No. 19-56514

United States Court of Appeals for the Ninth Circuit

OLEAN WHOLESALE GROCERY COOPERATIVE, INC., et al.,

Plaintiffs-Appellees,

v.

BUMBLE BEE FOODS LLC, et al.,

Defendants-Appellants.

On Appeal from the United States District Court for the Southern District of California, No. 3:15-md-02670-JLS-MDD
The Honorable Janis L. Sammartino

BRIEF *AMICUS CURIAE* OF CONSUMER HEALTHCARE PRODUCTS ASSOCIATION IN SUPPORT OF DEFENDANTS-APPELLANTS

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INTEREST OF *AMICUS CURIAE*[1]

The Consumer Healthcare Products Association (CHPA) is a 140-year-old, member-based national trade association that represents the leading manufacturers and marketers of over-the-counter (OTC) medicines and dietary supplements. CHPA members' products provide millions of Americans with safe, effective, and affordable therapies to treat and prevent many common ailments and diseases. As an organization, CHPA strives to promote the increasingly important role of such products through science, education, and advocacy. Among its many activities, CHPA monitors legal issues that affect its members, as well as the entire industry, and offers its perspectives in cases that raise such issues.

This is one of those cases. CHPA's members are routinely targeted as defendants in class action lawsuits seeking to hold companies liable for any number of alleged misrepresentations on product labels and ingredient lists. Also routinely, plaintiffs and their attorneys seek to certify classes of *every* consumer to have purchased a product even though, in reality, large numbers of consumers were not actually injured. The panel decision correctly recognized that such an approach to class certification—indiscriminately lumping together injured and

[1] 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 of this brief; and no person except amicus, its members, or its counsel contributed money intended to fund the preparation or submission of this brief. All parties consent to the filing of this brief.

uninjured consumers in a broadly-defined class—is irreconcilable with Article III and Rule 23. CHPA respectfully submits this brief to emphasize that the panel's decision was right in that regard and that its ramifications extend well beyond the antitrust-specific context of this case.[2]

INTRODUCTION AND SUMMARY

The panel majority correctly held that a proposed class with more than a *de minimis* number of uninjured and unharmed members cannot be certified. Article III does not allow it, because federal courts have no "power to order relief to *any* uninjured plaintiff." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2208 (2021) (emphasis added). And Rule 23 does not allow it, because the necessary task of identifying and then excising anything more than a tiny number of uninjured class members would cause that individualized process to "predominate." *In re Asacol Antitrust Litig.*, 907 F.3d 42, 53-54 (1st Cir. 2018). The *de minimis* rule thus serves the critical purpose of protecting these boundaries at the class certification stage—when they matter most—by requiring plaintiffs to define proposed classes in a way that captures only those class members who actually have a viable claim and a potential right to recovery.

[2] CHPA does not take a position on the merits of the case or any issue other than the *de minimis* exception.

A decision that relaxes the *de minimis* requirement and permits classes with large numbers of uninjured consumers would be unnecessarily harmful to class action defendants like CHPA's members. As a survey of just a few representative cases shows, plaintiffs routinely ask courts to certify classes of consumers in which only *some* consumers share plaintiffs' beliefs about the targeted product and thus only *some* consumers are even plausibly injured. Such over-subscribed classes are unlawful. Worse still, rejecting the *de minimis* requirement would welcome an even greater onslaught of class actions in which emboldened plaintiffs have every incentive to certify as large a class as they can get away with. Such a regime would drain scarce judicial resources and artificially inflate pressure on defendants to settle claims for which there is unquestionably no harm, no injury, and no right to recover. The Court should reinstate the panel majority's holding on the *de minimis* exception.

ARGUMENT

I. THE PANEL MAJORITY'S *DE MINIMIS* REQUIREMENT PROPERLY SAFEGUARDS THE PARAMETERS OF ARTICLE III AND RULE 23.

"Every class member must have Article III standing in order to recover individual damages." *TransUnion*, 141 S. Ct. at 2208. Article III "does not give federal courts the power to order relief to any uninjured plaintiff, *class action or not*," *id.* (emphasis added), but requires instead that any "damages award goes *only* to injured class members," *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036,

1053 (2016) (Roberts, C.J., concurring) (emphasis added). These unassailable propositions ensure that, just as "standing doesn't arise and evanesce" throughout any particular case, *Gardner v. Mutz*, 962 F.3d 1329, 1337 (11th Cir. 2020), Article III's requirements also do not loosen or tighten depending on "the form a proceeding takes—be it a class or individual action," *Tyson Foods*, 136 S. Ct. at 1046.

"Rule 23's requirements," in turn, "must be interpreted in keeping with Article III constraints." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 612-13 (1997). Chief among them is the "exacting" and "rigorous" predominance standard. Panel Op. 15-16. That inquiry "aim[s]" to preclude certification when it would "do away with the rights a party would customarily have to raise plausible individual challenges on [individual] issues." *Bais Yaakov of Spring Valley v. ACT, Inc.*, No. 20-cv-1537, 2021 WL 3855656, at *5 (1st Cir. Aug. 30, 2021). In other words, certification cannot "giv[e] plaintiffs and defendants different rights in a class proceeding than they could have asserted in an individual action." *Tyson Foods*, 136 S. Ct. at 1048.

As this Court has recognized, moreover, assessing predominance is not "a matter of nose-counting," because "more important questions apt to drive the resolution of the litigation are given more weight." *Ruiz Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1134 (9th Cir. 2016). When it comes to the "more important

questions" of litigation, "no principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341-42 (2006) (cleaned up). And "standing is 'perhaps the most important'—or, alternatively, the 'most central'—of Article III's jurisdictional prerequisites." *Gardner*, 962 F.3d at 1337 (citations omitted).

The panel majority's *de minimis* requirement properly enforces these principles by compelling plaintiffs (and their lawyers) to define a proposed class accurately *before* certification. With no "power to order relief to any uninjured plaintiff," *TransUnion*, 141 S. Ct. at 2208, a district court's unavoidable "need to identify" more than a *de minimis* number of uninjured class members "will predominate" over common issues, *Asacol*, 907 F.3d at 53-54. It necessarily follows that such a class cannot be certified. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 363 (2011) (predominance must be resolved "before allowing the class"). The *en banc* Court should reaffirm the panel majority's holding that a class with more than a *de minimis* number of uninjured members cannot be certified.

II. REJECTING THE PANEL MAJORITY'S *DE MINIMIS* RULE WOULD AUTHORIZE OVERBROAD CLASSES AND BE NEEDLESSLY DETRIMENTAL TO THE CONSUMER HEALTHCARE INDUSTRY.

Upholding these constitutional and procedural thresholds is critically important to CHPA and its members—and to stemming the decades-long

"proliferation of class actions involving broadly defined classes." *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 826 (1986).

It is no secret that OTC drugs and dietary supplements—what CHPA's members make and sell—are frequent targets for sweeping class action complaints challenging the products' labeling or advertising. Even during "a tumultuous 2020, … Plaintiffs' class action lawyers continued to file plenty of lawsuits against manufacturers of consumer packaged goods."[3] Indeed, consumer class actions have proven to be a particularly fertile area for lawyer-created allegations that range from idiosyncratic to farfetched to downright bizarre. Wherever a case falls on that spectrum, however, they almost always share one feature: *some* consumers may have purchased a product because they allegedly held a particular belief about it, but nowhere near *all* consumers in the proposed class did so. A few examples illustrate the recurring problem and the concomitant need for a *de minimis* requirement.

First, although averages cannot be used to "mask individualized injury" and certify a class, *In re Lamictal Direct Purchaser Antitrust Litig.*, 957 F.3d 184, 194 (3d Cir. 2020); Panel Op. 28-33, some district courts have allowed plaintiffs to do

[3] Perkins Coie, *Food & Consumer Packaged Goods Litigation 2020 Year in Review* 2 (Feb. 2021), https://www.perkinscoie.com/images/content/2/4/241153/2021-Food-CPG-Litigation-YIR-Report-v4.pdf.

just that. In *Farar v. Bayer AG*, for instance, plaintiffs alleged that multivitamins are worthless to *some* class members, rendering the label false, even though the products indisputably benefited other class members with "specific vitamin deficiencies or other particular needs." No. 14-cv-04601, 2017 WL 5952876, at *10 (N.D. Cal. Nov. 15, 2017). Despite the many uninjured class members, the court certified the class, needlessly wasting judicial and party resources. *Id.* at *16.

Second, there are cases in which plaintiffs do not hide behind a promise of "averages" but openly *admit* that the class contains uninjured class members. *Elkies v. Johnson & Johnson Services, Inc.*, No. 17-cv-7320, 2018 WL 11223465, at *4 (C.D. Cal. Oct. 18, 2018), is one example. Plaintiffs there alleged that the packaging of Infants' Tylenol and Children's Tylenol was misleading because the picture of a mother and infant implied that the product was "specially formulated" for infants. *Id.* at *1, *4. Despite an admission from plaintiffs' expert that "many consumers in the class have no injury at all," the court certified the class—asserting that "inclusion of uninjured individuals in a class is not heretical to certification." *Id.* at *4. The court provided no analysis of how many uninjured class members were included in the class definition or how Article III and Rule 23 permit such an approach.

Unfortunately, the *Elkies* court is not alone. Other district courts have likewise mistakenly certified overbroad classes containing numerous uninjured

class members. *See, e.g.*, *Krommenhock v. Post Foods, LLC*, 334 F.R.D. 552, 566-67 (N.D. Cal. 2020) (certifying class even though "the Challenged Statements may not actually be material to some putative class members because some of them may have healthier lifestyles and can afford to eat higher levels of sugar" and the labels had changed over time); *Fitzhenry-Russell v. Dr. Pepper Snapple Grp., Inc.*, 326 F.R.D. 592, 606, 613-14 (N.D. Cal. 2018) (certifying a class of all purchasers of Canada Dry Ginger Ale despite evidence that between 63 and 75 percent of consumers did not think ginger ale had "real ginger" in it or were not motivated to drink Canada Dry for that reason, as the complaint alleged); *Broomfield v. Craft Brew All., Inc.*, No. 17-cv-01027, 2018 WL 4952519, at *10, *21 (N.D. Cal. Sept. 25, 2018) (certifying class even though plaintiffs' expert survey showed that between 22.8% and 29% of the class were not injured under plaintiffs' theory of liability); *In re Scotts EZ Seed Litig.*, No. 12-cv-4727, 2017 WL 3396433, at *17 (S.D.N.Y. Aug. 8, 2017) (denying motion to decertify class even though plaintiffs' survey evidence showed 39% of the class was not deceived); *Martin v. Monsanto Co.*, No. 16-cv-2168, 2017 WL 1115167, at *7, *10 (C.D. Cal. Mar. 24, 2017) (certifying class when only between 42% and 66% of respondents in a survey were potentially deceived in the ways plaintiff alleged); *Lewert v. Boiron, Inc.*, No. 2:11-cv-10803, 2014 WL 12626335, at *6 (C.D. Cal. Nov. 5, 2014) (certifying class "even if [some consumers] experienced a benefit while taking" the product or

the class included consumers "who did not rely on the purported misrepresentation—whether because of exposure to publicity … , reliance on a doctor's recommendation, or otherwise"); *Chavez v. Blue Sky Nat. Beverage Co.*, No. 06-cv-06609, 2011 WL 13153874, at *8 (N.D. Cal. Sept. 27, 2011) (denying motion for decertification despite recognizing that there remained questions "as to whether any particular class member may have been affected by the geographic disclosure on the cans or whether the allegedly premium pricing was as a result of the geographic designation").

Many courts, of course, have correctly followed the law. *See, e.g.*, *Algarin v. Maybelline, LLC*, 300 F.R.D. 444, 454 (S.D. Cal. 2014); *In re 5-Hour Energy Mktg. & Sales Practices Litig.*, No. 13-ml-2438, 2017 WL 2559615, at *8-9 (C.D. Cal. June 7, 2017); *Minkler v. Kramer Lab'ys, Inc.*, No. 12-cv-9421, 2013 WL 3185552, at *4 (C.D. Cal. Mar. 1, 2013); *Oshana v. Coca-Cola Co.*, 472 F.3d 506, 514-15 (7th Cir. 2006); *Maeda v. Kennedy Endeavors, Inc.*, No. 18-cv-00459 JAO-WRP, 2021 WL 2582574, at *17-18 (D. Haw. June 23, 2021); *Morales v. Kraft Foods Grp., Inc.*, No. 14-cv-04387, 2017 WL 2598556, at *4 (C.D. Cal. June 9, 2017); *Otto v. Abbott Lab'ys Inc.*, No. 5:12-cv-01411, 2015 WL 9698992, at *1, *6 (C.D. Cal. Sept. 29, 2015); *Moheb v. Nutramax Lab'ys Inc.*, No. 12-cv-3633, 2012 WL 6951904, at *7 (C.D. Cal. Sept. 4, 2012).

These decisions are consistent with this Court's own precedent. *See Castillo v. Bank of Am., NA*, 980 F.3d 723, 730 (9th Cir. 2020) ("To ensure that common questions predominate over individual ones, the court must 'ensure that the class is not defined so broadly as to include a great number of members who for some reason could not have been harmed by the defendant's allegedly unlawful conduct.'"); *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 596-97 (9th Cir. 2012) (vacating grant of class certification where class members "were [not all] exposed to advertising that is alleged to be materially misleading," class did not "exclude those members who learned of the CMBS's allegedly omitted limitations before they purchased or leased the CMBS system," and issues of reliance and materiality would differ). They are also in accord with the decisions of other circuits. *See, e.g.*, *Asacol*, 907 F.3d at 51-52; *In re Rail Freight Surcharge Antitrust Litigation–MDL No. 1869*, 934 F.3d 619, 624-25 (D.C. Cir. 2019).

But the lingering inconsistency among the district courts—despite circuit precedent and the Constitution—indicates that this Court should re-establish that no class can be certified when it includes more than a *de minimis* number of uninjured class members. Not only is such a requirement faithful to Article III and Rule 23, but it also accommodates the competing interests of plaintiffs and defendants. For plaintiffs, the requirement simply demands that they define their proposed classes with the requisite precision upfront rather than taking a wait-and-

see approach. *See, e.g.*, *Soto v. Diakon Logistics (Del.), Inc.*, No. 08-cv-33, 2013 WL 4500693, at *5, *12 (S.D. Cal. Aug. 21, 2013) (granting a renewed motion for class certification that "narrow[ed] the definition of the class to apply to a more specific subset").

For defendants, the *de minimis* requirement provides invaluable protection against putative class members who indisputably have no standing and no valid claim to recover. *Supra* § I. Indeed, "[g]iven the '*in terrorem* character of a class action,' a class defined so as to improperly include uninjured class members increases the potential liability for the defendant and induces more pressure to settle the case, regardless of the merits." *Cordoba v. DIRECTV, LLC*, 942 F.3d 1259, 1276 (11th Cir. 2019). And it would incentivize plaintiffs to draw broad classes with impunity. There is no reason to bless such one-sided maneuvering.

None of this should be problematic, much less controversial. Asking plaintiffs to exclude uninjured class members from a proposed class gets the incentives right and enforces important constitutional limits. Consumer class actions, moreover, are by no means the only mechanism for policing deceptive advertisements or labels. There are still individual cases or entities like federal and state consumer protection agencies with the power to take action. Limiting classes to a *de minimis* number of uninjured class members leaves all of these consumer

protections in place but does so without upending fundamental precepts of Article III and Rule 23.

CONCLUSION

For the foregoing reasons, the *en banc* Court should confirm the panel majority's holding that a class cannot be certified with more than a *de minimis* number of uninjured class members.

Respectfully submitted,

Dated: September 7, 2021

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Circuit Rule 29-2(c)(2) because this brief does not exceed 15 pages, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

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 2016 in Times New Roman 14-point font.

Dated: September 7, 2021

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on September 7, 2021.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: September 7, 2021

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