No._____

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT BROTHERSON, PATRICK SHEEHY and CAROLYN BECHTEL, individually and on behalf of all others similarly situated,

Plaintiffs-Respondents,

v.

THE PROFESSIONAL BASKETBALL CLUB, L.L.C.,

Defendant-Petitioner.

Petition for Review
From the Western District of Washington
No. C07-1787-RAJ
Honorable Richard A. Jones, United States District Judge

THE PROFESSIONAL BASKETBALL CLUB, L.L.C.'S PETITION FOR PERMISSION TO APPEAL
(Fed. R. Civ. P. 23(f))

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CORPORATE DISCLOSURE STATEMENT

Defendant-Petitioner, The Professional Basketball Club, L.L.C., is not a publicly-held company, has no corporate parent, and no publicly-held company has an ownership interest of more than 10 percent.

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I. RELIEF REQUESTED

Pursuant to Fed. R. Civ. P. 23(f) and Fed. R. App. P. 5(a), The Professional Basketball Club, L.L.C. ("PBC"), requests permission to appeal the district court's decisions granting Civil Rule 23(b)(3) certification attached as Exhibits A and B.[1] Jurisdiction in the district court exists under 28 U.S.C. § 1453 and § 1332(d)(2)(A). This Court has jurisdiction under Civil Rule 23(f) and 28 U.S.C. § 1292(e).

II. INTRODUCTION

Three die-hard Seattle Sonics season ticketholders, upset that their team was moving to another city, filed a putative class action seeking a refund or to force the Sonics to continue playing in Seattle and honor their claimed renewal rights for season tickets at KeyArena for two more years. While the case was pending, the City of Seattle (which owned KeyArena) and PBC agreed to terminate the KeyArena lease, and the team relocated to Oklahoma City for the 2008-09 season. A year into the case, plaintiffs fundamentally changed their claims. Instead of trying to keep the team in Seattle, they now insisted they were deprived of an alleged right to exercise a future option to purchase season tickets in Oklahoma

[1] The class certification ruling was entered on July 1, 2009 ("Ex. A"). The district court referred to findings made in its earlier February 23, 2009, ruling ("Ex. B"), which reserved a decision, but addressed a "preliminary" view on the requirements of 23(a). This petition is timely filed because the time limit under Fed. R. Civ. P. 23(f) falls within Fed. R. Civ. P. 6(a). *Beck v. Boeing Co.*, 320 F.3d 1021, 1023 (9th Cir. 2003). This petition is filed within 10 court days of the Order certifying a class, July 3 being a legal holiday pursuant to RCW 1.16.050.

City for two seasons at frozen Seattle prices. The suit became a lawyer-invented argument that plaintiffs and other Seattle season ticketholders were actually ticket arbitragers who lost the opportunity to profit from reselling tickets (which they never purchased) for the Oklahoma City Thunder's first two seasons.

The district court followed plaintiffs down this invented path. It first read into a Seattle-based renewal brochure a non-existent "option" right to purchase season tickets for a team in Oklahoma City. Then it certified an artificial "option" contract class, ignoring the highly individualized considerations whether each putative class member would have actually (1) *decided to purchase tickets for Oklahoma City,* (2) *timely communicated that decision to PBC, and (3) made the required payments to renew*—which in many cases was many thousands of dollars up front.

The district court manifestly erred in certifying plaintiffs' hypothetical "option" contract class while acknowledging, but brushing aside, that the three named plaintiffs' testimonies were utterly inconsistent with the claims of the hypothetical class. The district court found that testimony by the three named plaintiffs *disclaiming* any interest in continued renewal, coupled with their failure to sign up for Oklahoma City tickets, was compelling evidence that they likely had not timely exercised and thus waived *their* renewal contract rights and had no surviving claim. Ex. A at 8:16-17. But then the court disregarded the law by

holding that the named plaintiffs may nonetheless "represent" the class and present at trial evidence that absent class members *are different* than them and did not waive their claims. That holding undermines the very purpose of a *representative* class action and should be reversed now.

Next, the district court also erred by failing to follow Rule 23's standards. Rather than the required rigorous analysis of the evidence, the district court relied on unsubstantiated assumptions that (1) all Seattle ticketholders *intended* to renew and purchase tickets in Oklahoma City, and (2) every one of them also *intended* to re-sell those tickets for a profit in a re-sale arbitrage. Yet *all* of the evidence in the record contradicted these assumptions.

Finally, the district court manifestly erred by placing the burden on PBC at trial to present individualized proof regarding whether 1,200 absent class members waived their rights to renew season tickets, while at the same time making it impossible for PBC to meet this burden in a representative class action trial.

In short, the district court turned the class action device on its head. The order allows named plaintiffs who have no claim to represent hypothetical claimants who are not before the court, it forces PBC to present individual evidence regarding each class member at trial with no apparent means of doing so, and it certifies a class based on assumptions that were flatly contradicted by the record before it. Unless corrected now by this Court, PBC will be forced to defend

a theoretical case, presented by plaintiffs with no claims, on behalf of hypothetical claimants who will not be present in the courtroom to be cross-examined.

III. FACTUAL AND PROCEDURAL BACKGROUND

A. The Lawsuit and Team Relocation.

PBC purchased the Sonics NBA franchise in July 2006. In early 2007, PBC sought approval from the Washington legislature to assist in constructing a new arena in Renton, Washington, a suburb of Seattle. If built, the Sonics would play there after 2010. As it was, the Sonics' lease with Seattle's KeyArena was set to expire following the 2009-10 season.

In March 2007, the Sonics sent a promotional brochure for the 2007-08 season describing a new ticketholder classification called "The Emerald Club." Emerald Club members would get a different level of customer service and be guaranteed a price freeze for their KeyArena seats for three years, or through the 2009-10 season.[2] The brochure says nothing about Emerald Club members receiving the right to purchase tickets for an arena in Oklahoma City for the same frozen prices and time span.

On April 16, 2007, *after* the promotional brochure was mailed, and *after* approximately 350 season ticketholders had purchased Emerald Club tickets for

[2] The brochure contained pictures of KeyArena along with a seating map of KeyArena. *See* Ex. C.

the upcoming season, the Washington legislature declined to proceed with the Renton arena plan. PBC immediately issued a press release saying that this was a "devastating blow." PBC's announcements during the next few days were highlighted in the media—"*Owner: Sonics may leave after '08 season*" was one headline on April 18, 2007.

Whether Emerald Club members renewed for 2007-08 season tickets because they expected it might be the last season in Seattle, to show continued support in the hope of a reprieve from relocation, or for any of the myriad reasons why people and businesses decide to buy season tickets,[3] renewals for the 2007-08 season continued to come in even after this legislative defeat. Although the renewal brochure promoted a three-year price freeze for KeyArena, the required renewal *payment* was for a *single season*—the 2007-08 season. Season ticketholders who renewed for 2007-08 got season tickets for games at KeyArena and all of those games were played in Seattle.

Because the renewal form required only pre-payment for the 2007-08 season, neither the form nor the act of renewal said anything about whether the Emerald Club purchasers intended to renew for the subsequent two years, nor were

[3] *See Strauss v. Long Island Sports, Inc.*, 401 N.Y.S.2d 233 (N.Y.A.D. 2 1978) (reasons why people renewed professional basketball season tickets varied; therefore, class certification was improper).

they required to do so. A season ticketholder who renewed for 2007-08 to savor one last nostalgic season in Seattle would have filled out the Emerald Club form exactly the same as a hypothetical person who intended to renew for three years.

With no prospect for a new local arena, PBC gave notice in August 2007 that it intended to try to end its lease at KeyArena effective *after* the 2007-08 season ended. Just days later, plaintiffs Brotherson, Bechtel and Sheehy sued. The suit has gone through a number of permutations since being filed. First, plaintiffs claimed that they were "duped" into joining the Emerald Club for 2007-08 because of allegedly misleading brochure statements regarding PBC's commitment to Seattle through 2010. Plaintiffs contended that if they had known the Sonics were leaving, they would not have signed up for the 2007-08 season. They also alleged breach of contract, injunctive relief forcing the team to stay in Seattle, and a claim for declaratory judgment where they expressly *disclaimed* any right or interest in purchasing tickets for a venue in a different city (i.e., Oklahoma City):

> WHEREFORE, Plaintiffs and Class members demand judgment against defendant as follows: . . . . A declaration that an offer of season tickets in a new venue *would not satisfy* Defendant's obligation to Plaintiffs and Cass (sic) members . . . .

First Am. Compl. at 12, Prayer D (emphasis added).

In short, plaintiffs wanted a refund of money paid for 2007-08 season tickets (even though they used them) or to require the team to stay in Seattle. One thing was clear: they did not want Oklahoma City tickets or even an "offer" of such

tickets. *Id.*

Given the highly publicized scuttling of plans for the proposed new Renton arena, plaintiffs initially moved to certify a very limited class—those 350 persons who renewed for 2007-08 *prior* to the bad news. Coincidentally, the same day, Seattle (the landlord) and PBC settled the lease dispute through an agreement that immediately terminated the lease, which cancelled the remaining seasons at KeyArena and authorized PBC to move the team to Oklahoma City. PBC announced that evening the team would in the future play at Oklahoma City's Ford Center and season ticket requests for the Ford Center would be taken beginning the next day and for two weeks thereafter—July 3-18, 2008—via an internet sign-up form. Prices were not set until August 14, 2008.

On July 17, 2008, plaintiffs filed a second motion, this time to certify a breach of contract/injunction class encompassing not just the early renewers, but *all* Emerald Club renewers that would *seek to keep the team in Seattle*. This motion was consistent with what they had been expressing to PBC since filing their lawsuit—they demanded that the team stay in Seattle and said they had no interest in tickets for games in Oklahoma.

Plaintiffs never moved for an injunction to keep the team in Seattle. Instead, they reversed position and created a new injunction claim, this time seeking to require PBC "to fly them to Oklahoma City and provide lodging for every Thunder

game." When the court reminded plaintiffs in a written order of their Rule 11 obligations, plaintiffs withdrew that injunction claim as well. In short, the lawsuit was grounded in keeping the team in Seattle and seeking damages for having been duped into buying tickets in the first place. Plaintiffs testified consistently with these claims. As the district court observed, "all three of [the named plaintiffs] have expressed an unwillingness to renew their tickets for a team playing in Oklahoma City." Ex. A at 4:12-13. "[T]here is no indication that Plaintiffs want the relief" of tickets in Oklahoma City. Ex. B at 23:15. "There is no evidence that any Plaintiff attempted to buy 2009 Thunder tickets." *Id.* at 23:20-21. In addition, the only absent class member who was deposed—Seattle-based Washington Mutual Bank—testified that it had no interest in renewing season tickets for games in Oklahoma City:

> Q. To your knowledge, did Washington Mutual try to buy tickets for games in Oklahoma City?
>
> A. No.

B. <u>Plaintiffs' New Story</u>.

With no chance of keeping the team in Seattle, plaintiffs' counsel devised yet another theory. Suddenly, plaintiffs were no longer loyal Sonics fans. They no longer wanted to keep the team in Seattle. Now, plaintiffs were transformed into arbitragers who wanted to purchase Oklahoma City tickets for the next two seasons at frozen Seattle prices and to profit from their resale to Oklahoma fans.

On February 23, 2009, the court dismissed all of plaintiffs' claims except this new "option contract" claim. *See* Ex. B. The district court read into the Seattle promotional brochure (the one adorned with pictures of Seattle's KeyArena) a contractual promise to plaintiffs to sell them tickets to the Ford Center in Oklahoma for the 2008-09 and 2009-10 seasons. This ruling contradicted the court's findings that the brochure related only to Seattle and KeyArena. Ex. B at 4:6-7 ("Nowhere in the Brochure did PBC suggest that the Sonics might play home games at a location other than Key Arena before the 2011 season."), *id.* at 4:21-23 ("The Emerald Club offer communicated that the Sonics would continue to play in Seattle at least through 2010.").[4]

Putting to the side the untenability of plaintiffs' invented "option contract" claim, the problem for plaintiffs on class certification is that the named plaintiffs' testimonies bear no resemblance to their claim, and the claim bears no resemblance to reality. None of the named plaintiffs wanted to or did sign up for tickets in Oklahoma City during the open sign-up period in July of 2008. "Plaintiffs . . . did not request renewal, even though they unquestionably knew that PBC was selling the [Oklahoma City Thunder] tickets to others." *Id.* at 20:12-13.

[4] It also contradicted Washington law that prohibits a court from adding a new term to a contract. *DePhillips v. Zolt Constr., Inc.*, 959 P.2d 1104, 1108 (Wash. 1998) (court cannot add to contract under the guise of construing it).

The district court acknowledged that a jury could conclude that plaintiffs had not timely exercised, had waived or had abandoned the alleged option contract right. *Id.* at 19:19-20; 21:11-16.

Accordingly, the district court deferred certifying a class on the invented arbitrage claim, asked for more briefing on 23(b)(3), and specifically instructed plaintiffs to submit a "plan for obtaining information from class members regarding any individualized issues of law or fact that arise." *Id.* at 30:13-15.

C. The Class Certification Ruling.

In its July Order, Ex. A, the district court certified a class of "option" contract season ticketholders. The court acknowledged that the named plaintiffs' option contract claim was very likely waived given the evidence of their individual actions and statements *disclaiming* interest in the remaining option years. Yet the court concluded that "[e]ven if Plaintiffs waived their renewal option, they can still present evidence that the vast majority of Emerald Club members did not." Ex. A at 8:17-19. The court did not explain what that evidence might be, who could possibly present it, or how that could ever occur in a representative class action.

The court acknowledged that whether plaintiffs intended to renew or waived their option right "no doubt raise individualized issues." *Id.* at 8:14. And the court further acknowledged that individual evidence will govern whether any one Emerald Club member would have exercised the "option" to renew season tickets

for two more years in Oklahoma City. *See, e.g., id.* at 13:6-7 ("[S]ome Emerald Club members could not have paid the price for 2009 season tickets."); *see also id.* at 13:24-14:3. Indeed, the only absent class member to testify—Washington Mutual Bank—is a good example of the highly individualized decision whether to renew. It testified that it had no intention to renew for tickets in Oklahoma City, and the bank has since been seized by federal regulators and has filed for bankruptcy.

But the court improperly brushed aside these concerns by asserting that PBC failed to show that these individual considerations "apply at all broadly" (*id.* at 13:9), and that in any event, it would be PBC's burden at trial to gather and present individualized evidence for a "significant portion" of absent class members. *Id.* at 16:8-10. *See also id.* at 7:18-21.

In assuming that most class members had the money to, and would, renew their tickets for Oklahoma City, the court did not cite the testimony of a single witness. Nor could it, since all the record evidence was to the contrary. Rather, the court supported its assumption by claiming that "[o]bjective and non-individualized evidence . . . suggests that . . . exercising the Emerald Club renewal options would be unusually profitable" (*id.* at 14:4-5) and that class members had "ample [profit] incentive to renew in 2009." *Id.* at 14:21-22. The court ignored that the *prices* for Oklahoma City Thunder games—which would have established

the "ample incentive to renew"—were not even posted until *after* the July 2008 sign-up period for renewal had expired. *Id.* at 14:8-12 (sign up ended July 18; prices came out August 14).

And the court never answered why—if they had "ample" economic incentive to renew—Washington Mutual did not want to or why plaintiffs did not do so. Indeed, the court recounted that plaintiff Sheehy was not sure he wanted to put up new money even *after* the prices were released. *Id.* at 4:17-18. Further, the court acknowledged that under plaintiffs' damages methodology, nearly half of the putative class members had *no* economic rationale to become arbitragers of season tickets in Oklahoma City—because analogous tickets in Oklahoma City would be less expensive—and would need to be excluded from this artificially-constructed class. *Id.* at 17-18. In short, there is no record evidence that a single person in this made-up class (1) wanted to renew tickets for Oklahoma City, (2) had the resources to do so, (3) figured out that it would be profitable to do so (when the necessary information was not yet available and a year later, plaintiffs' counsel was still trying to certify a class where half would not profit at all), and (4) acted in a timely fashion to renew.

IV. QUESTIONS SOUGHT TO BE APPEALED

A. Whether the district court erred by certifying a class represented by these plaintiffs who it recognized may have waived their claims and by ordering

plaintiffs to cure that defect by presenting the claims of a fictional plaintiff at trial.

B. Whether the district court erred by certifying a class based on assumptions that were flatly contradicted by all the record evidence.

C. Whether the district court improperly reversed the burden of proof on class certification.

V. ARGUMENT

This Court has "unfettered discretion" to allow an appeal from a class certification order. *See* Adv. Comm. Notes to 1998 Amend., Fed. R. Civ. P. 23(f). In exercising its discretion, this Court considers whether:

> (1) there is a death-knell situation for either the plaintiff or defendant that is independent of the merits of the underlying claims, coupled with a class certification decision by the district court that is questionable; (2) the certification decision presents an unsettled and fundamental issue of law relating to class actions, important both to the specific litigation and generally, that is likely to evade end-of-the-case review; or (3) the district court's class certification decision is manifestly erroneous.

Chamberlan v. Ford Motor Co., 402 F.3d 952, 955 (9th Cir. 2005). These three alternative criteria are "merely guidelines, not a rigid test." *Id.* at 960. The Court may accept review even when only one of the *Chamberlan* factors applies. *Id.* Here, arguably all three *Chamberlan* criteria compel review. The court manifestly erred in allowing plaintiffs who may not have a claim to represent a hypothetical class by presenting evidence of a fictional plaintiff. And, by forcing PBC to present individual evidence at trial relating to 1,200 absent class members without

the means for doing so, the court structured a "death knell" for PBC that this Court must correct. The district court's errors so undermine the purpose of the class device that they require immediate correction so they will not be repeated.

A. The District Court Manifestly Erred by Allowing Plaintiffs To Try the Case of a Fictional Plaintiff Bearing No Resemblance to Them.

The district court manifestly erred when it ruled that "[e]ven if Plaintiffs waived their renewal option, they can still present evidence that the vast majority of Emerald Club members did not." Ex. A at 8:17-19. This astounding holding turns Rule 23 on its head. The entire purpose of a class action is to present the named plaintiffs' claims as representative of a larger group of persons. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623, 625-26 (1997). The absent class members' claims rise or fall by putting the named plaintiffs' claims to the test of trial. *Lewis v. Casey*, 518 U.S. 343, 357 (1996) (named plaintiff must show injury and cannot show injury by other unidentified absent class members). Plaintiffs must show that a single adjudication, with just these three named representatives' own testimonies, can fairly resolve all class members' claims. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1022 (9th Cir. 1998). The named plaintiffs may not represent a class of claimants if they have waived their claims. *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992) (affirming denial of certification where "there is a danger that absent class members will suffer if their representative is preoccupied with defenses unique to it").

Moreover, when named plaintiffs do not have claims, they cannot try the case by proxy, as the district court erroneously believed, and "still present evidence that the vast majority of Emerald Club members" do have claims. District courts may not permit named plaintiffs to try the claims of a "perfect," "composite" plaintiff who is not before the court and whom a defendant cannot cross-examine:

> [P]laintiffs portrayed the class at trial as a large, unified group that suffered a uniform, collective injury. And [the defendant] was often forced to defend against a fictional composite without the benefit of deposing or cross-examining the disparate individuals behind the composite creation.

Broussard v. Meineke Discount Muffler Shops, Inc., 155 F.3d 331, 345 (4th Cir. 1998) (reversing class certification). Yet that is precisely what the district court has explicitly held. This Court should take review now to correct this manifest error.

B. The District Court Failed To Rigorously Analyze the Appropriateness of Class Certification, Relying on Theoretical Assumptions That Were Flatly Contradicted by All the Record Evidence.

A court must rigorously analyze the evidence in support of class certification to determine if all of the elements of Rule 23 are satisfied. *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1233 (9th Cir. 1996). At a minimum, this standard means that class certification may not rest on assumptions about what plaintiffs might prove at trial, but rather requires concrete evidence demonstrating how claims will be proven so that common issues will predominate over individual issues. *See Lozano v. AT & T Wireless Servs., Inc.*, 504 F.3d 718, 730-31 (9th Cir.

2007) (reversing class certification because district court failed to perform "rigorous analysis" of factual record, including requirement that claims and defenses of named plaintiff were typical of claims and defenses of unnamed class members); *Gariety v. Grant Thornton, LLP*, 368 F.3d 356, 365-67 (4th Cir. 2004) (vacating class certification because district court relied on hypothetical facts).

The district court rested its class certification order on the *assumptions* that all Seattle class members had a profit motive to renew season tickets for Oklahoma City and therefore intended to do so and would have done so if not thwarted by PBC. Ex. A at 14. But the district court was presented *no* evidence from a single season ticketholder who fits this hypothetical model. To the contrary, the only season ticketholders who testified—the three plaintiffs and Washington Mutual—contradicted the court's hypothesis and demonstrated unequivocally that each season ticketholder's claim for breach of an "option" contract would center on whether each wanted to renew, had the resources to renew, did not waive or abandon the right to renew, and would have renewed but for PBC's conduct.

In its recent authoritative decision, the Third Circuit emphasized that in conducting a "rigorous analysis" of class certification, district courts must "consider all relevant evidence and arguments" in deciding certification. *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 307, 320-26 (3rd Cir. 2008). A district court cannot simply ignore evidence that does not fit its theoretical model

by making assumptions. *Id.* This Circuit follows the same approach. Class certification may not rest on untested assumptions, and a district court may not ignore evidence that plainly demonstrates that individual issues of proof will predominate adjudication of a claim. *See Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1188-91 (9th Cir. 2001) (plaintiff failed to prove predominance of common issues when the main issues in a case required the separate adjudication of each class member's individual claim or defense.). *See also Vinole v. Countrywide Home Loans, Inc.*, ___ F.3d ___, No. 08-55223, 2009 WL 1926444, at *9 (9th Cir. July 7, 2009) (same); *In re Wells Fargo Home Mortgage*, ___ F.3d ___, No. 08-15355, 2009 WL 1927711 (9th Cir. July 7, 2009) (reversing certification under Rule 23(f) and finding district court's reliance on defendant's uniform policy did not eliminate need for individual determinations concerning application of policy).

If the district court had not relied on assumptions and instead had rigorously analyzed the testimony in the record from season ticket holders, it would have had no choice but to deny class certification. *See, e.g., Kelley v. Microsoft*, 251 F.R.D. 544, 558 (W.D. Wash. 2008) (no certification when claimant needed to show what motivated purchase); *Poulos v. Caesars World, Inc.*, 379 F.3d 654, 665 (9th Cir. 2004) (where one motivation for taking action does not fit all, class certification properly denied). *See also Pierce v. County of Orange*, 526 F.3d 1190, 1200 (9th

Cir. 2008) (decertification affirmed based on need to evaluate individual evidence of who was harmed). This Court should reverse class certification because the district court failed to conduct a rigorous analysis that would have compelled denial of class certification.

C. The District Court Improperly Shifted to PBC the Burden of Proof Under Rule 23.

Plaintiffs bear the burden of proving that class certification is appropriate. *See, e.g., Zinser,* 253 F.3d at 1188. In its February Order, the district court recognized that it could not *presume* that 100 percent of season ticketholders who renewed for the 2007-08 season in Seattle would choose to renew for the following years, particularly because the ownership group had taken actions that could be viewed as disloyal to Seattle and because the Sonics were no longer playing home games anywhere near Seattle. Ex. B at 23:21-24. The *only* evidence presented to the district court regarding season ticketholders plainly demonstrated that they did not intend to and did not renew season tickets when the team moved to Oklahoma City. Accordingly, the district court instructed plaintiffs in its February Order to prepare a "plan for obtaining information from class members regarding any individualized issues of law or fact that arise." *Id.* at 30:13-15.

Plaintiffs did not present any such plan. Yet faced with nothing more than the same evidence from the named plaintiffs, the court did an about face in its July Order and assumed what it previously had held it could not assume—that every

Emerald Club member wanted to and would renew season tickets unless PBC could prove otherwise. Ex. A at 15:8-21. "PBC must do more than simply point to the theoretical possibility of an individualized issue, it must provide evidence suggesting that it is likely that the issue bears on the claims of more than a few. . . ." *Id.* at 7:18-21. The district court further instructed that its class certification "would not prevent PBC from presenting [individual] evidence as to [specific class members'] conduct" in waiving their claims. *Id.* at 8:9-10. It remains a mystery as to just how PBC could "present" such evidence in a representative class action.

With respect to individualized evidence of whether class members wanted to renew, had the resources to renew, and would have renewed season tickets for Oklahoma City, the court said that PBC failed to show that these individual considerations "apply at all broadly" (*id.* at 13:9)—even though all three plaintiffs and the absent class member so testified—and that in any event it would be PBC's burden at trial to gather and present individualized evidence at trial for a "significant portion" of absent class members. *Id.* at 16:8-10; 7:18-21; and 11:11-12 ("PBC can defend itself on the question of damages by proving that class members would not have exercised the option."). Again, how PBC could be expected to present such evidence in a class action is not explained. If individualized proof is envisioned with mini-trials for each of 1,200 season

ticketholders, this simply concedes the *disutility* of certifying a class.

By relieving plaintiffs of their burden and requiring PBC to prove at trial that each of 1,200 people would not have renewed, the district court plainly violated the law. *See In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1086 (6th Cir. 1996) citing *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 161 (1982) (reversing certification when district court reversed proper burden of proof by asking defendants to show cause why the court should not certify the class).

VI. CONCLUSION

The class certification order in this case must be reversed. It allows three plaintiffs who do not have claims to pursue the hypothetical claim of a fictional plaintiff whom PBC will never be able to cross-examine. It is based on assumptions that ignore all the record evidence. And it blithely casts aside predominating individual issues, but then requires PBC to prove that *each* ticketholder would not have renewed. This petition for permission to appeal should be granted.

DATED this 15th day of July, 2009.

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PROOF OF SERVICE

I hereby certify that on the 15th day of July, 2009, I filed the foregoing document with the Clerk of the Court by sending it via overnight courier to the Clerk of the Ninth Circuit Court of Appeals and served the following opposing counsel via hand delivery:

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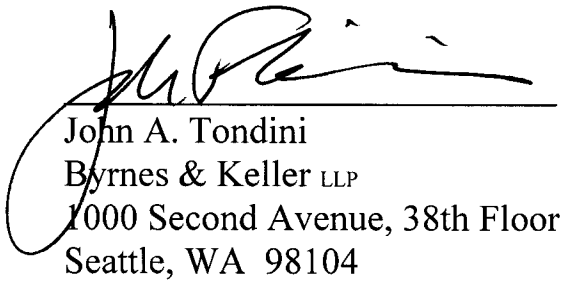

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