IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

Case No. 22-80048

IN RE: ORACLE CORPORATION SECURITIES LITIGATION

Petition from the United States District Court for the Northern District of California, Case No. 5:18-cv-04844-BLF, Hon. Beth Labson Freeman

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS-PETITIONERS

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/s/ Adam G. Unikowsky

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

IDENTITY AND INTEREST OF *AMICUS* AND SUMMARY OF ARGUMENT

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents approximately 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. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the Nation's business community, including amicus briefs at the Rule 23(f) stage. *See, e.g.*, *Heredia v. Sunrise Senior Living, LLC*, No. 21-80121 (9th Cir. Dec. 7, 2021); *McArdle v. AT&T Mobility LLC*, No. 18-80102 (9th Cir. Sept. 4, 2018).

The Chamber has a strong interest in this case. In *Comcast Corp. v. Behrend*, the Supreme Court held that courts must undertake "'a rigorous analysis'" of putative class actions to ensure that "Rule 23(b)(3)'s predominance criterion" has been satisfied before any class is certified. 569 U.S. 27, 33-34 (2013) (citations

[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, and that no one other than the *amicus curiae*, its members, or its counsel contributed money that was intended to fund preparing or submitting the brief.

omitted). *Amicus*'s members are frequent targets of securities-fraud class actions and have a strong interest in ensuring that courts adhere to *Comcast*'s interpretation of Rule 23.

Proper adherence to *Comcast* in securities-fraud cases is needed to ensure that Rule 23's predominance requirement is met. The presumption of *Basic, Inc. v. Levinson*, 485 U.S. 224 (1988), offers a mechanism for class counsel to obtain class certification without offering direct evidence that a misrepresentation affected the stock price. This creates a risk that courts will certify classes in which there is no realistic way to calculate damages for any, let alone all, class members. Rigorous adherence to *Comcast* guards against that risk.

In this case, the district court erroneously certified a class based on the speculation of the plaintiff's expert that a damages model *might exist*—despite the expert's refusal to explain what the model actually was. The district court applied a securities-fraud specific rule that securities-fraud plaintiffs are relieved of their burden of proving a satisfactory damages model at the class-certification stage because proof of a satisfactory damages model will overlap with proof of loss causation (which need not be proved at class certification).

That holding contravenes Supreme Court precedent. In *Goldman Sachs Group, Inc. v. Arkansas Teacher Retirement System*, 141 S. Ct. 1951 (2021), the Supreme Court held that in *all* class action cases, including securities-fraud class

actions, *Comcast* requires the court to "determin[e] that Rule 23 is satisfied, even when that requires inquiry into the merits." *Id.* at 1961 (quoting *Comcast*, 569 U.S. at 35) (bracket in original). The Court clarified that courts must consider evidence of the generic nature of an alleged misstatement at the class-certification stage, because it is relevant to price impact (a class-certification issue), even if that evidence is also relevant to materiality (a merits issue). *See id.* at 1960. For identical reasons, the district court should have considered whether the plaintiff's damages model satisfied *Comcast*, even if that analysis is also relevant to loss causation.

The Court should grant review under Rule 23(f). The district court's decision, if followed by other courts, would effectively nullify *Comcast* in securities-fraud class actions by allowing a plaintiff to establish predominance merely by promising, rather than proffering, a damages model. The resulting increase in improper class certifications would harm both the business defendants and the customers and employees who rely upon them.

ARGUMENT

I. Under *Comcast*, Class Certification Requires Proof of a Viable Damages Model in All Class Actions, Including Securities-Fraud Class Actions.

Comcast Corp. v. Behrend, 569 U.S. 27 (2013), establishes that class certification requires proof of a damages model that is capable of being applied on a classwide basis. *Comcast* applies to securities-fraud class actions.

A. Under *Comcast*, the plaintiff must provide proof of a viable damages model to satisfy Rule 23's predominance requirement.

To certify a damages class, the court must find, among other requirements, that "questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). *Comcast* holds that to establish predominance, the plaintiff must proffer, at the class-certification stage, proof of a damages model that can be used to establish damages for all class members without the need for individualized adjudications.

In *Comcast*, the plaintiff class proffered a damages model that purported to show that the aggregate classwide damages arising from four different theories of antitrust injury was $875,576,662. 569 U.S. at 31-32. But the district court ruled that only one of those theories was legally viable. *Id.*

The Supreme Court held that the class should not have been certified. *Id.* at 34. As the Court explained, a plaintiff is entitled to only those damages that arise from the asserted theory of injury. Hence, the plaintiff was legally required to isolate the damages arising from the viable theory of antitrust impact. *See id.* at 35 (noting that the plaintiffs would be "entitled only to damages" resulting from the "theory of antitrust impact accepted for class-action treatment by the District Court").

The plaintiff's damages model was incapable of determining the damages for *any*—let alone *every*—class member, because it did not isolate the damages arising from the viable theory of antitrust impact. The Court explained that "a model

purporting to serve as evidence of damages in this class action must measure only those damages attributable to that theory. If the model does not even attempt to do that, it cannot possibly establish that damages are susceptible of measurement across the entire class for purposes of Rule 23(b)(3)." *Id.* "Without presenting another methodology, respondents cannot show Rule 23(b)(3) predominance: Questions of individual damage calculations will inevitably overwhelm questions common to the class." *Id.* at 34.

Notably, the Court made clear that its decision "turn[ed] on the straightforward application of class-certification principles," rather than turning on "substantive antitrust law." *Id.* Indeed, the Court applied the most basic class-action principle: a class action cannot be certified unless the suit can be efficiently conducted on a classwide basis without extinguishing individualized defenses. Any classwide proceeding in *Comcast* would inevitably have degenerated into one of two scenarios. Suppose a jury had accepted the plaintiff's expert's theory of injury and determined that the aggregate impact of the four alleged injuries was, indeed, $875,576,662. Then what? One possibility is that for *every* class member, the court would conduct a mini-trial in which the plaintiff would have to meet its burden of isolating the damages attributable to the sole viable theory of antitrust injury —a mini-trial that might well differ from class member to class member. *Id.* at 37-38 (noting that "[t]he permutations involving four theories of liability and 2 million

subscribers located in 16 counties are nearly endless"). The other possibility is that, to streamline matters, the court would have simply deducted some amount from the total damages award, and then apportioned the damages evenly among the class members—thus nullifying the plaintiff's burden of proving damages as to each class member, and impermissibly using the class action as a mechanism to "abridge . . . substantive right[s]," contrary to the Rules Enabling Act. 28 U.S.C. § 2072(b). These outcomes are precisely what Rule 23's predominance requirement is designed to prevent.

B. *Comcast* applies to securities-fraud class actions.

Comcast is an interpretation of Rule 23, which applies to all class actions, including securities-fraud class actions. *See Goldman Sachs Grp., Inc. v. Ark. Teacher Ret. Sys.*, 141 S. Ct. 1951, 1960-61 (2021) (applying *Comcast* in securities-fraud class action). Therefore, *Comcast*'s requirement of proof of a damages model at class certification applies in securities-fraud class actions.

The *Basic* presumption heightens the need for adherence to *Comcast*. *Basic*'s rule facilitates a plaintiff's burden of showing predominance under Rule 23 by removing one potential roadblock to such showing. Under *Basic*, "if a plaintiff shows that the defendant's misrepresentation was public and material and that the stock traded in a generally efficient market, he is entitled to a presumption that the misrepresentation affected the stock price." *Halliburton Co. v. Erica P. John Fund,*

Inc., 573 U.S. 258, 279 (2014). As such, the class-action plaintiff does not bear the burden of directly proving price impact in order to obtain class certification. *Id.* Although the defendant is entitled to present evidence at the class-certification stage that the misrepresentation *did not* affect the stock price, the burden of proof rests on the defendant; the plaintiff bears no affirmative obligation to provide a price impact model. *See Goldman Sachs*, 141 S. Ct. at 1963.

Because securities-fraud plaintiffs do not bear the burden of proof on the question of price impact, there is a serious risk that securities-fraud classes will be certified without any realistic way of resolving such cases on a classwide basis. The problem is that a plaintiff can show *Basic*'s prerequisites—a public and material misrepresentation and a generally efficient market—without providing any mechanism for disentangling the effect of the allegedly actionable misstatements and other statements that may have affected the stock price during the relevant period. This creates a risk that a court will certify a securities-fraud class without any realistic way of actually resolving the magnitude of price impact for the class as a whole, let alone for any particular class member. That outcome would contravene Rule 23's core goal of ensuring that classes are not certified unless the plaintiff proves that the case is genuinely amenable to classwide resolution.

Comcast helps to avoid that outcome. Damages can be an area where individualized issues end up predominating, particularly in securities fraud class

actions. Holding plaintiffs to their burden to present a model for determining damages on a classwide basis helps ensure that Rule 23(b)(3)'s predominance requirement is met.

II. Under *Comcast*, the Class-Certification Order Should Be Reversed.

If the district court had properly applied *Comcast*, the outcome of this case would have been foreordained: the class could not have been certified.

The plaintiff's expert was not retained to, and did not, propose a particular damages model. Appx13. Instead, he speculated that he *could hypothetically* conduct an "event study" and construct a damages model. *Id.* Under *Comcast*, this is insufficient. The plaintiff must provide proof of a damages model, not an assertion that proof might be provided at some future point.

The district court distinguished *Comcast* on the theory that in *Comcast*, the plaintiff made no reference to a damages model tailored to the plaintiff's theory of injury, whereas in this case, the plaintiff's expert represented that "a class-wide damages model could be constructed"—albeit that he had not done so yet. Appx14. This is not a plausible reading of *Comcast*. If this reasoning were correct, then the plaintiff in *Comcast* would have been able to prevail if the expert had merely asserted that it was *possible* to provide a damages model tailored to the theory of liability—even without explaining what it was. That cannot be right. It would render the Supreme Court's decision in *Comcast* irrelevant as a practical matter. *Comcast*

requires *evidence* of a damages model tailored to the theory of liability, not just a promise that such evidence might be provided later.

The district court further reasoned that "[t]he details about Union's damages theory Oracle seeks pertain to loss causation issues that courts generally do not consider at the class certification stage." Appx15. The district court was correct that loss causation is a merits issue, *see Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 813 (2011), and that the *Comcast* analysis will overlap with the loss-causation analysis. But it erred in concluding that this overlap was a basis to disregard *Comcast*.

Last Term, the Supreme Court rejected a virtually identical argument in *Goldman Sachs*. The Court held that at the class-certification stage, when analyzing whether the misrepresentation affected the stock price, courts should consider evidence of the generic nature of the alleged misrepresentations. 141 S. Ct. at 1958. Courts should analyze that issue even though that evidence is also relevant to the closely related issue of whether the misrepresentations were material—a merits issue not considered at class certification. *Id.* at 1960. As the Court explained, under *Comcast*, "a court has an obligation before certifying a class to 'determine that Rule 23 is satisfied, even when that requires inquiry into the merits.'" *Id.* at 1960-61 (quoting *Comcast*, 569 U.S. at 35) (alteration omitted). Here, too, the overlap between providing a manageable damages model (a class-certification requirement)

and proving loss causation (a merits requirement) does not relieve the plaintiff of the burden of satisfying the requirements for class certification.

III. This Court Should Grant Review Under Rule 23(f).

The Court should grant review under Rule 23(f) because this case presents an important question of law that stretches beyond the facts of this case.

The district court held that in securities-fraud cases, plaintiffs could show predominance based on the mere representation that their expert could, if asked, construct a damages model that isolates the effect of the alleged misrepresentations. That decision, if followed by other courts, would nullify *Comcast*. In every case, securities-fraud plaintiffs could simply instruct their experts to add a footnote to their reports promising that they could, if necessary, prepare a model. If defendants' counsel attempt to challenge that representation during the expert's deposition at the class-certification phase, the expert could simply say that the analysis has not yet been done. Even if, after class certification, the expert's promise turns out to be a bluff, the damage will already have been done: the unwarranted settlement pressure from class certification will already have been brought to bear upon the defendant. And that settlement pressure may ultimately deprive this Court of the opportunity to correct the district court's interpretation of *Comcast*.

The district court justified its decision by pointing to other district courts that, it claimed, had adopted a similar interpretation of *Comcast* at class certification.

Appx15. This highlights that courts in this circuit are misapplying binding Supreme Court precedent. This Court's review under Rule 23(f) is therefore needed to clarify the application of *Comcast* in securities-fraud cases.

CONCLUSION

The petition for permission to appeal should be granted.

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Respectfully submitted,

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I hereby certify that on this 31st day of May, 2022 a true and correct copy of the foregoing Brief was served via the court's CM/ECF system, and on the following counsel via electronic mail. Counsel for Plaintiffs have consented to this mode of service.

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