Siddharth Hariharan, et al v. Adobe Systems, Inc., et al Doc. 16

Case No. 13-80223

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

IN RE HIGH-TECH EMPLOYEE ANTITRUST LITIGATION

Petition for permission to appeal from the United States District Court
Northern District of California
The Honorable Lucy H. Koh, Presiding
Case No. 5:11-2509-LHK

REPLY IN SUPPORT OF PETITION FOR LEAVE TO APPEAL UNDER FEDERAL RULE OF CIVIL PROCEDURE 23(F)

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Plaintiffs avoid grappling with the unsettled issues of class-certification law that the district court acknowledged. Instead, plaintiffs quote liberally from the certification order as if its mere existence—and volume—validated its reasoning. They recite evidence that no-cold-call agreements existed and may have affected a few of the 60,000 class members in some of the 2400 job categories. But plaintiffs have no meaningful answer to the reasons why leave to appeal should be granted.

Plaintiffs do not dispute that this class cannot be certified unless antitrust impact is a common issue, because determining impact individually would defeat predominance. Nor do they dispute that the district court endorsed averaging as a stand-in for a common method to prove impact and damages for each class member. Averaging ignores individual differences among class members, however, and cannot determine whether all, or only some, were injured. Thus, an average result does not "resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011).

Contrary to plaintiffs' contention, manifest error is not the "only" identified basis for the petition (Resp. 4). Plaintiffs have invoked no controlling authority after *Dukes* and *Comcast* that permits the nimble use of aggregation and averaging methods, like those deployed here, that *assume* the common impact that they must have a common means of *proving*. And the citations plaintiffs do provide show that—as the petition explained (at 3, 8-10, 20 & n.6)—these fundamental issues of

class-action law are unsettled in this Circuit after *Dukes* and *Comcast*.

Plaintiffs insist that these high-technology defendants used rigid pay structures reminiscent of the civil service. They invent a Department of Justice finding (absent from SER687-89) that the no-cold-call agreements reduced employee compensation. But plaintiffs do not address the absurdity of their expert's results in light of the minuscule (and unchanged) hiring between defendants before, during, and after the agreements. For example, Intel's only agreement was with Google, which had a fundamentally different business and little demand for Intel employees: in 12 years (2001-2012), only 102 Intel employees left for Google, most of them during the class period. *See* ER1095(291). Yet plaintiffs' model purports to show that limiting cold calls from this single, unfruitful source injured each of Intel's 30,000 employees in exactly the same way, resulting in an undifferentiated damages estimate of hundreds of millions of dollars. Plaintiffs cannot explain (much less measure) how a restraint on one recruiting method by a sliver of the market could affect every member of this widely diverse class in the same way.

The certification order approves the use of the class device when there is no possibility that class litigation will result in accurate and reliable determination of each class member's right to relief. That approach makes a mockery of the commonality and predominance standards of Rule 23 and flatly violates the limitations of the Rules Enabling Act. Review by this Court is therefore warranted.

I. The Importance Of These Unsettled Issues Is Clear And Undisputed.

Plaintiffs do not dispute that the district court's approach, if allowed to stand, would bring about a sea-change in the law of class actions: *any* class could be certified so long as it contains enough injured persons to show some average effect. This shortcut to class certification could be repurposed for every area of law. *See* Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 103 (2009) (repeatedly cited with approval in *Dukes*).

A. Plaintiffs cannot dispute that the district court was correct to label "the legal standard with respect to the predominance inquiry" as "somewhat unsettled" and "not altogether clear." ER822(19). Indeed, the court acknowledged that district courts across the country are divided over class certification in wage-suppression antitrust cases. *See id.* n.7. But neither the district court nor plaintiffs acknowledge the order's square conflict with Judge Alsup's rejection of averaging as a stand-in for common proof. *See In re Graphics Processing Units Antitrust Litig.*, 253 F.R.D. 478, 494 (N.D. Cal. 2008).

The district court remarked that "intervening authority such as *Amgen* [*Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184 (2013),] has refined the predominance inquiry since the cases cited by Defendants were decided," ER822(19) n.7, but that misapprehension of *Amgen* highlights the need for clarification by this Court. Taking their cue from the district court and the Seventh Circuit (ER822-

26(19-22)), plaintiffs suggest that *Amgen* relieves them of their duty under *Dukes* to show that their averaging and aggregation methods can resolve the claim of each class member. But *Amgen* did not silently alter the *Dukes* standard or relieve class proponents from their obligation to demonstrate that the aspects of a claim that can be proved through common evidence predominate over those that cannot.

Amgen addressed a unique presumption that all buyers of a security traded in an efficient market have relied on any material misrepresentation. *See* 133 S. Ct. at 1195-96. But *Amgen* does not mean that *every* issue becomes a merits issue whenever the plaintiffs average the evidence. The questions of antitrust impact and damages can have different answers for different plaintiffs.[1] As *Comcast* confirms, *Amgen* does not relieve plaintiffs of the need to demonstrate a means of commonly proving those points. *See Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1431 (2013) (antitrust impact); *id.* at 1433 (damages).

The confusion and disarray in the lower courts over the interplay among *Comcast*, *Dukes*, and *Amgen*, and the limited guidance from this Court, reinforce the need for review. Among the issues requiring clarification is *Dukes*' rule that common questions under Rule 23 are those that generate a "common answer" to a "crucial question." 131 S. Ct. at 2552. In a passage that plaintiffs try to obscure

[1] Here, for example, some employees may have missed concrete opportunities as a result of the challenged agreements. Contrary to the district court's conclusion, their cases would not "rise[] and fall[] with their common evidence." ER888(85).

(Resp. 4-5), the district court characterized "the critical question" as "whether common questions predominate over individual questions—not whether plaintiffs could show common answers to those questions." ER825(22). That misapprehension likely underlies the court's confusion of averages with common answers.

B. *Comcast* underscores the importance of rigorously scrutinizing proposed means of measuring individual class members' damages through common evidence. Unlike *Leyva v. Medline Industries*, 716 F.3d 510, 514 (9th Cir. 2013), where individual damages could be calculated using arithmetic and records in the defendant's "computerized payroll and time-keeping database," plaintiffs' expert here conceded that his model could not measure any individual class member's damages. Dist. Ct. Dkt. 308-1, at 23-24. Plaintiffs propose instead to produce only an aggregate sum impact. The district court's approval of that method is flatly inconsistent with *Comcast*, and reinforces the need for this Court's review.

II. The District Court Approved An Averaging And Aggregation Approach That Was Explicitly Designed To Gloss Over Individualized Issues.

A. The district court approved plaintiffs' blending of class members into a single equation to make dispositive individualized issues magically disappear. By aggregating data across all defendants, plaintiffs' approach assumes the common answers it purports to prove. It assumes that the impact on employees of a company that entered into one agreement (as did four defendants) was the same (adjusted for age, seniority, and such) as the impact on employees of a company that entered

into two (Pixar) or three (Apple and Google). *See* Dist. Ct. Dkt. 65 ¶ 108. It assumes a film company and a computer chip maker would experience the same impact from different single agreements. It assumes that a safety engineer would suffer the same impact as a web designer. It assumes that employees who might not have received retention incentives because of lower performance or skills would be affected the same as top performers and mission-critical employees. And the common impact factor uses compensation actions by any one defendant to determine undercompensation with regard to all class members.

Plaintiffs admit that they designed their aggregation and averaging models to work only at the collective level because "the individual data is likely to be dominated by forces that operate at the individual level." ER1151(347); *see* Pet. 15. Put another way, the inherently individualized nature of employee compensation made it impossible to devise a means of commonly proving impact as *Dukes* requires. Plaintiffs' expert, Dr. Leamer, admitted that "inherent noise in the individual level data" would "drown out" the supposedly rigid "internal pay structures" on which plaintiffs' entire theory depends. ER874(71).[2] Plaintiffs now boast that, by combining data for disparate class members, "the idiosyncratic parts get averaged out."

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[2] In defending the district court's disregard for the collapse of Dr. Leamer's model when it was disaggregated even at the company level (Resp. 14), plaintiffs forget Leamer's admission that he concealed his own results from disaggregating his model by defendant. Dist. Ct. Dkt. 308-1, at 360-361. No wonder: disaggregation altered the *sign* of the effect, absurdly indicating that the agreements caused overcompensation at some employers. ER1010-11(206-07).

Resp. 16. But Rule 23 does not permit a method of supposed common proof that does not explain and account for each class member's situation, but instead simply averages out the differences. Guidance from this Court is needed.

The district court recognized that the method it approved "may have masked some of the individual variations within each job title." ER874(71). Under a proper analysis (and in a typical putative employee class comprising just one or a few job titles), individual variations within a job title are sufficient to preclude certification. *See* Pet. 11 n.4. Here the in-title variations are multiplied 2400 times over.

B. Wishing away *Comcast* and *Dukes*, plaintiffs quote this Court's 2002 holding—outside the class certification context—that "it is a generally accepted principle that aggregated statistical data may be used where it is more probative than subdivided data." *Paige v. California*, 291 F.3d 1141, 1148 (9th Cir. 2002) (quoted in Resp. 16). *Paige* permitted the aggregation of statistics from multiple examination sittings to assess whether the test had a discriminatory impact on a racial *group*. *Id.* at 1144. That does not suggest that aggregate statistics can prove *individual* injury—especially in light of the holding in *Dukes* that the plaintiff must demonstrate "that the class members have suffered *the same injury.*" 131 S. Ct. at 2551 (emphasis added; internal quotation marks omitted). And *Comcast* has made clear that any proposed methodology for presenting classwide proof must *in fact* be susceptible to classwide application. 133 S. Ct. at 1433.

C. Plaintiffs have nothing to say about the undisputed evidence refuting the critical premise of the certification order—that defendants' "company-wide compensation structures … left little scope for individual variation." ER860(57). The compensation range within a single job classification routinely exceeded 50% of the low salary (*e.g.*, ER1454), and the compensation trajectories of individuals within a single job classification were literally all over the map. *See* ER1250(472); Pet. 16. Plaintiffs ultimately insist that the mere existence of compensation structures and overall compensation budgets—*i.e.*, of nonrandom compensation—is enough to permit average effects to substitute for common proof of impact and damages.[3] Plaintiffs also point to Google's across-the-board change in compensation structure—nearly two years after the class period—in response to employee surveys indicating a strong preference for base salary over bonus and equity. ER1488-89. That change occurred in a setting where startups were actually *hiring* Google employees at a high rate, not merely cold calling them. Google lost more employees to Facebook alone in a single year (2010) than it lost to *all defendants* from 2005 to the present—and it lost *none* to other defendants before 2005. *Compare* SER865 n.69 *with* ER1095. Nothing suggests that any defendant would have implemented across-the-board increases in response to cold calls from companies

[3] What the district court cited as evidence that any decrease in cold-calling would affect all 60,000 class members (ER841-42(38-39)) reflected only counteroffers for a few "targeted" top performers and a general effort to pay employees well enough so that the best ones would not leave.

that were hiring few of its employees.

III. The Rules Enabling Act And Due Process Violations Are Significant And Fully Preserved.

Plaintiffs contend (Resp. 18) that defendants failed to preserve a challenge under the Rules Enabling Act and Due Process Clause. Not so. This issue was pressed (SER716) and passed upon below (ER 889(86)). *Cf. United States v. Williams*, 504 U.S. 36, 41 (1992).

Plaintiffs do not defend the district court's manifestly erroneous holding that the Rules Enabling Act's strictures apply only to Rule 23(b)(2) classes. Plaintiffs instead insist that the foreclosed defenses here are no more individualized than in any other case. Resp. 19-20. But use of undifferentiated averages and aggregate data to resolve whether class members were injured deprives defendants of any opportunity to show that individuals (*e.g.*, low-performers, or those whose skills had no interest for a party subject to a no-cold-call agreement) were not injured at all.

Citing Seventh Circuit cases, plaintiffs maintain that "the possibility that a few class members might not have been injured does not preclude class certification in antitrust cases." Resp. 19. But both the Supreme Court and this Court have held otherwise: class members must "have suffered *the same injury*." *Dukes*, 131 S. Ct. at 2551 (internal quotation marks omitted; emphasis added); *Ellis v. Costco*, 657 F.3d 970, 981 (9th Cir. 2011) (quoting *Dukes*, 131 S. Ct. at 2552). Where one set of class members—in this case at most a few, if any—has suffered an antitrust

injury and another set has not, the class members have not suffered "the same injury." To proceed as a class, plaintiffs must "prove, through common evidence, that *all* class members were in fact injured by the alleged conspiracy"; averaging together some class members who were injured with others who were not does not suffice. *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244, 252 (D.C. Cir. 2013) (emphasis added). And, regardless of the Seventh Circuit's view, this Court recognizes that "no class may be certified that contains members lacking Article III standing." *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 594 (9th Cir. 2012).

The district court's embrace of averaged and aggregated data acts as a procedural device to deprive defendants of their substantive defenses, resulting literally in the "Trial by Formula" that *Dukes* rejected, 131 S. Ct. at 2561. None of this implies a "ban on math" or that "a class can *never* be certified for damages purposes." Resp. 19-20. Damages often may be determined by applying a common method to each member's individual circumstances. *E.g.*, *Leyva*, 716 F.3d at 514. But no class can be certified under an approach that obliterates individualized issues to sweep in a substantial number of plaintiffs whose injury is doubtful, individualized, and not susceptible to determination through common evidence.

CONCLUSION

The petition should be granted and the certification order reversed.

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ATTESTATION: The filer attests that concurrence in the filing of this document has been obtained from all signatories.

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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.

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