IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

Case No. 21-80121

AUDREY HEREDIA, successor-in-interest to the Estate of Carlos Heredia, et al.,

Plaintiffs-Respondents,
v.

SUNRISE SENIOR LIVING, LLC, et al.,

Defendants-Petitioners.

On Rule 23(f) Petition Challenging Order Granting Class Certification
by the United States District Court for the Central District of California
Case No. 8:18-CV-1974

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS-PETITIONERS' RULE 23(F) PETITION

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CORPORATE DISCLOSURE STATEMENT

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/s/ Adam G. Unikowsky

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STATEMENT REGARDING CONSENT

All parties consent to the filing of this brief.[1]

IDENTITY AND INTEREST OF AMICUS AND SUMMARY OF ARGUMENT

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents 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. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the Nation's business community, including amicus briefs at the Rule 23(f) stage. *See, e.g.*, *Arnold v. State Farm Fire & Casualty Co.*, No. 20-90029 (11th Cir. Dec. 14, 2020); *Mitchell v. State Farm Fire & Casualty Co.*, No. 18-90043 (5th Cir. Oct. 15, 2018); *McArdle v. AT&T Mobility LLC*, No. 18-80102 (9th Cir. Sept. 5, 2018); *Ferreras v. American Airlines, Inc.*, No. 18-8023 (3d Cir. Mar. 27, 2018).

[1] Pursuant to Fed. R. App. P. 29(a)(4)(E), *amicus curiae* states that no party's counsel authored this brief in whole or in part; that no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and that no person other than the *amicus curiae*, its members, or its counsel contributed money that was intended to fund preparing or submitting the brief.

The district court's class certification order conflicts with *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021). *TransUnion* holds that under Article III, uninjured class members cannot recover damages. Yet, the district court certified a class in which most, if not all, class members were uninjured. Undoubtedly, assisted living residents need care and are often dependent on staff members for that care. But Plaintiffs do not allege that absent class members experienced any physical or emotional injury from allegedly insufficient staffing. Nor do they even allege that they experienced inadequate care from staff members that created the risk of an injury. Instead, they allege that Sunrise used a staffing model that created a *risk* of lower staffing levels that in turn created a *risk* of harm—in effect, an allegation of a "risk of a risk" of harm. Under *TransUnion*, that is insufficient to establish injury under Article III. Yet the district court certified the class without even mentioning *TransUnion*, let alone conducting the analysis *TransUnion* requires.

The district court's decision contradicts Supreme Court precedent and, if followed by other courts, would render *TransUnion* inapplicable in a broad swath of cases. The Chamber and its members have a strong interest in ensuring that district courts comply with *TransUnion*, and in encouraging courts of appeals to correct lower court decisions that stray from Supreme Court precedent.

ARGUMENT

I. The District Court Erred in Certifying a Class that Included Uninjured Members.

In *TransUnion*, the Supreme Court held that Article III forbids a court from entering judgment in favor of uninjured class members. Despite plaintiffs' creativity, this case is *TransUnion* all over again. Because most, if not all, class members were uninjured, the district court erred in certifying the class.

It is important to pin down the exact nature of Plaintiffs' asserted injury. First, Plaintiffs explicitly state that they "do[] not seek recovery for personal injuries, emotional distress, or bodily harm that may have been caused by Sunrise's conduct." C.D. Cal. Order at 28, ECF No. 503 ("Order") (quoting complaint). Undoubtedly, many seniors who reside in assisted living facilities need care and are often dependent on staff members for it. If a resident experiences physical or emotional mistreatment, that resident indisputably has standing under Article III to seek recourse. But Plaintiffs chose not to allege any physical or emotional injury to avoid individualized questions that would preclude class certification. *See id.*

Second, Plaintiffs do not allege that the class actually encountered substandard staffing. They do not allege that they were promised a specific level of staffing and did not receive it. Hence, this case does not present the question whether a resident who actually experiences substandard staffing suffers an Article III injury.

Instead, Plaintiffs allege they were "exposed" to a staffing *model* that *might*, in some cases, have resulted in substandard staffing. ECF No. 411-1, at 16 ("all class members are exposed to the challenged staffing policies"). This is the injury that the district court deemed sufficient to warrant class certification. *See* Order at 8 ("Plaintiffs assert as a result of Sunrise's deficient staffing model, '[a]ll residents are subject to a corporate staffing model that fails to ensure staffing sufficient to meet promised services.'"). It is no accident that Plaintiffs frame their injury that way. If the asserted injury were exposure to low levels of staffing, then variations in staffing levels—and Sunrise's declarations of residents who experienced adequate staffing—would have foreclosed class certification. Only by framing their injury as exposure to the *risk* of low levels of staffing were Plaintiffs able to convince the district court that class certification was warranted. Order at 24-25 ("Sunrise further argues that Plaintiffs' claims fail as to predominance and commonality because 'staffing at Sunrise varies based on local manager's discretion, the 'neighborhood' where the resident lived, the time period, and each resident's needs.' … But the Court is not convinced that these issues would predominate in this action given Sunrise's own admissions that all residents … are all subject to Sunrise's *allegedly deficient staffing model*." (emphasis added)).

TransUnion forecloses Plaintiffs' claim that mere exposure to a deficient staffing model constitutes an Article III injury. In *TransUnion*, the Supreme Court

concluded that the mere risk of harm is not an injury giving rise to standing. 141 S. Ct. at 2208, 2210-11. Here, the claim of injury is even weaker than in *TransUnion*. In effect, Plaintiffs assert a "risk of a risk" of harm—they allege that their exposure to the staffing model created a *risk* of insufficient staffing, which, in turn, created a *risk* that they would encounter a physical or emotional injury. That double bank shot does not establish an Article III injury.

In an attempt to establish actual injury, Plaintiffs assert two theories of economic injury. First, Plaintiffs allege that they seek to recover "move-in fees." Order at 15. Residents pay those fees prior to admission, before they receive daily care services. Order at 27.

Those move-in fees do not satisfy Article III's requirement of an injury "that is fairly traceable to the challenged conduct of the defendant." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016). Plaintiffs do not allege that Sunrise's alleged misrepresentations induced any, much less all, class members to move into Sunrise's assisted living facilities. And if Plaintiffs would have moved into the assisted living facilities regardless of whether the alleged misrepresentations were made, Plaintiffs cannot trace the move-in fees to the alleged misrepresentations.

Plaintiffs' second theory of actual damages is that they are entitled to recover a "portion of the monthly fees paid for care services." Order at 15-16. Plaintiffs

argue that they are entitled to compensation of the value of what was promised and not received—*i.e.*, an allegedly more favorable staffing model.

That argument is irreconcilable with *TransUnion*. The Supreme Court held that bare risk of harm is not itself an actionable harm. Plaintiffs cannot transmute a risk of harm into actual harm merely by characterizing the risk as lowering the value of the service they purchased.

Indeed, although this Court has yet to weigh in on this issue post-*TransUnion*, a recent Eighth Circuit case makes precisely this point. In *Johannessohn v. Polaris Industries, Inc.*, 9 F.4th 981 (8th Cir. 2021), the plaintiffs alleged that Polaris "failed to disclose heat defects and that this artificially inflated the price of their all-terrain vehicles." *Id.* at 983-84. Plaintiffs theorized that "they can show economic injury by the mere fact that they paid an inflated purchase price." *Id.* at 988. The Eighth Circuit rejected this claim and held the plaintiffs lacked Article III standing, applying the principle that "purchasers of an allegedly defective product have no legally recognizable claim where the alleged defect has not manifested itself in the product they own." *Id.* at 987 (quotation marks omitted). Here, too, Plaintiffs were not injured by merely being exposed to an allegedly defective staffing model, and cannot cure that defect by asserting that they paid an inflated purchase price.

At a minimum, the Court should vacate and remand to the district court to conduct a *TransUnion* analysis. Although Sunrise raised this issue in the district court, the district court made no mention of it.

That omission was erroneous. Courts must apply "a rigorous analysis" to putative class actions to ensure that both "the prerequisites of Rule 23(a)" and "Rule 23(b)(3)'s predominance criterion" have been satisfied before any class is certified. *Comcast Corp. v. Behrend*, 569 U.S. 27, 33-34 (2013) (quotation marks omitted). Plaintiffs must demonstrate "through evidentiary proof" that their claims "in fact" can be litigated on a class-wide basis without the need for individualized mini-trials. *See id.* Plaintiffs must also demonstrate standing through evidentiary proof. *TransUnion*, 141 S. Ct. at 2208 ("A plaintiff must demonstrate standing with the manner and degree of evidence required at the successive stages of the litigation." (internal quotation marks omitted)).

Taking these two principles together, class certification requires affirmative proof that all—or at least most—class members have standing. *Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1137-38 & n.6 (9th Cir. 2016). Here, Plaintiffs theorized that all class members suffered economic harm, but they bore the burden of proving that theory, not just alleging it. Sunrise persuasively argued that numerous class members were uninjured. The district court could not merely ignore Sunrise's

argument, make no findings on actual injury, and certify the class. This Court should, at a minimum, remand for the district court to conduct a *TransUnion* analysis.

II. This case warrants immediate review under Rule 23(f).

The Court should grant review under Rule 23(f) because this case presents an important question of law that stretches beyond the facts of this case. If followed by other courts, the district court's reasoning would nullify *TransUnion* in a broad swath of cases and result in deleterious policy consequences.

The district court's decision means that a mere risk of harm can be deemed economic injury every time a plaintiff has an economic relationship with the defendant. Sunrise provides the apt analogy of hotel guests suing over an allegedly flawed corporate staffing formula. Pet. at 18. In such a case, if an expert were willing to assert that a more favorable staffing formula would have made a hotel reservation marginally more valuable, the district court's theory would allow the judge to certify the class on the ground that all class members suffered economic injury consisting of a miniscule fraction of the purchase price.

That conclusion, in turn, would nullify *TransUnion* in all cases in which the plaintiff is a buyer and the defendant is a seller. In all such cases, the plaintiff could transform risk of harm into actual harm merely by stating that the risk decreased the value of the service or product and hence should have resulted in a lower purchase price. *TransUnion* would be confined to the rare case in which the plaintiff lacks a

direct relationship with the defendant. *TransUnion* was such a case (the defendant was a credit reporting agency), but there are few others like it. The Court should not countenance a ruling that virtually limits *TransUnion* to its facts.

Permitting Plaintiffs to evade *TransUnion* would have harmful policy consequences. Class actions dominated by uninjured class members have no social value. The theory behind class action litigation is that each member of a large class of plaintiffs may have suffered a small injury that is insufficient to justify bringing an individual suit. Thus, the class action suit, in theory, deters wrongdoers from causing injuries that are, in the aggregate, large. That theory does not work where, as here, most if not all class members suffers *zero* damage, resulting in an aggregate actual damage amount that is similarly near zero, while carrying staggering statutory damages price tags.

What is more, if class members need not prove injury, it would be easy to assemble large classes—such as every single person who has ever used a service or purchased a product. In this case, for instance, the class includes over 3,000 members, seeking hundreds of millions of dollars in damages. Order at 29; Pet. at 1. Large classes inevitably yield unfairness to defendants. The Supreme Court has noted "the risk of '*in terrorem*' settlements that class actions entail." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011). "Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims."

Id. The bigger the class, the bigger the *in terrorem* risk. What is more, the bigger the class, the less realistic it is for defendants to provide individualized defenses for particular class members. It is true that the presence of individualized defenses does not automatically foreclose class certification: "That the defendant might attempt to pick off the occasional class member here or there through individualized rebuttal does not cause individual questions to predominate." *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 276 (2014). Yet providing individualized rebuttals is particularly difficult when thousands of claims must be simultaneously investigated and defended.

Class actions harm not only to businesses, but also their customers who ultimately bear the costs. Assisted living facilities, in particular, have struggled enormously during the COVID-19 pandemic. Hundreds of senior care facilities have closed or today teeter on the edge of bankruptcy.[2] Diverting the time of facilities to defending against class-action lawsuits and spending limited resources on defense attorney fees and class counsel fees ultimately harms these facilities and their residents—just as it harms all businesses and customers. Plaintiffs' theory would create an end-run around *TransUnion* and open the door to a wave of class action

[2] Press Release, Am. Health Care Ass'n, *Nursing Homes Need Financial Support to Prevent Mounting Closures* (June 17, 2021), https://www.ahcancal.org/News-and-Communications/Press-Releases/Pages/Nursing-Homes-Need-Financial-Support-To-PreventMounting-Closures.aspx; Tony Pugh, *Bankruptcies, Closures Loom for Nursing Homes Beset by Pandemic*, Bloomberg Law (Dec. 30, 2020), https://news.bloomberglaw.com/health-law-and-business/bankruptcies-closures-loom-for-nursing-homes-beset-by-pandemic.

lawsuits against businesses in every industry, imposing substantial costs on an economy already struggling to recover from the pandemic.

CONCLUSION

The petition for permission to appeal should be granted.

Respectfully submitted,

December 7, 2021

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CERTIFICATE OF COMPLIANCE

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/s/ Adam G. Unikowsky

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of December, 2021, a true and correct copy of the foregoing Brief was served via the court's CM/ECF system, and on the following counsel via electronic mail. Counsel for Plaintiffs have consented to this mode of service.

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