Case No. 16-15120

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KARL E. RISINGER,
Plaintiff-Appellee,

v.

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

On Appeal from the United States District Court
for the District of Nevada
Case No. 2:12-cv-00063 (Hon. Miranda M. Du)

MOTION FOR LEAVE TO FILE BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE RETAIL LITIGATION CENTER, INC. AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS-APPELLANTS

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MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE*

Pursuant to Federal Rule of Appellate Procedure 29, the Chamber of Commerce of the United States of America ("the Chamber") and the Retail Litigation Center, Inc. ("RLC"; collectively, "*Amici*") respectfully move for leave to file the accompanying brief in support of Defendants-Appellants SOC, LLC; SOC-SMG, Inc.; and Day & Zimmermann, Inc. ("SOC").

1. 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, 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.

2. The RLC is a public policy organization that identifies and engages in legal proceedings that affect the retail industry. The RLC's members include many of the country's largest and most innovative retailers. The member entities whose interests the RLC represents employ millions of people throughout the United States, provide goods and services to tens of millions more, and account for tens of billions of dollars in annual sales. The RLC seeks to provide courts with retail-

industry perspectives on important legal issues, and to highlight the potential industry-wide consequences of significant pending cases.

3. Many of *Amici*'s members and affiliates are defendants in class actions. Accordingly, they have a keen interest in ensuring that the courts rigorously analyze whether a plaintiff has satisfied the requirements for class certification before a class is certified.

4. *Amici* support SOC in this appeal and urge the Court to reverse the decision below. *Amici*'s brief does not duplicate SOC's brief, but provides *Amici*'s own perspective on the important issues before the Court. In particular, *Amici*'s brief argues that: (i) the district court's finding of predominance and superiority in this case is inconsistent with the rigorous analysis required by Federal Rule of Civil Procedure 23 at the class certification stage; (ii) the district court erred by ignoring SOC's right to present individualized defenses; and (iii) the district court's approach to class certification invites abusive class action litigation, which imposes an enormous cost on businesses.

5. Pursuant to Federal Rule of Appellate Procedure 29(c)(5), *Amici*'s brief was drafted by attorneys for *Amici*, and no party contributed financially to the preparation of the brief.

6. *Amici* sought the consent of all parties to the filing of the brief before moving for permission to file it. SOC consented to the filing of the brief, but

Plaintiff-Appellee Karl Risinger declined to do so.

For the reasons stated above, the Chamber and RLC request that the Court grant this motion for leave to file the accompanying brief in support of SOC.

Dated: July 13, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to Federal Rule of Appellate Procedure 25, I certify that on July 13, 2016, I filed this motion 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 further certify that all parties in the case are registered CM/ECF users and that service will be accomplished via the appellate CM/ECF system.

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CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America is a nonprofit 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.

The Retail Litigation Center, Inc. is a 501(c)(6) membership association. It has no parent company. No publicly held corporation owns ten percent or more of its stock.

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INTEREST OF *AMICI 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.

The Retail Litigation Center, Inc. ("RLC") is a public policy organization that identifies and engages in legal proceedings that affect the retail industry. The RLC's members include many of the country's largest and most innovative retailers. The member entities whose interests the RLC represents employ millions of people throughout the United States, provide goods and services to tens of millions more, and account for tens of billions of dollars in annual sales. The RLC seeks to provide courts with retail-industry perspectives on important legal issues,

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[1] This brief is submitted pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure. *Amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici*, their members, or counsel has made any monetary contributions intended to fund the preparation or submission of this brief.

and to highlight the potential industry-wide consequences of significant pending cases.

Many of the members and affiliates of the Chamber and the RLC are defendants in class actions. Accordingly, 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 AND SUMMARY OF ARGUMENT

Class actions are the "exception to the usual rule." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348 (2011). When properly employed, "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 under Rule 23." *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 155 (1982) (quotations omitted). Yet class treatment is appropriate only if the major legal and factual questions in the case can be adjudicated on a classwide basis. If individual issues predominate over common ones, the benefits of class adjudication are lost, and the class may not be certified. *See* Fed. R. Civ. P. 23(b)(3).

As the opening brief of Defendants-Appellants SOC, LLC; SOC-SMG, Inc.; and Day & Zimmermann, Inc. (collectively, "SOC") demonstrates, the district court in this case improperly found predominance and superiority by ignoring individualized issues inherent in both the fraud and contract claims alleged by

Risinger. *Amici* agree with the arguments advanced in SOC's brief and file this brief to underscore three additional points.

First, the district court's finding of predominance and superiority in this case is inconsistent with the rigorous analysis required under Federal Rule of Civil Procedure 23 at the class certification stage. As demonstrated by SOC's brief, it is not possible to determine on a classwide basis which recruits received and relied on SOC's alleged misrepresentations or which recruits could establish contract claims based on extrinsic evidence. The district court appeared to conclude otherwise based on inferences that it drew in favor of Plaintiff-Appellee Karl Risinger ("Risinger") and the putative class. While that standard is appropriate when deciding a defendant's motion for summary judgment, it is wholly improper when conducting the "rigorous analysis" required by Rule 23. Proceeding with a class action because a plaintiff has pointed to *some* classwide evidence supporting liability improperly elides a plaintiff's burden at the certification stage: to show that establishing liability for his or her individual claim necessarily will establish liability for the entire class.

Second, even assuming *arguendo* that it was proper to adopt an initial presumption in this case that liability could be shown on a classwide basis (which it was not), the district court still erred by ignoring SOC's right to present individualized defenses. Pursuant to the Rules Enabling Act, Rule 23 cannot

enlarge or modify any substantive rights. Accordingly, even if a court adopts a presumption of classwide liability, defendants in a class action must be allowed to develop and introduce evidence *rebutting* that presumption as to individual class members to the same extent they could in an individual action. Moreover, any denial of SOC's right to rebut the presumption of reliance would violate due process as well as Rule 23.

Third, the district court's approach to class certification in this case is not only inconsistent with Rule 23 and due process, but also invites abusive class action litigation, which imposes an enormous cost on businesses.

ARGUMENT

I. THE DISTRICT COURT FAILED TO CONDUCT THE RIGOROUS ANALYSIS REQUIRED BY RULE 23 BY PRESUMING THAT LIABILITY COULD BE SHOWN ON A CLASSWIDE BASIS.

"The class action is an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Dukes*, 564 U.S. at 348–49 (quotations omitted). To justify a departure from this usual rule, the class plaintiff bears the burden of showing that classwide adjudication of the claims asserted is appropriate. *Id.* at 350. Class treatment is only appropriate where a rigorous analysis shows that the key questions can in fact be resolved in the same manner as to each class member, for in such cases "the class-action device saves the resources of both the courts and the parties by permitting [those questions] to be litigated in

an economical fashion . . . ." *Califano v. Yamasaki*, 442 U.S. 682, 701 (1979). Classwide adjudication is inappropriate where key issues vary by class member and where these variations will make management of the class action unwieldy.

Adjudicating the claims in this case requires individualized analysis. As demonstrated by SOC's brief, determining whether each class member received or relied on a misrepresentation and whether extrinsic evidence establishes a contract claim necessarily involves individualized evidence. In denying summary judgment to SOC in part, the district court "view[ed] the evidence in the light most favorable to Risinger as the nonmoving party." 1ER15. However, the district court appears to have taken the same approach to its class certification analysis, reasoning that, because Risinger pointed to *some* evidence that could support a finding of classwide liability, he had necessarily established predominance and superiority. The court simply ignored the extensive evidence identified by SOC needed to adjudicate the claims of each class member. Its approach is therefore inconsistent with the rigorous analysis required under Rule 23.

A. <u>Rule 23(b)(3) Requires a Rigorous Analysis of Predominance and Superiority.</u>

A class may be certified "only if the trial court is satisfied, after a rigorous analysis," that the requirements of Rule 23 have been satisfied. *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013) (internal quotation marks omitted). Among other things, a plaintiff must show (1) "that the questions of law or fact common to

class members predominate over any questions affecting only individual members" and (2) "that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3).

The first inquiry, into predominance, "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997). "[F]ar more demanding" than Rule 23(a)'s commonality requirement, the predominance requirement ensures that class adjudication "achieve[s] economies of time, effort, and expense." *Id.* at 615. Predominance is not satisfied, and a class cannot be certified, "if the main issues in a case require the separate adjudication of each class member's individual claim or defense." *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1189 (9th Cir. 2001), *opinion amended on denial of reh'g*, 273 F.3d 1266 (9th Cir. 2001).

Rule 23(b)(3)'s second prong, superiority, precludes a court from certifying a class unless a class action is the best "method[] for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). In making this determination, courts look to "the class members' interests in individually controlling the prosecution . . . of separate actions" and "the likely difficulties in managing a class action," among other things. *Id.*

In requiring a "rigorous analysis" of these requirements, the Supreme Court has emphasized that "Rule 23 does not set forth a mere pleading standard"; rather,

"[a] party seeking class certification must affirmatively demonstrate his compliance with the Rule." *Dukes*, 564 U.S. at 350. Indeed, this analysis "[f]requently . . . will entail some overlap with the merits of the plaintiff's underlying claim." *Id.*; *see also Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 981 (9th Cir. 2011) ("[A] district court must consider the merits if they overlap with the Rule 23(a) requirements.").

B. The Need to Consider Individualized Evidence of the Alleged Misrepresentations, Reliance, and Contract Liability Precludes Findings of Predominance and Superiority.

Several aspects of the district court's decision indicate that the court applied the wrong standard in evaluating Risinger's motion for class certification. In concluding that he had established predominance, the court observed that "Risinger has provided evidence indicating that the employment agreements given to class members were standardized." 1ER029. The court, moreover, rejected SOC's argument that individualized evidence would be relevant to the contract claims because the court had, drawing all inferences in favor of the non-moving party, "already resolved the majority of interpretation issues based on the parties' cross motions for summary judgment." *Id.* Finally, the court noted that "Risinger has offered testimony" indicating that "representations made to recruits were identical or nearly identical" and observed that "circumstantial evidence and common sense" could be relevant to evaluating reliance of the class. *Id.*

While the presence of *some* classwide evidence may be sufficient to preclude a grant of summary judgment in favor of a defendant, the "rigorous analysis" required under Rule 23 asks a different question: whether adjudicating the claims of the entire class can be accomplished without resort to numerous mini-trials involving individualized evidence. In answering that question, it was not enough for the court to note that Risinger had identified some classwide evidence. Rather, the court was obligated to explain why the extensive individualized evidence identified by SOC was somehow not relevant. Once that evidence is considered, it is clear that the classwide claims cannot be adjudicated without individual issues overwhelming common ones. The district court simply manufactured predominance by ignoring this critical evidence.

For example, the communications between recruits and recruiters varied in material respects. The "call scripts" that plaintiffs claimed recruiters used—in reality, a bulleted list of topics to discuss with recruits—were not created until midway through the class period. *See* 3ER458, 5ER803. And at least one guard has said he never heard the alleged workweek representation during his recruitment. *See* 3ER293–94. These varied communications prevent classwide adjudication of both fraud and contract claims: non-uniform alleged misrepresentations cannot support classwide fraud claims, and non-uniform extrinsic evidence about communications giving meaning to the contract term "customary" cannot support

classwide contract claims.

Likewise, as many courts have recognized, reliance is an inherently individualized issue that generally precludes class treatment of fraud claims. *See, e.g.*, *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 225 (2d Cir. 2008) ("in this case, reliance is too individualized to admit of common proof"), *abrogated on other grounds by Bridge v. Phx. Bond & Indem. Co.*, 553 U.S. 639 (2008); *Gariety v. Grant Thorton, LLP*, 368 F.3d 356, 362 (4th Cir. 2004) ("Because proof of reliance is generally individualized to each plaintiff allegedly defrauded, fraud and negligent misrepresentation claims are not readily susceptible to class action treatment, precluding certification of such actions as a class action.") (internal citations omitted); *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 745 (5th Cir. 1996) ("Rather than guess that reliance may be inferred, a district court should base its determination that individual reliance does not predominate on the wisdom of . . . individual trials [that precede potential class certification]."); *Nagel v. ADM Investor Servs., Inc.*, 217 F.3d 436, 443 (7th Cir. 2000) ("Because the complaints alleged fraud, which is plaintiff-specific, issues common to all the class members were not likely to predominate over issues peculiar to specific members, which is still another requirement of Rule 23 for class certification."); *In re St. Jude Med., Inc.*, 522 F.3d 836, 838 (8th Cir. 2008) ("Because proof often varies among individuals concerning what representations were received, and the degree to

which individual persons relied on the representations, fraud cases often are unsuitable for class treatment."); *Heffner v. Blue Cross & Blue Shield of Ala., Inc.*, 443 F.3d 1330, 1344 (11th Cir. 2006) ("In a variety of contexts, we have held that the reliance element of a class claim presents problems of individualized proof that preclude class certification.").

Nor does the district court's single citation of a Second Circuit case, *U.S. Foodservice*, justify any inference in this case of reliance by every class member. In *U.S. Foodservice*, the court held that reliance was subject to generalized proof—and thus a classwide inference—because the defendants' assertion that certain plaintiffs may not have relied on the representation at issue was "conjectural" and "bald speculation." *In re U.S. Foodservice Inc. Pricing Litig.*, 729 F.3d 108, 120 (2d Cir. 2013). The other circuits that have accepted classwide reliance inferences have done so in equally exceptional circumstances, where reliance was the *only way* to explain plaintiffs' conduct. *See CGC Holding Co. v. Hutchens*, 773 F.3d 1076, 1089–90 (10th Cir. 2014) (inferring reliance "where the behavior of . . . the members of the class cannot be explained in any other way than reliance upon the defendant's conduct"); *Klay v. Humana*, 382 F.3d 1241, 1259 (11th Cir. 2004) (inferring that each doctor, when entering into a contract with an insurer, relied on the insurer's representation that the insurer would pay the doctor the amounts due under the contract).

By contrast, this Circuit's decision in *Poulos v. Caesar's World, Inc.* exemplifies the circumstances under which an inference of classwide reliance is inappropriate. *See* 379 F.3d 654, 664–68 (9th Cir. 2004). In *Poulos*, the plaintiffs urged an inference of classwide reliance on a casino's implicit misrepresentation that its digital poker and slot machines operated like their analog counterparts. *Id.* Rejecting this invitation, this Court noted that class members might have gambled as "an addiction, a form of escape, a casual endeavor, a hobby, a risk-taking money venture, or scores of other things." *Id.* at 668. A classwide inference was inappropriate, it held, because there was "no single, logical explanation for gambling"—which it contrasted with circumstances in which there was "only [one] logical explanation for [a plaintiff's] behavior." *Id.* at 667–68.

Just as it is impossible to infer the motivation of every gambler playing a digital slot machine, it is impossible to infer the motivation of every recruit who accepted employment with SOC. People have any number of reasons for accepting a job, as the literature on job search, recruiting, and job choice reflects. *See, e.g.*, Wendy R. Boswell et al., *Employee Job Search: Toward an Understanding of Search Context and Search Objectives*, 38 J. Mgmt. 129 (2012); Derek S. Chapman et al., *Applicant Attraction to Organizations and Job Choice: A Meta-Analytic Review of the Correlates of Recruiting Outcomes*, 90 J. Applied Psychol. 928 (2005). This literature emphasizes how job seekers' unique characteristics

shape their job search behavior and decisions. Job seekers' motivations vary by gender, by race, and by age. *See, e.g.*, Boswell at 148; Chapman at 930. And the motivations of new entrants into the workforce are different than those of employed job seekers, which are different than those of the unemployed. *See* Boswell at 130–49. A particular individual's decision to accept a job may depend on the perceived fit between that individual and a job or organization, whether that individual has available alternatives, or job factors like compensation and the flexibility of working conditions. *See* Chapman at 929–30, 934.

Given this complexity, it is impossible to infer a single motivation for every class member in this case—that is, for every recruit ultimately employed as an armed guard in Iraq by SOC from 2006 through 2012. Each recruit heard an array of statements about employment at SOC from a recruiter. *See, e.g.*, 3ER458. Each recruit had his or her own idiosyncratic goals and priorities, and potentially his or her own outside knowledge about guards' working conditions in Iraq. *See, e.g.*, 2ER210. An inference that every recruit relied on a single alleged misrepresentation about guards' work schedules cannot be sustained.

Because a classwide inference of reliance is unsupportable, individualized questions of reliance destroy predominance and superiority. The only way to test each recruit's claim of reliance would to be to conduct a series of individualized mini-trials on why each recruit accepted work as a guard. Establishing whether any

particular guard relied on the challenged representation—necessitating discovery and cross-examination of hundreds or thousands of class members—would so overwhelm any common questions that the benefits of class adjudication would be lost entirely.

II. EVEN IF A PRESUMPTION OF CLASSWIDE LIABILITY WERE APPROPRIATE, SOC'S DUE PROCESS RIGHT TO RAISE INDIVIDUALIZED DEFENSES WOULD DESTROY PREDOMINANCE AND SUPERIORITY

Had this case been brought as a series of individual actions, SOC would have a due process right to mount a full defense to each plaintiff's factual showing—including cross-examination and other opportunities to test the reliability of the plaintiff's claim—before an Article III court. That is because "[i]n almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970).

SOC has the same rights in a class action, which is merely a procedural device that "leaves the parties' legal rights and duties intact and the rules of decision unchanged." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 408 (2010) (plurality opinion). Defendants' due process rights cannot be eliminated by combining multiple claims into a class action.

Similarly, a court may not expand the substantive rights of plaintiffs (or abrogate a defendant's rights) in light of the Rules Enabling Act, which forbids

interpreting Rule 23 to "abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b); *see also Dukes*, 564 U.S. at 367. This Court therefore cannot extend judicial relief under Rule 23 to an individual who would be unable to establish the right to relief in his or her own action. Moreover, Rule 23's "procedural protections" are grounded in "due process," *Taylor v. Sturgell*, 553 U.S. 880, 901 (2008), and were crafted not only to allow the efficient aggregation of claims, but also to protect defendants' due-process rights. Because due process requires that a defendant be given "an opportunity to present every available defense," *Lindsey v. Normet*, 405 U.S. 56, 66 (1972), courts have avoided reading Rule 23 in a manner that would deprive a defendant of its right "to litigate its . . . defenses to individual claims." *Dukes*, 564 U.S. at 367.

Accordingly, even if the district court had a valid basis for adopting a classwide inference of liability (which it did not), SOC would still have a due process right to challenge that inference with respect to particular plaintiffs. *Cf. Dukes*, 564 U.S. at 367; *Goldberg*, 397 U.S. at 269. This conclusion was made explicit in *Halliburton II*, which confirmed—in the context of the fraud-on-the-market presumption—that defendants retain "an opportunity to rebut [a] presumption of reliance with respect to an individual plaintiff." *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2412 (2014). Moreover, although the *Halliburton II* Court concluded that predominance existed in that case, that

conclusion rested on reasoning that compels the opposite result here. The Court reasoned that, because the vast majority of investors in public securities trade in reliance on the integrity of the market price, a defendant would only be able to "pick off the occasional class member here or there" by proving that he did not so rely. *Id.* at 2412. Because those defenses would be limited, the "individualized questions of reliance in the case" would not overwhelm common issues. *Id.* Thus, *Halliburton II* confirms that (a) a defendant retains the right to dispute the reliance of individual class members and (b) a class may be certified only where such disputes will be so rare that they do not "overwhelm common issues." Here, challenges to many or most class members' reliance would overwhelm common issues, destroying predominance.

Indeed, there is every reason to think that SOC would be able to disprove the reliance of a great number of class members on the challenged representation. SOC could challenge, for example, the reliance of guards who had previously worked as guards for SOC, or the reliance of guards who first heard the challenged representation after accepting employment. *See, e.g.*, 2ER210. SOC could probe whether each guard was told by recruiters that their schedule could "change should operational requirements or business needs require," 5ER709, or learned through other communications that their work schedule was not invariably fixed.

Given the need for discovery and cross-examination on these issues, there is

no administratively feasible method for SOC to present these individualized defenses within the class-action framework. These individualized defenses thus overwhelm common questions, destroying predominance and superiority.

III. THE DISTRICT COURT'S RELAXED STANDARDS FOR PREDOMINANCE AND SUPERIORITY WOULD INVITE ABUSIVE CLASS ACTION LITIGATION.

Relaxed standards for predominance and superiority—like those applied by the district court here when presuming reliance and disregarding SOC's due process rights—tilt the playing field in favor of class certification, inviting an array of vexatious class-action suits that impose significant costs on businesses large and small.

It is hard to overstate the toll that frivolous class actions take on U.S. businesses and ultimately their customers. Class actions can often drag on for years. *See, e.g.*, Mayer Brown LLP, *Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions*, U.S. Chamber Institute for Legal Reform 1, 5 (Dec. 2013) ("Approximately 14 percent of all class action cases remained pending four years after they were filed, without resolution or even a determination of whether the case could go forward on a class-wide basis.").[2] And the costs of defending against them continue to rise. *See* Carlton Fields Jorden Burt LLP, *Class Action Survey: Best Practices in Reducing Cost and Managing Risk in Class*

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[2] *Available at* http://www.instituteforlegalreform.com/uploads/sites/1/Class_Action_Study.pdf.

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.").[3]

Although these costs are high enough to hit the bottom line of even the largest company, meritless and overreaching class actions hit small business particularly hard "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);[4] Matthew Grimsley, *What Effect Will* Wal-Mart v. Dukes *Have on Small Businesses?*, 8 Ohio St. Entrepreneurial Bus. L.J. 99, 116 (2013) (discussing how small businesses, with fewer resources, are particularly ill-equipped to fight frivolous class actions). In addition to these direct costs, the indirect reputational costs of being embroiled in a class action are significant. *See, e.g.*, Grimsley, 8 Ohio St. Entrepreneurial Bus. L.J. at 100 & n.7.

Given all this, it is not surprising that "[c]ertification of a large class may so

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[3] *Available at* http://classactionsurvey.com/pdf/2015-class-action-survey.pdf.
[4] *Available at* http://www.instituteforlegalreform.com/uploads/sites/1/ilr_small_business_2010_0.pdf

increase [defendants'] potential damages liability and litigation costs that [they] may find it economically prudent to settle and to abandon a meritorious defense." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978); *see also AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011) ("[W]hen damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable."). "Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims." *Concepcion*, 563 U.S. at 350. In fact, a "study of certified class actions in federal court in a two-year period (2005 to 2007) found that all 30 such actions had been settled." *Eubank v. Pella Corp.*, 753 F.3d 718, 720 (7th Cir. 2010) (citing Emery G. Lee III et al., *Impact of the Class Action Fairness Act on Federal Courts* 2, 11 (Fed. Judicial Ctr. 2008)).

Class actions will probably always "present opportunities for abuse." *Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165, 171 (1989). Given the ubiquity of fraud claims in consumer class action litigation, the district court's decision below is particularly likely to generate abusive litigation. Plaintiffs cannot be permitted to ignore variations within a class that go to the heart of each class member's claim. For all these reasons, the Court must ensure that the essential requirements of due process and Rule 23 are respected.

CONCLUSION

For the reasons explained above, the district court's judgment should be reversed and remanded.

Dated: July 13, 2016

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 29(d) because this brief contains 4,382 words—no more than half the limit for the length of the parties' principal briefs—excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. 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 this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14-point font.

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CERTIFICATE OF SERVICE

Pursuant to Federal Rule of Appellate Procedure 25, I certify that on July 13, 2016, I filed this brief 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 further certify that all parties in the case are registered CM/ECF users and that service will be accomplished via the appellate CM/ECF system.

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