 S. Ct. at 1433.

Second, Rule 23 assures that plaintiffs may not pursue efficiencies through the class mechanism by overriding defendants' due-process rights. Indeed, Rule 23's "procedural protections," are grounded in "due process," *Taylor v. Sturgell*, 553 U.S. 880, 901 (2008), and were carefully crafted to preclude aggregation of claims when doing so would undermine defendants' due-process right "to present every available defense." *Lindsey v. Normet*, 405 U.S. 56, 66 (1972) (quotations omitted).

The Supreme Court has made clear, moreover, that the Rule 23(b) requirements must be satisfied *at the class certification stage*. That Court has precluded district courts from kicking individualized issues down the road in the hopes that a solution will present itself or (more likely) that the case will settle; rather, they must "conduct a 'rigorous analysis'" at class certification to determine whether the plaintiff has "'affirmatively demonstrate[d] his compliance' with Rule 23." *Comcast*, 133 S. Ct. at 1432-33 (quoting *Dukes*, 564 U.S. at 350-51)); *see also Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2412 (2014). That is why Rule 23 requires the plaintiff to demonstrate "through evidentiary

proof" that the class's claims "*in fact*" can be litigated on a classwide basis while still allowing defendants' their rights to challenge liability. *Comcast*, 133 S. Ct. at 1432 (quotations omitted).

II. THE DISTRICT COURT FAILED TO CONDUCT THE RIGOROUS ANALYSIS REQUIRED BY RULE 23

The district court's class certification decision flouts the principles just described, in two respects. *First*, the district court recognized that plaintiffs' claims will implicate significant individualized issues, but nevertheless certified a class on the ground that *some* aspects of plaintiffs' claims can be adjudicated on a classwide basis. *Second*, and relatedly, the district court ratified a trial plan that would bifurcate common and individualized *defenses* to liability, whereas a proper application of Rule 23(b) would recognize that the prevalence of individualized defenses precludes certification in the first place.

A. The District Court Impermissibly Certified The Class Despite Recognizing That Plaintiffs' Claims Implicate Significant Individualized Issues

The crux of plaintiffs' claims is that Pepperidge Farm violated California law by treating its distributors as independent contractors when they in fact were employees. Under California law, a nine-part test governs that question. *See, e.g.*, *Alexander v. FedEx Ground Package Sys., Inc.*, 765 F.3d 981, 988-89 (9th Cir. 2014) (citing *S.G. Borello & Sons v. Dep't of Indus. Relations*, 769 P.2d 399, 404 (Cal. 1989)). According to the district court, one important factor in determining

whether the distributors were properly classified is whether Pepperidge Farm had the "right to control" its distributers. And the court concluded that Rule 23's commonality, predominance, and superiority requirements are satisfied because Pepperidge Farm's right to control could be determined by a standard distribution agreement, and the question whether that agreement gave Pepperidge Farm the right to control could be "subject to common proof." Order at 30, 33, 40.

The problem, however, is that, according to the district court, numerous factors other than Pepperidge Farm's "right to control" were relevant to the classification question, and these factors were "subject to an individualized analysis." *Id*. at 32. That should have been the end of the matter—the fact that plaintiffs' claim that the distributors were misclassified implicated significant issues "subject to an individualized analysis" necessarily means that the question whether Pepperidge Farm's distributors were properly classified is not subject to "common *answers*," *Dukes*, 564 U.S. at 350 (quotation omitted), so class certification should have been denied.

The district court nevertheless certified the class by assuming that any individualized evidence would "be presented at trial." Order 33. But that does not solve the problem of individualized proof—it *demonstrates* the problem. "[P]laintiffs wishing to proceed through a class action must actually *prove*—not simply plead—that their proposed class satisfies each requirement of Rule 23,"

including here the requirement that common issues predominate over admittedly individualized ones. *Halliburton*, 134 S. Ct. at 2412. District courts have a corresponding "duty to take a close look at whether common questions predominate"—"certification is proper only if the trial court is satisfied, after a rigorous analysis," that the class's claims can be adjudicated fairly and efficiently on a classwide basis, without the need for mini-trials and without compromising the defendant's rights to litigate the claims against it. *Comcast*, 133 S. Ct. at 1432 (quotations omitted); *see also Dukes*, 564 U.S. at 350-51. The district court thus erred as a matter of law in certifying the class despite recognizing the existence of individualized issues as to whether distributor were properly classified as independent contractors.

Nor did the district court's effort to brush aside individualized issues end at the question whether distributors were improperly classified. For example, one of plaintiffs' claims is that Pepperidge Farm failed to provide for meal periods and rest breaks, *see* Order at 36, and the district court correctly concluded that this issue was not susceptible to common proof because the evidence "may show that some putative Class Members had the opportunity to take breaks," *id*. at 38. Yet the district court simply ignored these individualized issues, holding that "[t]he underlying issue is whether Defendant improperly classified Class Members as independent contractors," *id.*, and moving on, apparently assuming that the issue

would be litigated in "individual hearings or prove-ups during the damages phase," *id*. at 34. Again, while bifurcated trial plans that promote efficiency while preserving fairness are to be commended, the court "cannot gerrymander predominance by suggesting that only a single issue be certified for class treatment (in which, by definition, it will 'predominate') when other individualized issues will dominate the resolution of the class members' claims." 1 Joseph M. McLaughlin, *McLaughlin on Class Actions* § 4:43, at 1007-08 (13th ed. 2016) (quoting *Hyderi v. Wash. Mut. Bank, FA*, 235 F.R.D. 390, 398 (N.D. Ill. 2006)).[2] Indeed, the court committed essentially the same error by suggesting that that non-aggrieved distributors could simply opt out, thus gerrymandering not only the issues to be decided on a classwide basis but also the class itself. *See* Pet. 14-17.

B. The District Court Similarly Erred In Certifying The Class Despite Recognizing The Existence Of Individualized Defenses

The district court also erred in certifying the class despite recognizing the existence of significant, individualized defenses. For example, one major liability question will be whether the distributors—assuming they should have been classified as employees—were exempt from California's overtime requirements. Under the district court's trial plan, Pepperidge Farm would be permitted to assert

[2] In another appeal pending before this Court, we have addressed in greater detail the serious predominance and superiority problems posed by certification of issue classes. *See* Am. Br. of Chamber of Commerce of the U.S., Dkt. No. 24, *Rahman v. Mott's LLP*, No. 15-15579 (Oct. 9, 2015).

any classwide affirmative defenses to demonstrate distributors' exempt status during class proceedings, but "[a]ny affirmative defenses relating to the particular circumstances of individual class members" would have to wait for "individual hearings or prove-ups during the damages phase." Order at 34.

That approach directly conflicts with the class-action principles described above, because it relieves the plaintiffs of their burden to show at the certification stage that liability can be established on a classwide basis. Affirmative defenses go directly to the defendant's liability, and the *plaintiff* always has the burden at class certification of proving that the defendant's liability can be determined without resort to individualized mini-trials. *See Halliburton*, 134 S. Ct. at 2412; *Comcast*, 133 S. Ct. at 1432-33; *Dukes*, 564 U.S. at 350. Thus, liability issues cannot be carved up "to create a 'common evidence' proceeding that would not resolve any class member's claims and leave a great deal for follow-on proceedings." McLaughlin, *supra* § 4:43, at 1009; *see also* 7AA Charles A. Wright et al., *Federal Practice and Procedure* § 1790, at 588-89 (3d ed. 2005) (issue classes may not be used "merely to postpone confronting difficult certification questions").

Indeed, deferring affirmative defenses until after a classwide liability determination all but assures that defendants will not be allowed their due-process right to litigate their defenses *at all*. As the Supreme Court has explained,

"[c]ertification of a large class may so increase the defendant's potential damages liability and litigation costs" that even the most surefooted defendant "may find it economically prudent to settle and to abandon a meritorious defense." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978). "Faced with even a small chance of a devastating loss, defendants will be pressured into" settlement, *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011), and those settlement pressures are only increased where a classwide liability determination has first been made. A defendant's only meaningful opportunity to litigate its affirmative defenses is alongside the plaintiff's claims, and its only meaningful protection against losing its due-process right to litigate those defenses is class certification. The district court's failure rigorously to enforce Rule 23's requirements at class certification was legally erroneous.

III. IMMEDIATE APPEAL UNDER RULE 23(f) IS WARRANTED

Interlocutory appeal is warranted here because of the importance of the legal issues presented, because district courts within this Circuit have divided on those issues, and because the district court's decision to certify the class was clearly erroneous as a matter of law.

Immediate review is especially warranted, moreover, because the court's certification order exemplifies a troubling trend in class-action litigation. It suggests that to get a class certified, a plaintiff need only articulate an issue that is

theoretically capable of classwide resolution if taken at face value. It is true, for example, that Pepperidge Farm's standard distribution agreements *could* suffice to establish that Pepperidge Farm does or does not have the right to control, and that this conclusion *could* suffice to establish whether plaintiffs were properly classified. But under the district court's own analysis, plaintiff-specific proof could also be required to determine the classification question. And the same is true with respect to Pepperidge Farm's affirmative defenses, which the district court simply deferred until after the class proceeding concluded. To litigate an action consistent with due process, *all* claims and defenses must be presented to the jury. And when even some of those claims and defenses are subject not to common but to individualized proof, the efficiencies that the class action was meant to foster are defeated. Yet under the district court's rule, all it takes to certify a class is a question defined "a sufficiently abstract level of generalization" that it could in theory be subject to common proof. *Love v. Johanns*, 439 F.3d 723, 729-30 (D.C. Cir. 2006) (quotations omitted).

The district court's errors, in other words, not only undermine the class certification decision in this case, but demonstrate a common misunderstanding concerning district courts' crucial role in assuring the "rigorous" threshold analysis of Rule 23's requirements required to ensure that the efficiencies of the class

vehicle are achieved, that defendants' due-process rights are protected, and that abusive class actions are cut off at the pass.

CONCLUSION

The petition should be granted.

Dated: May 2, 2017

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B), Circuit Rule 32-1(a), and Circuit Rule 32-2(b) because this brief contains 2,795 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and Circuit Rule 32-1(c).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14-point font.

Dated: May 2, 2017

/s/ Anton Metlitsky
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I hereby certify that I electronically filed the foregoing Brief with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit through the CM/ECF system on May 2, 2017, which will automatically serve all parties.

Dated: May 2, 2017

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