IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

Case No. 18-80102

STEVEN MCARDLE,

Plaintiff-Respondent,
v.

AT&T MOBILITY LLC; NEW CINGULAR WIRELESS PCS LLC; NEW CINGULAR WIRELESS SERVICES, INC.,

Defendants-Petitioners.

On Rule 23(f) Petition Challenging Order Granting Class Certification
by the United States District Court for the Northern District of California
Civil Action No. 4:09-cv-01117-CW

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT-PETITIONER'S RULE 23(F) PETITION

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CERTIFICATE OF INTERESTED PERSONS

To *amicus curiae*'s knowledge, there are no interested persons other than those identified in the petition.

/s/ Adam G. Unikowsky

CORPORATE DISCLOSURE STATEMENT

Amicus curiae certifies that it has no outstanding shares or debt securities in the hands of the public, and it does not have a parent company. No publicly held company has a 10% or greater ownership interest in *amicus curiae.*

/s/ Adam G. Unikowsky

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STATEMENT REGARDING CONSENT

All parties consent to the filing of this amicus brief. [1]

IDENTITY AND INTEREST OF AMICUS

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It 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, from every region of the country. The Chamber regularly files *amicus* briefs in cases that raise issues of concern to the Nation's business community.

The District Court certified a class after finding that Plaintiffs' "allegations" and "initial evidence" established a common *question*, without concluding that this question was susceptible to a common *answer*. The court concluded that class certification was appropriate because all class members received two particular documents, and therefore applied a presumption that they all relied on those documents. But it overlooked that the overall mix of information received by each class member differed—and thus, the question of whether each class member was deceived can yield no common answer.

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[1] Pursuant to Fed. R. App. P. 29(a)(4)(E), *amicus curiae* states that no party's counsel authored this brief in whole or in part; that no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and that no person other than the *amicus curiae*, its members, or its counsel contributed money that was intended to fund preparing or submitting the brief.

The District Court's holdings contradict the Supreme Court's decisions establishing rigorous standards for class certification. The Chamber and its members have a strong interest in ensuring that federal district courts comply with those standards.

SUMMARY OF ARGUMENT

I. The Court should hear this appeal because it presents a fundamental question of class action practice that extends beyond the parties to this case. The question presented is whether reliance can be adjudicated on a classwide basis when all class members receive varying information, merely because two particular documents were sent to all members of the class. Plaintiffs allege that AT&T made deceptive statements in its Terms of Service and domestic rate plan brochure regarding its international pricing policy. Because all class members received those documents, Plaintiffs allege that the question of whether those plaintiffs relied on AT&T's statements can be adjudicated via class litigation. AT&T points out, however, that the *overall* information received by each class member varies—some class members may have relied on AT&T's website, automatically-generated text messages, or conversations with customer service. Whether a class can be certified when the overall information received by all class member varies, merely because *some* information was transmitted to all class members, is an important question that the Court should resolve.

II. The District Court erred in certifying the class. Class certification turns not on whether there is a common *question*, but whether class litigation can yield common *answers*. Here, there is a common question—whether all class members were deceived. But classwide litigation cannot generate a common answer, because deception will turn on the information given to each class member—which will differ from class member to class member. The fact that all class members received the Terms of Service and domestic rate plan brochure is irrelevant, because AT&T's liability does not turn on whether those particular documents, standing alone, are deceptive. Rather, AT&T's liability turns on whether the information it conveyed to each class member, in the aggregate, was deceptive. Thus, if a class member who is confused by (or does not read) the Terms of Service and domestic rate plan brochure subsequently obtains accurate information from AT&T's website, that customer cannot obtain relief. Because class members vary on whether they obtained additional information beyond the Terms of Service and domestic rate plan brochure, class certification was unwarranted.

ARGUMENT

I. This Case Presents A Significant Question of Class Action Practice Extending Beyond the Parties to this Case.

The Chamber agrees with AT&T that the District Court erred in certifying the class. The Chamber submits this amicus brief to explain why this case presents

a significant question concerning class action practice that extends beyond the parties to this case. Because the District Court's class certification question presents a "fundamental issue of law relating to class actions," the Court should certify the class under Rule 23(f). *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 959 (9th Cir. 2005).

This case presents the question whether a court may certify a class in an unfair competition case when the plaintiff can establish that every class member received an allegedly deceptive document, but the overall mix of information provided to each class member nonetheless varied substantially. Plaintiffs contend, and the District Court found, that the fact that every class member received an allegedly deceptive document is sufficient to establish commonality and predominance. By contrast, AT&T argues that because the *overall* information received by each class member varied significantly, Plaintiffs cannot establish commonality and predominance. The resolution of this dispute is of great importance to the class action bench and bar.

Plaintiffs' class-certification theory hinges on the fact that all class members received AT&T's Terms of Service and its domestic rate plan brochure, which included allegedly deceptive statements. D. Ct. Op. 24. In response, AT&T points out that class members interested in AT&T's pricing policies for international travel could have obtained additional information in several ways. For instance,

customers could obtain international brochures upon request. Rule 23(f) Pet., at 7. They could go to AT&T's website, which included detailed terms and conditions as well as a "Frequently Asked Questions" page. *Id.* at 7-9. They might have received automatic text messages describing AT&T's policies. *Id.* at 9. And they could call customer service. *Id.* at 9-10. As AT&T explains, AT&T's international brochures, its website, its text messages, and its trained customer service employees would have conveyed information that would dispel any confusion from the materials that Plaintiffs allege were deceptive. *Id.* at 7-10. Further, Plaintiffs allege that AT&T made misleading omissions—and whether an omission is misleading is inherently going to depend on the information that AT&T affirmatively conveyed, which differs from class member to class member. *Id.* at 26.

The District Court did not dispute AT&T's premise that the overall mix of information differed from class member to class member. Instead, it held that it could certify the class based *only* on the fact that each class member received the Terms of Service and domestic rate plan brochure. It explained that "although AT&T published various disclosures in various forms, every Roaming Class member acknowledged receipt of the Terms of Service, and every version of that document during the class period made the same disclosure." D. Ct. Op. at 24. Thus, "[w]hether the Terms of Service and rate plan brochures were likely to

deceive the public——taking into account all of the other information that was available about AT&T's international roaming fees——is a question that ties together all members of the Roaming Class." *Id.* at 25. It rejected AT&T's argument that class certification should be denied because class members may have varied on what *additional* information they received, finding that this possibility "'does not transform the common question into a multitude of individual ones.'" *Id.* (quoting *Mass. Mut. Life Ins. Co. v. Superior Court*, 97 Cal. App. 4th 1282, 1292-93 (2002)).

Whether a class can be certified based on the fact that all class members received the Terms of Service and domestic rate plan brochure—but differed on what other information they received—is an important question of law that this Court has not squarely resolved. The Ninth Circuit has held that when all putative class members receive the same (or substantially similar) information that is allegedly deceptive, a class can be certified on the theory that all class members are presumed to have relied on that information. *See Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1017, 1020 (9th Cir. 2011) (certifying class when all class members were exposed to the same statements on Ticketmaster's website, and there was no evidence that class members "were exposed to quite disparate information from various representatives of the defendant"). The Ninth Circuit has also held that when some putative class members receive an allegedly deceptive

document, while other putative class members do not, a class cannot be certified because reliance cannot be established on a classwide basis. *See Berger v. Home Depot USA, Inc.*, 741 F.3d 1061, 1069 (9th Cir. 2014) ("Berger has not alleged that all of the members of his proposed class were exposed to Home Depot's alleged deceptive practices—and in fact, he has alleged the opposite."); *Mazza v. Am. Honda Motor Co., Inc.*, 666 F.3d 581, 596 (9th Cir. 2012) ("For everyone in the class to have been exposed to the omissions, as the dissent claims, it is necessary for everyone in the class to have viewed the allegedly misleading advertising. Here the limited scope of that advertising makes it unreasonable to assume that all class members viewed it."). This case falls in between those two poles: All members of the class *did* receive a particular document (as in *Stearns*), but the *overall* information received by each class member varied (as in *Berger* and *Mazza*).

Whether a class may be certified in that scenario is an important and recurring question of law. In virtually all unfair-competition cases, a class action plaintiff will be able to show that all class members received *some* common information. For example, everyone who buys a product receives the product packaging; everyone who subscribes to a website clicks through the terms of service. Yet, purchasers may differ on whether they obtained additional information, via advertisements, customer service, or other mechanisms. If Plaintiff's theory were correct (and it is not), consumer class actions could be

certified in virtually every case, on the theory that the "common question" is whether the *particular document* that all class members received—product packaging, terms of service, or the like—is deceptive. And this would be true regardless of whether the *overall mix* of information received by each class member varied. Thus, the question presented here is likely to recur in future cases, warranting the Court's exercise of discretion to hear this petition under Rule 23(f).

II. The District Court's Decision is Incorrect.

The District Court erred in certifying the class. Plaintiffs did not meet their burden of proving commonality and predominance under Rule 23.

This is a paradigmatic example of a case where Plaintiffs are raising "common 'questions,'" but a classwide proceeding will not "generate common *answers*." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011) (quotation marks omitted). Plaintiffs raise the common question of whether all members of the class were deceived. But a classwide proceeding cannot generate a common answer, because reliance will depend on what information each class member received—which will differ from class member to class member.

Plaintiffs frame the "common question" at issue as whether the Terms of Service and domestic rate plan brochures that all class members received, standing alone, were deceptive. That question may generate a common answer—but it is a common answer that is irrelevant to this case. Whether a customer was deceived

turns on the information he actually received, not on cherry-picked documents. If a customer is confused by the Terms of Service, but receives clarifying information from customer service or a text message that accurately conveys AT&T's pricing policies, he cannot assert a claim for fraud. *See Knapp v. AT&T Wireless Servs., Inc.*, 195 Cal. App. 4th 932, 944 (2011) ("[O]ther members of the proposed class may very well have seen this express disclosure or discussed the rounding up policy with a sales representative in person or on the telephone, which constitutes facts that would affect the determination whether a misrepresentation or omission had occurred."). In that scenario, it is wholly irrelevant whether the Terms of Service standing alone—without the clarifying information—would be misleading. The relevant question is whether the class member actually was deceived—and class litigation cannot generate a common answer to that question.

The District Court's observation that the Terms of Service and domestic rate plan brochures "formed the authoritative, binding expression of AT&T's policies" that "would have been the logical place for any customer to look," D. Ct. Op. 25, does not change the analysis. If Plaintiffs were asserting a breach-of-contract claim based on a classwide violation of the Terms of Service, it would be relevant that the Terms of Service are a "binding expression of AT&T's policies." But Plaintiffs are not pursuing such a claim. Rather, they are pursuing an unfair-practices claim that depends on their subjective reliance. And if a class member

sought clarification from a different source, the class member would presumably have relied on that different source, rather than the Terms of Service. For instance, a customer who called a customer service representative and asked specific information about international pricing policies would be far more likely to rely on the answers he received than on the Terms of Service. Likely, the average customer is far more likely to rely on a text message specifically conveying international pricing policies than on Terms of Service. Indeed, any customer who would take the trouble to obtain additional information on international pricing policies would be unlikely to rely on the Terms of Service.

Thus, this case is similar to *Berger* and *Mazza*. The premise of *Berger* and *Mazza* is that when all class members receive different information, reliance cannot be determined on a classwide basis—the very situation presented here. Plaintiffs insist that this case differs from *Berger* and *Mazza* because in those cases, no document went to every class member, whereas here, the Terms of Service and domestic rate plan brochure went to every class member. But that is a distinction without a difference. A court cannot assess reliance without analyzing the full picture of information that a class member received. If that differs for each class member, reliance cannot be determined on a classwide basis, regardless of whether all class members received the terms of service.

The Court should grant the Rule 23(f) petition and hold that if all class members receive varying information, reliance cannot be adjudicated on a classwide basis.

CONCLUSION

The petition for leave to appeal should be granted.

September 4, 2018

Respectfully submitted,

/s/ Adam G. Unikowsky

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CERTIFICATE OF COMPLIANCE

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/s/ Adam G. Unikowsky

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of September, 2018 a true and correct copy of the foregoing Brief was served on all counsel of record in this appeal via CM/ECF.

/s/ Adam G. Unikowsky