No. 18-80135

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

IN RE QUALCOMM ANTITRUST LITIGATION

Petition for Review of Order Granting Certification of Class from the United States District Court for the Northern District of California, Docket No. 17-md-02773-LHK, The Honorable Lucy H. Koh, District Judge

REPLY BRIEF IN SUPPORT OF PETITION FOR PERMISSION TO APPEAL PURSUANT TO RULE 23(F) FROM ORDER GRANTING CLASS CERTIFICATION

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Federal Cases

Federal Rules

INTRODUCTION

The plaintiffs' Answering Brief ("AB") offers no persuasive reason for declining to review the largest class action ever certified in this Circuit. Three issues warrant this Court's attention.

First, the district court applied California's antitrust laws to a nationwide damages class that includes indirect purchasers residing in states that deny them standing to sue for damages. The district court thus created an intra-Circuit split, parted ways with district courts across the nation, and contravened *Mazza v. American Honda Motor Co., Inc.*, 666 F.3d 581 (9th Cir. 2012). A legal error of this magnitude, which adds over 100 million class members to a class already chafing at Rule 23's outer limits, cannot await end-of-case review.

Second, plaintiffs point to no class *anywhere* that approaches this one in size or scope; they offer no plan for managing this unprecedented class action; and the district court certified it without even asking for one. As the First Circuit held just four days after Qualcomm filed its petition, that error justifies reversal. *In re Asacol Antitrust Litig.*, ___F.3d ___, 2018 WL 4958856, at *11 (1st Cir. Oct. 15, 2018) (reversing certification decision on Rule 23(f) review).

Third, the class contains approximately 95 million iPhone purchasers who, under plaintiffs' own theory, suffered no antitrust injury at all. Such a class cannot be certified. *Id.* at *6. This Court should grant the petition.

ARGUMENT

I. The district court's choice-of-law analysis was manifestly erroneous.

A. The district court's ruling is an outlier.

Plaintiffs argue that the district court's choice-of-law ruling cannot be manifestly erroneous "given ample precedent supporting [its] decision." AB 5. No such support exists. In fact, neither plaintiffs nor the district court point to a single post-*Mazza* case—***not one***—that applies California's Cartwright Act to indirect purchasers residing in states that follow *Illinois Brick*. On the contrary, district courts in this Circuit, post-*Mazza*, have uniformly held that non-repealer states' interests in having their antitrust laws applied outweigh California's interest in extending its laws to indirect purchasers residing in those states.[1]

Plaintiffs and the district court rely on one federal case pointing the other way: *Pecover v. Electronic Arts Inc.*, 2010 WL 8742757, at *17 (N.D. Cal. Dec. 21, 2010). But *Pecover* was pre-*Mazza*. When refusing to apply California's privacy laws to out-of-state plaintiffs in *In re Yahoo Mail Litigation*, the district court itself distinguished *Pecover*, questioning (rightly) whether it "remain[ed] good law after *Mazza*." 308 F.R.D. 577, 604 (N.D. Cal. 2015). It doesn't.

[1] *See, e.g.*, *In re Lithium Ion Batteries Antitrust Litig.*, 2017 WL 1391491, at *14 (N.D. Cal. Apr. 12, 2017); *In re Korean Ramen Antitrust Litig.*, 2017 WL 235052, at *22 (N.D. Cal. Jan. 19, 2017); *In re Optical Disk Drive Antitrust Litig.*, 2016 WL 467444, at *13 (N.D. Cal. Feb. 8, 2016); *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 2013 WL 4175243, at *2 (N.D. Cal. July 11, 2013).

Not only does the district court's opinion create an intra-Circuit split, but it also parts ways with antitrust class actions across the country. When indirect-purchaser plaintiffs file federal antitrust class actions, they typically limit their proposed classes to consumers residing in *Illinois Brick* repealer states.[2] Courts in this Circuit and beyond also routinely *dismiss* indirect-purchaser claims from nationwide antitrust class actions where those claims arise from purchases made in non-repealer states.[3] The overwhelming weight of authority therefore reflects the principle—which this Court recognized in *Mazza*—that courts cannot stretch a single state's antitrust law to create a cause of action for residents of states that bar such claims entirely. But that is precisely what the district court did here.

B. Plaintiffs misread and misapply *Mazza*.

In *Mazza*, this Court applied California's governmental-interest test and concluded that (1) material conflicts existed among California and non-California consumer-protection laws with respect to scienter, reliance, and remedies; (2) each state had an important interest in striking its own balance between protecting

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[2] *See, e.g.*, *In re Asacol*, 2018 WL 4958856; *In re Cathode Ray Tube (CRT) Antitrust Litig.*, 2013 WL 5391159 (N.D. Cal. 2013); *In re DDAVP Indirect Purchaser Antitrust Litig.*, 903 F. Supp. 2d 198 (S.D.N.Y. 2012).

[3] *See, e.g.*, *In re Packaged Seafood Prod. Antitrust Litig.*, 242 F. Supp. 3d 1033, 1068 (S.D. Cal. 2017); *In re Packaged Ice Antitrust Litig.*, 779 F. Supp. 2d 642, 657 (E.D. Mich. 2011); *In re Wellbutrin XL Antitrust Litig.*, 260 F.R.D. 143, 168 (E.D. Pa. 2009); *In re Grand Theft Auto Video Game Consumer Litig.*, 251 F.R.D. 139 (S.D.N.Y. 2008); *In re Graphics Processing Units Antitrust Litig.* ("*GPU*"), 527 F. Supp. 2d 1011, 1028 (N.D. Cal. 2007).

consumers and attracting foreign businesses; and (3) foreign states had a strong interest in having their own consumer-protection laws applied to transactions between their residents and corporations doing business in their state, while California had only an "attenuated" interest in applying its consumer-protection laws to residents of foreign states. 666 F.3d at 590–94. Accordingly, each class member's claim was governed by the consumer-protection laws of the jurisdiction in which he or she purchased the product at issue (in *Mazza*, a car). *Id*. at 594.

The same analysis applies here when analyzing the difference between California antitrust-standing law and the antitrust-standing law of "non-repealer" states. Yet Judge Koh halted her analysis at step (2) of the governmental-interest test, concluding that foreign states had ***no*** interests worthy of being weighed against California's. Plaintiffs largely abandon any defense of Judge Koh's reasoning and try instead to distinguish *Mazza* on three spurious new grounds.

First, plaintiffs assert that the state-law conflicts were more complex in *Mazza*—resulting in a greater "predominance" problem—because they concerned *three* variables (scienter, reliance, and remedies) instead of *one* (indirect-purchaser standing). AB 6–7. But "more complex" doesn't mean "more material" or "more outcome-determinative." The standing/no standing distinction is as material as it gets, because "no standing" means that consumers in non-repealer states never take the field, let alone round the bases of scienter, reliance, and remedy before heading

home. And that is why, post-*Mazza*, no other court in this Circuit has lumped indirect purchasers from repealer and non-repealer states together in a single nationwide class. *See* Part I.A., *supra*.

Plaintiffs argue that correcting this error would merely "chip away" at the class's size. AB 7. But it's not a "chip," it's a chop—and a big one at that. Roughly 53% of U.S. residents live in non-repealer states.[4] Reducing the class's estimated size by the same percentage would eliminate roughly more than 100 million consumers presenting more than half a billion claims. It is patently improper for a court to certify a class when perhaps half of the class members lack standing as a matter of law. Plaintiffs suggest that this little detail could be tidied up on appeal from final judgment, obviating Rule 23(f) review. AB 4. But here's what that would mean: throughout the course of a lawsuit that will take years to resolve, the parties and the court will be needlessly saddled with the administrative and evidentiary burdens of having more than *100 million* extra claimants in the case—not *one* of whom meets the basic threshold requirement of standing. The parties also will labor under a grossly inflated view of the damages at issue. The time to

[4] *See* https://www.americanbar.org/content/dam/aba/publishing/antitrust_source/lindsay_chart.authcheckdam.pdf (identifying the 24 non-repealer states); http://worldpopulationreview.com/states/ (disclosing the percentage of the U.S. population living in each state).

remedy that situation is now, when it can be done efficiently and with massive savings to the court and parties.

Second, plaintiffs attempt to distinguish *Mazza* on the ground that the *Mazza* plaintiffs sought to impose liability under California law against (1) a foreign defendant (2) for interactions with plaintiffs in other states; whereas here, (1) Qualcomm is headquartered in California and (2) plaintiffs did not interact with Qualcomm at all, in California or elsewhere, but instead purchased cellphones indirectly from other businesses that are not parties to this lawsuit. AB 14.

Plaintiffs draw these distinctions without explaining how they relate to California's governmental-interest analysis. More importantly, the plaintiffs misstate *Mazza*'s facts. In *Mazza*, as in this case, the sole defendant (American Honda) was a corporation headquartered in California—not a "foreign defendant." 666 F.3d at 590. And in both cases, the consumers (car purchasers/cellphone purchasers) had no direct "interactions" with the California defendant (American Honda/Qualcomm), but purchased the defendant's products (cars/cellphones) through other non-party California and non-California businesses (authorized dealerships/cellphone distributors). Yet despite all these similarities, here, unlike in *Mazza*, Judge Koh subjected the entire nationwide class to California law.

Third, plaintiffs try to distinguish *Mazza* on the ground that American Honda committed its alleged bad acts outside California, while Qualcomm

committed its alleged bad acts inside California. AB 9–10, 14. Again, plaintiffs fail to link their distinction to the governmental-interest analysis; and again, they misstate *Mazza*'s facts. American Honda, located in California, appears to have produced or directed the production of the allegedly misleading marketing materials and then distributed them to dealerships, TV stations, and magazines. 666 F.3d at 586–87. These activities allegedly resulted in consumer purchases, both inside and outside California, of cars equipped with a disappointing braking feature. Qualcomm likewise allegedly executed its allegedly anticompetitive practices in California, resulting in purchases, both inside and outside of California, of cellphones allegedly burdened by royalty overcharges. AB 9.

Plaintiffs' remaining arguments consist of quarreling with *Mazza*'s interpretation of California choice-of-law principles, primarily *Mazza*'s holding that the place of the wrong for conflicts purposes is "the jurisdiction in which the transaction took place." 666 F.3d at 594; *see also* AB 13–15. But only the *en banc* Court may revisit *Mazza*, and only if presented with solid arguments that the *Mazza* panel got it wrong. The plaintiffs offer none.

II. This 250-million-person class is unmanageable.

Plaintiffs argue that courts often certify class actions "numbering in the millions." AB 6. That may be, but this class is two orders of magnitude larger, and plaintiffs point to no class remotely approaching this one in size or diversity. They

cite two certified classes supposedly "of comparable size." *Id.* at 19. But both pale in comparison to this class in both sheer numbers and scope. *In re Bluetooth Headset Products Liability Litigation* concerned more than 100 million *Bluetooth headsets sold*, not class members, 654 F.3d 935, 939 n.4 (9th Cir. 2011), and *Hanlon v. Chrysler Corp.* concerned only 3.3 million Chrysler-minivan owners, 150 F.3d 1011, 1018 (9th Cir. 1998).

Having failed to identify any class remotely akin to this one, the plaintiffs argue that the class mechanism is made for large classes seeking small individual recoveries. AB 19. But "there are other tools available to address the problem of low-value, high-volume claims that pose individual issues of causation." *Asacol*, 2018 WL 4958856, at *10. Among other things, "[r]egulators may sue." *Id.* Here, the FTC is currently suing Qualcomm over the very conduct at issue in this action. *FTC v. Qualcomm*, No. 5:17-cv-00220 (N.D. Cal.).

The district court also skirted the crucial questions of class notice and damages. Although plaintiffs assert that they "consider[ed]" the notice question, AB 20, they presented no *evidence* on it to the district court. Instead, class counsel told the court that unnamed claims administrators would reach a "significant portion of the class." ECF 725-1 ¶ 14. When the plaintiffs finally submitted a post-certification notice plan, it violated class members' due-process rights. Plaintiffs' notice administrator declares that, given the class's "voluminous nature" and the

lack of "readily available" contact information, "direct notice in this case is not feasible." ECF 783-2 ¶ 9. But "individual notice to identifiable class members is not a discretionary consideration to be waived in a particular case." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176 (1974). Plaintiffs cannot simultaneously argue that practically every consumer in the United States is a class member, yet not a single unnamed class member can be identified.

On the question of how to calculate and allocate damages among a quarter-billion people holding 1.2 billion potential claims, the plaintiffs said nothing at all while the district court said only that it "expects that Plaintiffs will be able to propose efficient means to calculate and distribute damages to class members." ECF 760 at 63. This 'certify first, manage later' approach to class certification finds no support in Rule 23, which demands manageability be proven *ex ante*, not *ex post*. *See* Fed. R. Civ. P. 23(b)(3)(D).

Plaintiffs' failure to present, and the district court's failure to require, a workable damages plan—or any damages plan at all—at the time of certification is particularly problematic in this case. Here, each class member would be entitled to three times the amount of her overpayment—a determination "complicated by the scores of different products involved, varying local market conditions, fluctuations over time, and the difficulties of proving consumer purchases after a lapse of five

or ten years." *Abrams v. Interco*, 719 F.2d 23, 31 (2d Cir. 1983). Plaintiffs' answering brief ignores this problem, just as their class-certification motion did.

III. The district court manifestly erred in finding classwide impact.

The district court manifestly erred when it certified a class containing a "great number" of uninjured class members. *See Torres v. Mercer Canyons, Inc.*, 835 F.3d 1125, 1138 (9th Cir. 2016). Of the 1.2 billion cellphone purchases at issue, nearly 100 million are iPhones purchased after Apple's contract manufacturers stopped paying royalties to Qualcomm. That fact alone precludes Rule 23(b)(3) predominance.[5] *Asacol*, 2018 WL 4958856, at **10–11.

Plaintiffs also argue that critiques of Dr. Flamm's "pass-through" regression model are best reserved for summary judgment. AB 17–18. They rely on *Optical Disk Drive* for that proposition, but fail to name the expert whose analysis was rejected on summary judgment in that case: Dr. Flamm. 2017 WL 6503743, at *10. Plaintiffs also ignore cases that denied certification when a pass-through analysis, like Dr. Flamm's, neglected to take bundling, rebates, and discounts into account. *Batteries*, 2017 WL 1391491, at *12; *GPU*, 253 F.R.D. 478, 505 (N.D. Cal. 2008).

CONCLUSION

The Court should grant the petition.

[5] Notably, the plaintiffs just served a merits expert report purporting to calculate overcharges to OEMs. No overcharges were calculated for post-2016 iPhone sales.

Dated: October 30, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1 because it is proportionally spaced, has a typeface of 14 points or more and contains 2,131 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

I hereby certify that on October 30, 2018, 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.

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