No. 16-80004

In the United States Court of Appeals for the Ninth Circuit

COGENT COMMUNICATIONS, INC.,

Petitioner,

v.

JOAN AMBROSIO, et al.,

Respondent.

On Appeal from the United States District Court for the Northern District of California,
Richard Seeborg, District Judge
Case No. 14-cv-02182-RS

BRIEF OF *AMICUS CURIAE* INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL IN SUPPORT OF DEFENDANT-PETITIONER, SEEKING PERMISSION TO APPEAL

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CORPORATE DISCLOSURE STATEMENT

Amicus Curiae International Association of Defense Counsel ("IADC") has no parent corporations and no subsidiary corporations. No publicly held company owns 10% or more of its stock.

Dated: January 26, 2016

KOPON AIRDO, LLC

By: /s/ Eleonora P. Khazanova
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STATEMENT OF COMPLIANCE WITH RULE 29(c)(5)

No party or party's counsel authored this brief in whole or in part. No party or party's counsel contributed money to fund the preparation or submission of this brief. No other person except IADC and its counsel contributed money to fund the preparation or submission of this brief. *See* Fed. R. App. P. 29(c)(5).

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Interest of Amicus Curiae

International Association of Defense Counsel ("IADC")[1] is an association of corporate and insurance attorneys from the United States and around the globe whose practice is concentrated on the defense of civil lawsuits. The IADC is dedicated to the just and efficient administration of civil justice and continual improvement of the civil justice system. The IADC supports a justice system in which plaintiffs are fairly compensated for genuine injuries, responsible defendants are held liable for appropriate damages, and non-responsible defendants are exonerated without unreasonable cost. In support of these principles, the IADC has filed briefs in cases such as this, supporting careful application of class action standards. The proper application of class actions standards has a global reach, given that other nations have recently begun adopting their own class action models on the basis of the American experience and routinely look to Rule 23 for guidance. R. Mulheron, *The Class Action in Common Law Systems* (Hart Publishing: Oxford 2005) (noting that Australia, and Canada have their own versions of class action procedures); Christopher Smithka, *From*

[1] The parties have consented to the filing of this brief.

Budapest to Berlin: How Implementing Class Action Lawsuits in the European Union Would Increase Competition and Strengthen Consumer Confidence, 27 Wis. Int'l L.J. 173, 190, 192 (2009-2010)(stating that Germany and Austria have versions of the class-action lawsuit).

Accordingly, this Court's interpretation of Rule 23 will have a significant impact on IADC members both here and abroad.

Summary of Argument

In light of the Supreme Court decisions in *Wal-Mart Stores, Inc. v. Dukes,* 131 S. Ct. 2541 (2011) and *Comcast Corp., v. Behrend,* 133 S. Ct. 1426 (2013), the courts must assess a class certification petition pursuant to heightened "rigorous analysis" of Rule 23 requirements. Post-*Comcast*, courts within the Ninth Circuit apply such scrutiny not only to issues of liability, but also to damages and causation. This requirement is inherently incompatible with the lower court's lip-service acknowledgement of the individualized damages issues here, and its willingness to indulge the Plaintiffs' claim that they "*expect"* to produce common evidence in the future with respect to damages.

Argument

I. The District Court's Approach to Individualized Damages Issues at Class Certification Contravenes the

Rigorous Analysis Standard Governing Motions to Certify post-*Comcast*.

"[C]ertification is proper only if the trial court is satisfied, after a rigorous analysis, that [Rule 23's] prerequisites ... have been satisfied" *Comcast*, 133 S.Ct. at 1429. Here, the court seemingly ignored Supreme Court precedent, and granted certification on the basis of Plaintiffs' bare promise to present a damages model in the future. In other words, the court impermissibly treated the damages issues as a placeholder to be revisited at a later time. *See Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2412 (2014)(*Comcast* and *Dukes* "have made clear that plaintiffs wishing to proceed through a class action must actually *prove*—not simply plead—that their proposed class satisfies each requirement of Rule 23[.]") (emphasis in original).

While the Ninth Circuit has not opined on the applicable standard of proof for the Rule 23 requirements, at least four circuits have adopted a preponderance of the evidence standard. *See Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 811 (7th Cir. 2012); *Novella v. Westchester Cnty.*, 661 F.3d 128, 148–49 (2d Cir. 2011); *Alaska Elec. Pension Fund v. Flowserve Corp.*, 572 F.3d 221 (5th Cir. 2009); *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 320 (3d Cir. 2008); *see*

also Prescott v. Prudential Ins. Co., 729 F.Supp.2d 357, 364 (D. Me. 2010); *Keegan v. Am. Honda Motor Co., Inc.*, 284 F.R.D. 504 (C.D. Cal. 2012) (applying the preponderance standard despite "no Ninth Circuit authority that directs use of a preponderance standard in deciding class certification motions" because it is the "general standard of proof used in civil cases").

There is no indication that the district court considered the preponderance of evidence standard in its ruling with respect to the individualized damages issues. To the contrary, Plaintiffs failed to point to any proof showing how the Plaintiffs' individualized damages claims would get calculated in the instant case, and instead put the issues of individualized damages on a backburner. District courts in the Ninth Circuit have repeatedly refused to certify class actions where plaintiffs have failed to present evidence that damages can be calculated on a classwide basis, particularly where—as here—substantial discovery has occurred. For example, in *Kamakahi v. Am. Society for Reproductive Medicine,* the Northern District of California stated:

> The mere suggestion that more data could improve the model is insufficient, at least without any showing that the data is available. *See In re Hydrogen Peroxide Antritrust Litig.*, 552 F.3d 305, 318 (3d Cir.2008) ("The evidence and

> arguments a district court considers in the class certification decision call for rigorous analysis. A party's assurance to the court that it intends or plans to meet the requirements is insufficient."); *see also In re Graphics Processing Units Antitrust Litig.*, 253 F.R.D. 478, 506 (N.D.Cal.2008) ("After eight months of discovery, plaintiffs should have the data to formulate their regression analysis with more precision.").

305 F.R.D. 164, 181 (N.D.Cal. 2015); *see also In re Dial Complete Marketing and Sales Practices Litig.*, 2015 WL 8346122, at *36 (D.N.H. Dec. 8, 2015) ("Plaintiffs simply have not provided the court with sufficient details to permit a full assessment of whether damages can be feasibly calculated on a classwide basis."); *Lilly v. Jamba Juice Co.*, 308 F.R.D. 231, 243 (N.D. Cal. 2014) ("plaintiffs must establish at the certification stage that damages ... [can] feasibly and efficiently be calculated once the common liability questions are adjudicated."); *Gomez v. Rossi Concrete, Inc.,* 270 F.R.D. 579, 585 (S.D. Cal. 2010)("a court is not bound to accept a plaintiff's allegations as true if they relate to class certification issues.").

Other Circuits have taken similar approaches. *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244 (D.C. Cir. 2013), recognized that post-*Comcast,* accurate damages expert's models are essential to class action suits, stating that if there is "[n]o damages

model, [there can be] no predominance, [and] no class certification." 725 F.3d at 253. "Common questions of fact cannot predominate where there exists no reliable means of proving classwide injury in fact." *Id.* at 252-53. A "hard look" at "statistical models that purport to show predominance" is required. *Id.* at 255. If a defendant's critiques of a proposed damages model are correct, for example, "that is not just a merits issue," but instead "would shred the plaintiffs' case for certification." *Id.* at 252-53. Here, Plaintiffs did not even provide a model for the court's consideration, and the court erroneously certified a class with no damages model being presented by Plaintiffs.

Even the Seventh Circuit in *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 800 (7th Cir. 2013), cert. denied, 134 S. Ct. 1277 (2014), which like the Ninth Circuit has noted that individualized damages issues do not preclude a finding of predominance, has interpreted *Comcast* to require proof at the class certification stage. The Seventh Circuit pointed to "the emphasis that the majority opinion [in *Comcast*] place[d] on the requirement of predominance and on its having to be satisfied by proof presented at the class certification stage rather than deferred to later stages in the litigation" and concluded that "[t]he [Supreme] Court

doesn't want a class action suit to drag on for years with the parties and the district judge trying to figure out whether it should have been certified." *Id.* at 800. Yet, this is precisely what the lower court has done here, in contravention of the Supreme Court requirements.

Without the lower courts exercising their gate-keeping function, the potential for *in terrorem* settlements increases. "Blackmail settlements" can arise in situations where there is "a small probability of an immense judgment in a class action." *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298 (7th Cir.1995); *see also*, AT&*T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752 (2011) (class actions entail "the risk of 'in terrorem' settlements" because "[f]aced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims"). If class certification in this case is allowed to stand, this will increase the pressure on defendants to settle without ever trying the merits of the claims. Already in 2015, the total settlement amount for the top ten wage-and-hour class action suits, was $463.6 million, compared to $215.3 million in 2014, and $248.45 million in 2013. Seyfarth Shaw LLP, *Annual Workplace Class Action Litigation Report: 2016 Edition*, at 5-7, (available at

http://www.workplaceclassaction.com/files/2016/01/2016-WCAR-final-thru-Ch-1-non-printable1.pdf).

II. Remand is Warranted because under *Leyva*, the District Court Failed to Determine whether Plaintiffs Established that Damages can be Feasibly and Efficiently Calculated.

The district court seemingly relied on a single phrase in *Leyva v. Medline Indus. Inc.*, 716 F.3d 510, 514 (9th Cir. 2013), to justify its "certify now, prove later" approach. However, the guidance from *Leyva*, which states that "the presence of individualized damages cannot, by itself defeat class certification under Rule 23(b)(3)," should not be used to eviscerate the Plaintiffs' duties under the rigorous analysis standard, and make such analysis a nullity. *Leyva* does not foreclose analysis of individualized damages. *Weidenhamer v. Expedia, Inc.*, 2015 WL 7157282, at *14 (W.D. Wash. Nov. 13, 2015) ("although Plaintiff correctly notes that the presence of individualized damages cannot, by itself, defeat class certification under Rule 23(b)(3) ... these issues may still be a factor in the predominance analysis in cases where damages calculations are not a matter of straightforward accounting"). Indeed, in *Leyva*, the Ninth Court found that the Plaintiffs had presented evidentiary proof that individualized damages could be "feasibly and

efficiently" calculated "once the common liability questions were adjudicated." *Leyva*, 716 F.3d at 514. Even under *Leyva*, the Court should—at a minimum—analyze whether the presence of individualized damages **overwhelms common issues.** Without a workable damages model provided by the Plaintiffs, that query cannot be answered at this juncture, and the district court's solution of leaving that issue to another day is improper. *Wallace B. Roderick Revocable Living Trust v. XTO Energy, Inc.*, 725 F.3d 1213, 1220 (10th Cir. 2013) ("court should consider the extent to which material differences in damages determinations will require individualized inquiries ... predominance may be destroyed if individualized issues will overwhelm those questions common to the class").

Moreover, unlike the damages in *Leyva*, the damages here are not subject to simple mathematical calculation. Here, the Petitioner disputed that damages could be easily calculated given the absence of business records sufficient to determine how each putative class member spent his or her day and the overwhelming inconsistencies between the Plaintiffs' testimony, their own interrogatory responses, and Cogent's business records. *Compare Lilly*, 308 F.R.D. at 244 ("the

Court concludes that the correct reading of *Comcast* is that plaintiffs must establish at the certification stage that damages ... [can] feasibly and efficiently be calculated once the common liability questions are adjudicated ... Often, this will impose only a very limited burden. In a wage-and-hour case like *Leyva*, for example, producing a payroll database will likely suffice. But where defendants can make at least a prima facie showing that damage calculations are likely to be more complex, expert reports or at least some evidentiary foundation may have to be laid to establish the feasibility and fairness of damage assessments."). Here, the Plaintiffs only proposed an expert and an as yet unexplained proposed damages model. Under the circumstances, *Leyva* cannot support a diminished analysis of commonality concerning damages issues.

Conclusion

For the foregoing reasons, this Court should grant permission to appeal the district court's order under Rule 23(f).

Dated: January 26, 2016

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CERTIFICATE OF COMPLIANCE

Pursuant to 9th Circuit Rules 28-4, 29-2(c)(2) and (3),

32-2 or 32-4 for Case No. 16-80004

I certify that this brief complies with the length limits set forth at Ninth Circuit rule 32-4, and contains 1955 words. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

Dated: January 26, 2016 KOPON AIRDO, LLC

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CERTIFICATE OF SERVICE

I hereby certify that, on this 26th day of January, 2016, I electronically filed the foregoing brief of *Amicus Curiae* International Association of Defense Counsel with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the CM/ECF system. I further certify that on January 26, 2016, I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery to the following participants:

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