No. 20-80119

United States Court of Appeals
for the
Ninth Circuit

JAMES KARL, on behalf of himself, and on behalf of a class of those similarly situated,

Plaintiff-Respondent,

– v. –

ZIMMER BIOMET HOLDINGS, INC., a Delaware Corporation; ZIMMER US, INC., a Delaware Corporation; BIOMET INC., an Indiana Corporation; BIOMET U.S. RECONSTRUCTION, LLC, an Indiana limited liability company; BIOMET BIOLOGICS, LLC, an Indiana limited liability company,

Defendants-Petitioners.

FROM AN ORDER FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA,
CASE NO. 3:18-CV-04176-WHA, HON. WILLIAM H. ALSUP

BRIEF FOR *AMICUS CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF PETITION FOR PERMISSION TO APPEAL PURSUANT TO RULE 23(F)

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CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America is a non-profit corporation organized under the laws of the District of Columbia. It has no parent corporation. No publicly held corporation owns ten percent or more of its stock.

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INTEREST OF AMICUS CURIAE[1]

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. The Chamber 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, and from every region of the country. The Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the Nation's business community, including cases addressing the requirements for class certification. Many of the Chamber's members are defendants in employment class actions. The Chamber and the broader business community have a keen interest in ensuring that courts rigorously analyze the requirements for class certification before a class is certified.

INTRODUCTION

The Supreme Court repeatedly has recognized that class actions are an "exception to the usual rule" of individual adjudication, and that, as a result, Rule 23 demands that courts conduct a "rigorous analysis" to ensure that classwide adjudication of truly common issues creates efficiencies without sacrificing

[1] *Amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus*, its members, or counsel has made any monetary contributions intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

procedural fairness. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351, 367 (2011) (quotations omitted).

This rigorous analysis requires the plaintiff to demonstrate "through evidentiary proof" that the class's claims "*in fact*" can be litigated on a classwide basis. *Comcast Corp. v. Behrend*, 569 U.S. 27, 33-34 (2013). The plaintiffs' evidence is only half the story: "proper analysis under Rule 23 [also] requires rigorous consideration of *all* the evidence and arguments offered by the parties." *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 321 (3d Cir. 2008) (emphasis added); *see Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 982-84 (9th Cir. 2011). Even where the named plaintiffs propose to try their case through uniform, classwide proof, a rigorous class-certification analysis still requires the Court to consider the *defendant's* evidence and arguments to confirm that classwide adjudication consistent with due process is possible.

The district court failed to conduct this analysis in two critical respects. First, the court repeatedly brushed aside Zimmer's arguments because, the court believed, "it suffices for class certification that plaintiffs' theory turns on … common proof." Op. 8. That is incorrect. If the defendant's evidence shows that the plaintiffs' claims cannot be adjudicated through common proof, then a class cannot be certified.

Second, and relatedly, the court disregarded Zimmer's position because it

misunderstood the governing law and what is required of courts at class certification. As to plaintiff's misclassification claims under *S.G. Borello & Sons, Inc. v. Department of Industrial Relations*, 769 P.2d 399 (Cal. 1989), the court effectively held that the *only* relevant factor is a uniform at-will contract. But no precedent holds that the mere existence of an at-will agreement suffices to determine employment status (or to certify a class) and many cases within this Circuit are to the contrary. Pet. 14-20.

The district court likewise dismissed Zimmer's argument that individualized inquiries into the applicability of the "business-to-business" exception to California's recently-enacted ABC test preclude certification, calling this "a merits question for later." Op. 14. That, too, was error. A district court must resolve difficult certification questions *before* a class is certified, and whether this exception can be adjudicated through common proof is a certification question that must be resolved at the class-certification stage, not after.

Because the district court's decision implicates important questions of law that will affect countless employers within this Circuit and deepens multiple interrelated intra-Circuit splits over the importance of at-will agreements in misclassification cases, this Court's immediate review is warranted. The district court's failure to conduct a rigorous analysis, moreover, is a recurring problem. Such systemic errors contradict established precedent and create significant

incentives for vexatious class-action suits that impose significant costs on businesses, and in turn on consumers.

This Court has already granted a 23(f) petition—a petition the Chamber also supported—raising these very same issues, but the case settled before this Court could weigh in. *See Alfred v. Pepperidge Farm Inc.*, Dkt. 16 (9th Cir. No. 17-80074). This petition provides an ideal vehicle to answer the questions this Court could not answer in *Alfred*. The Court should grant the petition and make clear that district courts cannot avoid their responsibility to conduct a rigorous Rule 23 analysis at the class-certification stage by sweeping aside individualized issues.

ARGUMENT

I. RULE 23 REQUIRES A RIGOROUS ANALYSIS AT THE CLASS-CERTIFICATION STAGE

"The class action is an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Dukes*, 564 U.S. at 348 (quotations omitted). Class treatment thus is appropriate only where the key questions can be resolved "in the same manner [as] to each member of the class," *Califano v. Yamasaki*, 442 U.S. 682, 701 (1979), "[f]or in such cases, the class-action device saves the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion." *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 155 (1982) (quotations omitted).

Rule 23 reflects these principles by ensuring that cases offering the efficiencies described above can proceed through the class vehicle, but those that lack that potential must proceed individually. Where class members' claims turn on individualized facts, in other words, a putative class action cannot satisfy the requirements of Rule 23. *E.g.*, *Comcast*, 569 U.S. at 34.

Equally crucial here, Rule 23 ensures that plaintiffs may not pursue efficiencies through the class mechanism by overriding defendants' due-process rights, including a defendant's right to present individualized defenses. Rule 23's "procedural protections" are grounded in "due process," *Taylor v. Sturgell*, 553 U.S. 880, 901 (2008), and were carefully crafted to preclude aggregation of claims when doing so would undermine defendants' due-process right "to present every available defense." *Lindsey v. Normet*, 405 U.S. 56, 66 (1972) (quotations omitted); *see Dukes*, 564 U.S. at 367.

The Supreme Court has made clear, moreover, that Rule 23's requirements must be satisfied at the class-certification stage. District courts may not kick individualized disputed issues down the road to the merits stage; rather, courts must "conduct a 'rigorous analysis'" at class certification to determine whether the plaintiff has "'affirmatively demonstrated his compliance' with Rule 23." *Comcast*, 569 U.S. at 33-35 (quoting *Dukes*, 564 U.S. at 350-51). This rigorous analysis does not stop with the plaintiffs' arguments and evidence: the court must

satisfy *itself*, after considering *all* the evidence and arguments, that Rule 23's "prerequisites … have been satisfied." *Dukes*, 564 U.S. at 351 (quotations omitted).

II. THE DISTRICT COURT FAILED TO CONDUCT THE RIGOROUS ANALYSIS THAT RULE 23 REQUIRES

The district court's certification decision flouts these basic Rule 23 requirements. *First*, the court accepted plaintiff's argument for certification under *Borello* by examining only plaintiff's evidence and ignoring Zimmer's. Moreover, the court achieved that result by adopting a standard that would make certification of misclassification classes virtually automatic. *Second*, the Court dodged Zimmer's arguments under the ABC test by labeling them "merits" questions for later. Both errors warrant this Court's immediate review.

A. The District Court's Approach To *Borello* Impermissibly Ignores Defendants' Evidence And Makes Certification Virtually Automatic In Cases Involving At-Will Agreements

The core of plaintiff's claim is that Zimmer misclassified its salesforce as independent contractors when they were actually employees. For claims accruing before AB5 became effective on January 1, 2020, the multi-factor *Borello* standard governs that question. *See, e.g.*, *Alexander v. FedEx Ground Package Sys., Inc.*, 765 F.3d 981, 988-89 (9th Cir. 2014). Under *Borello*, "the principal test of an employment relationship is whether the person to whom service is rendered has the right to control the manner and means of accomplishing the desired result." *Ayala*

v. Antelope Valley Newspapers, Inc., 327 P.3d 165, 171 (Cal. 2014) (quotations omitted). An array of "secondary indicia" are also relevant. *Id*.

The district court, however, essentially condensed the entire multi-part framework into a single element—namely, whether the defendant's workforce was uniformly subject to an at-will contract or policy. In the district court's telling, "everything here occurs in the shadow of Zimmer's right to terminate plaintiffs *without* cause." Op. 10. And because "plaintiff's theory of liability turn[ed] on Zimmer's written policies, common to their workforce," the district court dismissed as irrelevant any "variation in observance or enforcement." *Id*. at 7.

That was error, for two basic reasons. First, while it is true that "plaintiffs' theory of liability turns on Zimmer's written policies," *id*., that is not true of Zimmer's defense. As Zimmer's explains, *other* indicia of employment status varied significantly across its salesforce, including, for example, how frequently sales people communicated with Zimmer and each other, or whether (unlike plaintiff here) they even sold Zimmer products exclusively. Pet. 8-9, 11. And a district court may only certify a class "after considering *all* relevant evidence," *In re Hydrogen Peroxide*, 552 F.3d at 325 (emphasis added), not just the plaintiff's. *See also Ellis*, 657 F.3d at 982-84. By accepting plaintiff's framing of the liability inquiry without seriously considering Zimmer's evidence and argument, the district court failed to conduct the rigorous analysis Rule 23 requires.

Second, the district court disregarded Zimmer's position because it was laboring under the erroneous impression that a form, at-will contract is effectively dispositive of certification (if not also employment status) under *Borello* and *Ayala*. That view deepens intra-Circuit conflicts, is inconsistent with California law, and would harm businesses and consumers alike.

To start, the district court's decision deepens longstanding intra-Circuit conflicts over the role of at-will agreements in the class-certification and misclassification analyses. As Zimmer's petition demonstrates, multiple courts within the Ninth Circuit—including other judges in the Northern District of California—hold that at-will agreements are *not* dispositive of employment status, and that common agreements are *not* enough to warrant certification. Pet. 14-20. These intra-Circuit conflicts warrant this Court's immediate review. Indeed, this Court granted interlocutory review in *Alfred*, which raised the same issues.

Worse, the district court's approach of relying almost exclusively on the at-will termination provision makes certification all but certain in cases involving at-will agreements. The district court repeatedly dismissed Zimmer's evidence on the ground that under "*Ayala*, these arguments go to the *exercise* of control, not to its existence." Op. 10. But *Ayala* did not hold that an employer's actual conduct under its policies was irrelevant to the classification inquiry—if it had, the California Supreme Court would have reversed outright. Despite the existence of

"form contracts" granting the defendant the "right to terminate the contract without cause," 327 P.3d at 173, *Ayala* remanded the case to the trial court to consider whether other *Borello* factors precluded certification. Indeed, *Ayala* emphasized that "the parties' course of conduct is [not] irrelevant. While any written contract is a necessary starting point," *Ayala* reaffirmed that "the rights spelled out in a contract may not be conclusive if other evidence demonstrates a practical allocation of rights at odds with the written terms." *Id*. at 174. The district court's error here was in treating *Ayala*'s starting point as the finish line, which allowed it in turn to dismiss Zimmer's "other evidence" as irrelevant.[2]

If allowed to stand, the district court's erroneous interpretation of *Borello* and *Ayala* will have serious implications for businesses and consumers alike. For starters, it necessarily assumes that defendants will not have the opportunity to raise individualized challenges to the employment status of particular salespeople. That approach cannot be squared with *Dukes* and the many other cases construing Rule 23 to preserve defendants' rights to litigate defenses to individual claims. 564 U.S. at 366. Moreover, the district court's overly permissive approach will in practice deny defendants the right to raise any defense at all. As the Supreme

[2] It would make little sense in practice to divine employment status from an at-will agreement alone. A contractor retained to renovate a house is the classic example of an independent contractor. No one would contend that the contractor is an employee just because he can be terminated at will.

Court has explained, "[c]ertification of a large class may so increase the defendant's potential damages liability and litigation costs" that even the most surefooted defendant "may find it economically prudent to settle and to abandon a meritorious defense." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978); *see AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011). And the costs of *in terrorem* settlements are eventually passed on to consumers. Meanwhile, the district court's interpretation of *Borello* and *Ayala* will effectively resolve the employment status of thousands of contractors (if not more) within this Circuit who are subject to at-will agreements.

In the end, it bears repeating that "[t]he class action is an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Dukes*, 564 U.S. at 348 (quotations omitted). But under the district court's misguided approach, class actions would become the rule rather than the exception in misclassification cases, given the ubiquity of at-will agreements. This Court should grant the petition and restore much-needed clarity to this important area of the law.

B. The District Court Made Essentially The Same Mistake With Respect To The ABC Test

The district court similarly erred as to the ABC test. Under California Labor Code § 2750.3(a)(1), misclassification claims arising after January 1, 2020 are governed by the three-part ABC test unless an exception applies. The district court

found that the ABC test was amenable to class treatment for the reasons just described: "it remains enough for class treatment here that plaintiffs' theory turns on Zimmer's common authority over its work force." Op. 14.

But the court again disregarded Zimmer's defense. Zimmer contended that the ABC test was not applicable because much of its workforce is subject to the "business-to-business" exception. Cal. Labor Code § 2750.3(e). And to determine whether that exception applies, the court will be required to consider (among other things) whether Zimmer contracted with salespeople who formed their own business entities. But instead of determining whether the exception's applicability could be adjudicated on a classwide basis, the district court punted, calling this "a merits question for later." Op. 14; *id*. at 5 ("whether [exception] applies asks a merits question properly left for a later date").

That was legal error. Under *Dukes*, a district court is *required* to undertake an "inquiry into the merits of the claim" if that inquiry bears on the claim's amenability to class treatment. *Comcast*, 569 U.S. at 35; *see Dukes*, 564 U.S. at 351-52. Whether the business-to-business exception applies is a merits question; but whether the exception's applicability can be determined on a classwide basis is a class-certification question that the district court was obligated to consider *before* it certified a class. Interlocutory review is warranted for this reason as well.

III. IMMEDIATE APPEAL UNDER RULE 23(f) IS WARRANTED

This Court should grant Zimmer's petition because of the importance of the legal issues presented, because district courts within this Circuit have divided on those issues, and because the district court's decision to certify the class was clearly erroneous. Pet. 13-25.

Immediate review is especially warranted, moreover, because the court's certification order exemplifies a troubling trend in class-action litigation. *See, e.g.*, *Alfred v. Pepperidge Farm, Inc.*, 322 F.R.D. 519 (C.D. Cal. 2017). Instead of confronting head-on whether Zimmer's arguments precluded classwide adjudication, the court assumed that Zimmer would be denied the opportunity to make those arguments at all. Under the district court's analysis, a plaintiff need only articulate an issue that is *theoretically* capable of classwide resolution if taken at face value. It is true, for example, that Zimmer's standard agreements *could* suffice to establish that it does or does not have the right to control, and that this conclusion *could* suffice to establish whether plaintiffs were properly classified. But that analysis assumes away Zimmer's evidence showing that plaintiff-specific proof would also be required to determine that question. The same is true with respect to the "business-to-business" exception.

The district court's errors, in other words, not only undermine the class certification decision in this case and many others raising misclassification issues,

but demonstrate a common misunderstanding concerning district courts' crucial role in assuring that the efficiencies of the class vehicle are achieved, that defendants' due-process rights are protected, and that abusive class actions are cut off at the pass. This Court could have resolved these issues upon granting 23(f) review in *Alfred*, but the case settled before the Court could do so. This case presents the Court with another opportunity.

CONCLUSION

The petition for immediate appeal should be granted.

Dated: August 18, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B), Circuit Rule 32-1(a), and Circuit Rule 32-2(b) because this brief contains 2,798 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and Circuit Rule 32-1(c).

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 2010 in Times New Roman 14-point font.

Dated: August 18, 2020

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of August, 2020, I electronically filed the foregoing with the Clerk of the Court for the U.S. Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. All participants are registered CM/ECF users, and will be served by the appellate CM/ECF system.

Dated: August 18, 2020

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