No. 18-_____

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STEVEN MCARDLE,
Plaintiff-Respondent,

v.

AT&T MOBILITY LLC; NEW CINGULAR WIRELESS PCS LLC;
NEW CINGULAR WIRELESS SERVICES, INC.,
Defendants-Petitioners.

Petition for Leave to Appeal from an Order of the United States District Court for the Northern District of California, No. 4:09-cv-01117-CW, Judge Claudia Wilken, Presiding

PETITION FOR LEAVE TO APPEAL A CLASS-CERTIFICATION ORDER UNDER FED. R. CIV. P. 23(f)

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RULE 26.1 DISCLOSURE STATEMENT

AT&T Mobility LLC is a nongovernmental limited liability company that has no parent company. Its members are BellSouth Mobile Data, Inc.; SBC Long Distance, LLC; and SBC Tower Holdings LLC. Those entities (and thus AT&T Mobility LLC) are all indirectly wholly owned by AT&T Inc., which is the only publicly held company with a 10 percent or greater ownership stake in them.

New Cingular Wireless Services, Inc. is a nongovernmental corporate entity that is wholly owned by AT&T NCWS Holdings, Inc., which in turn is wholly owned by BellSouth Mobile Data, Inc., which is wholly owned by AT&T Inc., the only publicly held company with a 10 percent or greater ownership stake in New Cingular Wireless Services, Inc.

New Cingular Wireless PCS LLC is a nongovernmental limited liability company that has no parent company. New Cingular Wireless PCS LLC's sole member is AT&T Mobility II, LLC; its members in turn are all privately held companies that are wholly-owned subsidiaries of AT&T Inc. AT&T Inc. is the only publicly held company with a 10 percent or greater ownership stake in New Cingular Wireless PCS LLC.

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INTRODUCTION

The class-action device was created to enable the efficient resolution of numerous essentially identical claims. Here, the district court turned that purpose on its head by certifying a class of people whose claims turn on varying facts and therefore cannot possibly be resolved in a single stroke. The court justified its conclusion with legal determinations that effectively preclude AT&T from relying on individualized evidence that it could, and would, present if the claims were litigated separately. That fundamental violation of Rule 23, the Rules Enabling Act, and due process should be reviewed and reversed by this Court.

Plaintiff Steven McArdle alleges that AT&T inadequately disclosed to customers traveling abroad between 2005 and 2009 that—because of how foreign carriers reported calls to AT&T—customers might incur roaming charges for unanswered calls. This claim, however, turns on individualized circumstances, including which written disclosures each customer received, whether an employee warned the customer about the charges, and whether the customer would have elected to risk incurring the charges in any event in order to use his or her phone abroad.

The district court glossed over these individualized issues in holding that Rule 23(a)(2)'s requirement that class claims involve questions "common to the class" was satisfied and that Rule 23(b)(3)'s predominance requirement was met. Both rulings entail "manifest error" on a "fundamental issue of law relating to class actions" and therefore warrant review under Federal Rule of Civil Procedure 23(f). *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 955 (9th Cir. 2005).

First, as to commonality, the district court concluded that, because every customer received the Terms of Service and a ***domestic*** rate-plan brochure, the question whether those materials inadequately disclosed the charges was a common issue. But the question whether AT&T's disclosures to a class member were inadequate turns on other disclosures that many customers indisputably received—including in the ***international*** rate-plan brochure—not just those two documents. The district court's holding misapplies the sole precedent on which the court relied—*Hanlon v. Chrysler Corp.*, 150 F.3d 1011 (9th Cir. 1998)—and more importantly cannot be squared with the Supreme Court's subsequent decisions in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011), and *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036 (2016). Those

cases establish that the commonality requirement is satisfied only when class members' claims "depend upon a common contention" that "is capable of classwide resolution … in one stroke" (*Dukes*, 564 U.S. at 350), employing the "'same evidence'" or "'generalized, class-wide proof'" (*Bouaphakeo*, 136 S. Ct. at 1045 (citation omitted)). That is not possible here—at least not without disregarding evidence of other disclosures that many customers (including McArdle) received beyond the two that the court identified.

Second, the crux of the district court's holding on predominance—that all class members can be presumed to have relied on the Terms of Service and domestic brochures ***alone***—contravenes several decisions of this Court (all of which the district court ignored), deviates from substantive California law on the issue, and either creates or deepens two intracircuit conflicts regarding when a plaintiff is entitled to a presumption of reliance for consumer-protection claims.

Review is urgently needed to correct these two serious deviations from precedent.

QUESTIONS PRESENTED

1. Whether the district court's application of Rule 23(a)(2)'s commonality requirement is irreconcilable with the Supreme Court's holding in *Dukes* that commonality is present only when class members' claims "depend upon a common contention" that "is capable of classwide resolution … in one stroke" (564 U.S. at 350).

2. Whether the district court's application of Rule 23(b)(3)'s predominance requirement is irreconcilable with decisions of this Court and district courts within this Circuit holding that class-wide reliance cannot be presumed when the class members received varying disclosures or when the claims rest on both alleged misrepresentations and alleged omissions.

FACTUAL BACKGROUND

A. International-Roaming Charges For Unanswered Calls Depended On How Foreign Carriers Reported The Calls To AT&T.

McArdle alleges that, between 2005 to 2009, AT&T inadequately disclosed that customers traveling abroad might incur international-roaming charges for unanswered calls that were routed to voicemail. Dkt. 378, ¶¶ 19-30.

During the class period, carriers operating on the global "GSM" standard, including AT&T, paid each other for calls made by their subscribers roaming on other carriers' networks. Dkt. 161, Ex. 2, at 37; Dkt. 349, Ex. 3, ¶¶ 6-9. The home carrier then could collect international-roaming charges from its customers based on the records it received from the foreign carrier. *Id.*

When a roaming AT&T subscriber did not answer a call, foreign carriers sometimes (although not always) charged AT&T for two calls: one for delivering the call to the phone and one for forwarding the call to AT&T's voicemail platform. Dkt. 161-2, at 40-43; Dkt. 349-3, ¶¶ 17-20. But the records did not distinguish between ***unanswered*** calls and brief ***answered*** calls. Dkt. 154, ¶ 8; Dkt. 160, ¶¶ 5-9; Dkt. 349-3, ¶¶ 22-23.

Similarly, AT&T could differentiate between a call ***leaving*** a voicemail and a call by the customer to ***retrieve*** voicemails only if the foreign carrier had flagged the call as a "call forward"—something that wasn't required and that foreign carriers were inconsistent about doing. Dkt. 349-3, ¶¶ 22-25. If the call was flagged, AT&T didn't bill the customer for the voicemail deposit. Dkt. 161-3, at 191.

Because of technological improvements, AT&T customers today generally do not incur roaming charges for unanswered calls. Dkt. 350, ¶¶ 5-7. For example, starting in August 2008—during the class period—AT&T began using signaling protocols to route unanswered calls directly to voicemail without ever sending them to the foreign network. Dkt. 161-2, at 74-78, 82-89.

B. AT&T Customers Received Various Written And Oral Disclosures Of Potential Roaming Charges.

During the class period, AT&T disclosed in varying ways and through multiple channels the possibility that customers might incur charges for unanswered calls. Dkt. 343.

Domestic rate-plan brochures and Terms of Service booklets. As the court below noted (Dkt. 374, at 4-6), AT&T's domestic brochures and Terms of Service disclosed the possibility of roaming charges for unanswered calls. Dkt. 349-4, ¶¶ 15-17. Although the placement in the domestic brochures changed over time, each stated: "You may be charged for both an incoming and an outgoing call when incoming calls are routed to voicemail, even if no message is left." Dkt. 164, Exs. 1-7.[1]

[1] As the district court noted, during the class period this disclosure appeared in some—but not all—of the domestic brochures under the

The Terms of Service stated that customers could incur "Chargeable Time" generated by "voicemail deposits and retrievals." *E.g.*, Dkt. 168, Ex. 1, at 4.

International rate-plan brochures. Because domestic rate plans do not apply abroad, AT&T communicated the terms of its international offerings to customers in several ways.

For example, customers who signed up for or asked about international services in AT&T stores ordinarily received international brochures. Dkt. 159, ¶ 3. Although the wording of the brochures varied over time, the key disclosure, which was at the beginning of the contract terms in the brochures, made plain that customers could be charged for unanswered calls: "When outside the U.S., ***you will be charged for both an incoming and an outgoing call when incoming calls are routed to voicemail even if no message is left.***" *Eg.*, *id.* at 1 (emphasis added).

Online disclosures. AT&T's website also included disclosures. For example, AT&T's International Services Terms and Conditions

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wrong heading: "'Caller ID Blocking.'" Dkt. 345, at 5. The court did not suggest that any of the other disclosures in other documents given to customers were mislabeled or otherwise difficult to locate.

webpage prominently stated: "When outside the U.S., ***you will be charged normal roaming airtime rates when incoming calls are routed to voicemail, even if no message is left***." Dkt. 153, ¶ 11, Exs. 18-20 (emphasis added).

AT&T's international-roaming webpage also linked to a "Frequently Asked Questions" page that discussed charges for unanswered calls. *Id.* ¶ 10. Starting in May 2008, one of the questions on the page stated:

> Q. How am I charged for voicemail calls while roaming internationally?
>
> A. Voicemail calls are charged as follows:
>
> **When your device is on:**
>
> - Calls that you do not answer that are routed to the AT&T voicemail system will be charged as an international roaming incoming call to your device.
>
> - In addition, the foreign carrier's routing of that call to the AT&T voicemail system may generate an outgoing call charge from your device's location to the U.S.
>
> - These charges apply even if the caller disconnects from the voicemail system without leaving a message.
>
> **If your device is turned off or in flight mode and the wireless network is off:**
>
> - When someone tries to call you, the call will go directly to your personal voicemail greeting.

- Since the network does not try to deliver the call to you in a foreign country, there are no international roaming charges.

Id. Ex. 17.[2]

Many AT&T customers visited these webpages before traveling. Indeed, AT&T prompted customers to do so. For example, customers who had international roaming automatically added to their account were sent a text referring them to the website or customer care for details. Dkt. 159, ¶¶ 7-9. And starting in December 2007, AT&T began sending similar texts to many California customers who turned their phones on while abroad. *Id.* ¶ 10.[3]

Oral disclosures. AT&T's call-center and store employees were trained to inform customers planning trips abroad of the possibility of charges for unanswered calls. Dkt. 349-2, at 71. In discovery, AT&T produced summaries of tens of thousands of calls reflecting disclosures

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[2] Before 2008, the FAQ webpage discussion was more concise: "While roaming internationally, calls deposited to your voicemail (when phone is 'active' and if busy/no answer) will incur twice the per minute charge." Dkt. 153-14, at 1. AT&T does not have archived versions of that web page from before October 2006. *Id.* ¶ 10.

[3] Until November 2008, all California customers received these texts. Dkt. 159, ¶¶ 10, 15. Thereafter, the texts were sent only to customers with iPhones or PC cards, who were at the highest risk of incurring substantial data roaming charges—a different issue from the one about which McArdle complains. *Id.* ¶ 15.

by customer-service representatives to California customers. Dkt. 155-1. The number of oral disclosures likely is far higher, because call summaries are terse—often not documenting every disclosure provided—and because store employees generally do not document inquiries at all. Dkt. 158, ¶¶ 5-7.

C. AT&T Often Provided Credits To Customers Who Complained About The Charges.

Despite these disclosures, if customers complained that they were unaware that they might be charged for unanswered calls, AT&T often provided them with a bill credit. Dkt. 349-2, at 82. These credits often were categorized as "courtesy" or "airtime" credits not linked to particular charges. Dkt. 162, ¶ 3.

PROCEDURAL HISTORY

The operative complaint in McArdle's lawsuit, first filed in 2009, alleges that AT&T inadequately disclosed that he might incur roaming charges for unanswered calls during a 2008 trip to Italy. Dkt. 78, ¶¶ 33-36, 54. The complaint asserts claims for fraud and violations of California's Unfair Competition Law ("UCL") (Cal. Bus. & Prof. Code §§ 17200 *et seq.*), False Advertising Law ("FAL") (*id.* §§ 17500 *et seq.*),

and Consumers Legal Remedies Act ("CLRA") (Cal. Civ. Code §§ 1750 *et seq.*).

The district court initially denied AT&T's motion to compel arbitration (Dkt. 74), and the parties then proceeded to complete discovery and brief class certification. But after the Supreme Court's decision in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), this Court vacated that order. *McArdle v. AT&T Mobility LLC*, 474 F. App'x 515 (9th Cir. 2012). On remand, the district court compelled McArdle to arbitrate his claims. Dkt. 257.

The arbitrator conducted a two-day hearing, during which he heard testimony from five witnesses and reviewed over 3,500 pages of exhibits. Dkt. 274-1, ¶¶ 11-12. Significantly, McArdle admitted during cross-examination that he had read AT&T's international webpages, which he conceded "called out" the disputed charges, and that "he believe[d] that he might have looked at" an international brochure "before the trip," which he agreed contained an "explicit" disclosure. *Id.*, Ex. 24, at 2-3. The arbitrator rejected McArdle's claims, explaining that "the evidence established that McArdle was provided with multiple disclosures of the potential roaming charges" and that he either "ignored

them, forgot about them[,] or unreasonably misunderstood their content." *Id.* at 4.

The district court then vacated the arbitrator's award and rescinded its earlier decision compelling arbitration. Dkt. 287.[4] The court held that the arbitration provision's prohibition against public injunctive relief violated California public policy and that the entire provision was therefore unenforceable. *Id.* at 6-9 (citing *McGill v. Citibank, N.A.*, 393 P.3d 85 (Cal. 2017)).

McArdle then renewed his request for class certification. Dkt. 301. The district court granted the motion in part, certifying under Rule 23(b)(3) a class of California customers who, between February 6, 2005 and January 31, 2009, "were charged international roaming fees" for "unanswered incoming calls," except "(a) customers who received refunds or credits" for the charges; "and (b) for the class' CLRA claim, any customers who used their cell phones for business purposes." Dkt. 345, at 30.

The district court acknowledged that "AT&T provided various disclosures" of the challenged roaming charges to customers, noting

[4] AT&T's appeal from that order (No. 17-17246) has been fully briefed.

AT&T's "international rate plan brochure," "[a] more user-friendly 'Frequently Asked Questions'" webpage, and oral disclosures by employees. *Id.* at 3-4.[5] But citing *Hanlon*, the court held that common questions existed as to the adequacy of AT&T's disclosures because "Roaming Class members were all charged at international roaming rates for unanswered incoming calls and all were subject to the same Terms of Service and domestic rate plans." *Id.* at 14.

The court then concluded that these common questions predominated over individualized ones. The court first stated (without identifying any supporting evidence) that the "Terms of Service" and ***domestic*** "rate plan brochures" that all customers received "would have been the logical place for any customer to look when investigating how to use his or her phone while traveling abroad." *Id.* at 24-25. The court then held that if "those disclosures" alone "were likely to deceive the public, then"—despite the many additional varying disclosures provided to cus-

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[5] The district court implied that AT&T's international brochure was available only online. Dkt. 345, at 3. The international contract terms—and its disclosure of the disputed charges—were available online. Dkt. 153, ¶ 11, Exs. 18-20. But the international brochure also was provided to customers who inquired about international roaming at AT&T stores (Dkt. 274-4, ¶¶ 15-17)—which is how McArdle himself received one before his trip (Dkt. 274-1, Ex. 24, at 2-3).

tomers—McArdle could prevail on the class claims "without establishing the individual reliance [or causation] of absent class members." *Id.* at 24-28.

ARGUMENT

Rule 23(f) review is "most appropriate" when either (1) "the certification presents an unsettled and fundamental issue of law relating to class actions" or (2) "the district court's … decision is manifestly erroneous." *Chamberlan*, 402 F.3d at 959. The district court here committed two especially egregious errors on fundamental questions of class-action law: (1) whether McArdle has shown that "there are questions of law or fact common to the class" (Fed. R. Civ. P. 23(a)(2)); and (2) whether any such common questions "predominate over any questions affecting only individual members" (*id.* 23(b)(3)), which requires McArdle to prove that "the common, aggregation-enabling issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues" (*Bouaphakeo*, 136 S. Ct. at 1045 (internal quotation

marks omitted)). Each error independently warrants this Court's immediate review.[6]

I. Review Is Warranted Because The District Court's Analysis Of Commonality Is Irreconcilable With Decisions Of The Supreme Court And This Court.

The district court concluded that commonality exists here because class members "all were subject to the same Terms of Service and domestic rate plans" (Dkt. 345, at 13-14)—even though many class members received additional varying disclosures regarding international-roaming charges. The district court invoked this Court's statement in *Hanlon* that "[t]he existence of shared legal issues with divergent factual predicates is sufficient" to satisfy Rule 23(a)(2)'s commonality requirement. *Id.* at 13 (quoting *Hanlon,* 150 F.3d at 1019).

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[6] Space constraints preclude us from detailing the other significant errors in the decision below. They include: (i) the determination that McArdle satisfies the typicality requirement, even though he admitted receiving disclosures of the disputed charges (Dkt. 348, at 16-17); (ii) the holding that McArdle is an adequate class representative, despite his close friendship with class counsel and credibility problems (*id.* at 17-19); (iii) the determination that McArdle's expert could identify which class members were injured and to what extent, despite the expert's admission that he is incapable of performing his own analysis (*id.* at 24-26, 29-34); and (iv) the holding that class members who are subject to arbitration provisions may be included in the class because ***McArdle's*** arbitration provision (rather than their own) is unenforceable (as that court understands *McGill*) (*id.* at 28-29).

But *Hanlon* held that a settlement class alleging a uniform design defect in an automobile component "share[d] sufficient factual commonality" to satisfy Rule 23(a)(2). 150 F.3d at 1019-20. In that context, commonality was obvious: Determining that the component in one class member's vehicle had been designed defectively would conclusively resolve the issue for all class members.

Since *Hanlon*, the Supreme Court has made clear that *Hanlon*'s factual context was critical to the correctness of its holding, explaining: "What matters" for purposes of commonality "is not the raising of common 'questions'—even in droves—but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation." *Dukes*, 564 U.S. at 350. Thus, commonality exists only when class members' claims "depend upon a common contention" that "is capable of classwide resolution … in one stroke." *Id.* In other words, the "'same evidence'" or "'generalized, class-wide proof'" must "'suffice for ***each*** [class] member to make a prima facie showing.'" *Bouaphakeo*, 136 S. Ct. at 1045 (emphasis added; citation omitted).

Only by divorcing the statement in *Hanlon* from the context of that case—and also ignoring *Dukes* and *Bouaphakeo*—was the court be-

low able to conclude that the commonality requirement was satisfied here. Contrary to the district court's holding, assessing whether any given class member here was defrauded or deceived will necessarily require "'evidence that varies from member to member.'" *Bouaphakeo*, 136 S. Ct. at 1045 (citation omitted). The evidence adduced in arbitrating McArdle's own claims proves the point.

McArdle denied being warned about the disputed charges by the employees to whom he spoke in several undocumented conversations, but he admitted that he saw not just the Terms of Service and domestic rate-plan brochure, but also other even more conspicuous disclosures in an international brochure and on AT&T's website (to which he was referred by a text message he received when he arrived abroad). Dkt. 274-1, Ex. 24, at 2-4. These disclosures were central to the arbitrator's conclusion that McArdle had not been deceived. *Id.* at 5. In other words, in resolving McArdle's claim, it did not matter that he had received certain documents that everyone else also received; what mattered is that he ***also*** received a variety of other disclosures that bore directly on whether he was or should have been aware that he could be charged for unanswered calls.

California law is clear on this point. *See*, *e.g.*, *Tucker v. Pac. Bell Mobile Servs.*, 145 Cal. Rptr. 3d 340, 357 (Ct. App. 2012) ("A consumer who saw, or was otherwise aware of such disclosures, could not have been deceived."); *Knapp v. AT&T Wireless Servs., Inc.*, 124 Cal. Rptr. 3d 565, 574 (Ct. App. 2011) (alleged misrepresentations must be assessed in light of "express disclosure[s]" and "discuss[ions]" with employees).

Because California law requires the fact finder to consider the full panoply of disclosures that each class member received, it follows that the question whether the Terms of Service and domestic rate-plan brochure adequately disclosed the charges does not resolve any element of each class member's claim and therefore is not a common issue under *Dukes*, *Bouaphakeo*, and *Hanlon*. Similarly, because the question of deception is demonstrably not "capable of classwide resolution" in "one stroke" (*Dukes*, 564 U.S. at 350) using the "same evidence" or "class-wide proof" (*Bouaphakeo*, 136 S. Ct. at 1045), it is irrelevant that McArdle was able to manufacture one narrow, ***non-dispositive*** issue that may be common to the class members but wouldn't resolve even a single element of his own claims.

Review is warranted to correct the district court's "manifestly erroneous" application of Rule 23(a)(2)'s commonality requirement and to provide needed guidance on the "fundamental question[]" whether identifying a non-dispositive common issue is sufficient under *Dukes*, *Bouaphakeo*, and *Hanlon*. *See Chamberlan*, 402 F.3d at 459.

II. Review Is Warranted Because The District Court's Predominance Analysis Is Manifestly Erroneous And Implicates Fundamental Questions Of Class-Action Procedure.

The district court—incorrectly—thought that AT&T's arguments concerning the varied nature of the disclosures "are better understood in terms of the predominance inquiry under Rule 23(b)(3)." Dkt. 345, at 14. But it then applied a legally erroneous predominance standard. The court held that AT&T's Terms of Service and ***domestic*** brochures—and only those two documents—would be the "logical place" for customers to look for information about ***international*** roaming. It then held that reliance on those documents could be presumed, thereby eliminating reliance as an individualized inquiry. *Id.* at 24-26.

That holding swept under the rug numerous individualized inquiries bearing on the reliance element, including (but not limited to):

- Whether any employees warned the customer about the charges. This examination requires customer-specific testimony, because although AT&T produced proof of tens of thousands of such warnings (Dkt. 155, Ex. 1), most conversations would have been undocumented (Dkt. 158, ¶¶ 5-7).
- Which written disclosures a customer received. This is another issue requiring testimony about undocumented visits to stores or to AT&T's website.
- Whether the customer relied on AT&T's alleged silence regarding charges for unanswered calls or would have behaved identically no matter what. Many customers would acknowledge that they knowingly accepted the risk of being charged for unanswered calls—amounting to $3.87 in McArdle's case (Dkt. 345, at 6)—in order to keep their phones on while abroad and therefore be able to answer calls, send text messages, or use data services (such as email, Yelp, or Google Maps).

This individualized evidence regarding the information received by class members should have precluded any finding of predominance.[7]

A. The Decision Below Conflicts With The Decisions Of This Court And Other District Courts In This Circuit Holding That Reliance May Not Be Presumed In Circumstances Like These.

The district court recognized that reliance may be presumed only if class members receive the same information. Dkt. 345, at 24. Its decision that reliance could be established by common proof therefore rests entirely on its assumption—unsupported by ***any*** evidence—that customers would not consult AT&T's ***international*** brochures and

[7] Nor are these the only critical individualized issues that defeat predominance. For example, determining whether roaming charges were for ***unanswered*** calls ***routed*** to voicemail instead of brief ***answered*** calls or calls to ***check*** voicemail is a question that cannot be answered by records alone (*see* page 5, *supra*), but requires a customer's testimony. Similarly, whether any "courtesy" credits correspond to roaming charges requires a file-by-file review. *See* Dkt. 162, ¶ 3. And whether roaming services were for personal (not business) use—which is a prerequisite for asserting CLRA claims (Dkt. 345, at 22 n.4)—requires testimony. (For example, AT&T's records label McArdle's personal cell-phone account as a business "Premier" account. Dkt. 230, ¶ 5.) The district court stated that a methodology proposed by McArdle's expert could address these issues on a classwide basis (Dkt. 345, at 22 n.4)—notwithstanding the expert's concessions that either his made-for-litigation method couldn't resolve these issues (Dkt. 349-1, at 70-75, 112-14) or he couldn't perform his own analysis (*id.* at 130-35).

webpages or ask AT&T employees about roaming is self-evidently wrong.

But McArdle introduced no evidence that customers believe that domestic rate plans apply overseas and look no further for information about roaming. To the contrary, McArdle himself reviewed AT&T's international webpages and brochures and spoke to multiple employees before his trip. Dkt. 274-1, Ex. 24, at 1-4. Moreover, AT&T presented undisputed evidence that its policy was to give international brochures to customers who signed up for or asked about roaming at stores. Dkt. 159, ¶ 3. And it is undisputed that AT&T texted millions of California consumers—covering a large percentage of the class—about its international-roaming policies. *See* page 9, *supra*.

Beyond this fundamental defect in the district court's rationale, the court's presumption of reliance—which was indispensable to its assertion that all other disclosures could be ignored—deviates from decisions of this Court and created or deepened two conflicts among district courts in this Circuit.

1. The ruling below contravenes decisions of this Court holding that courts may not presume reliance on particular disclosures when class members received varying written and oral disclosures.

The district court's presumption of reliance upon particular disclosures despite the need for individualized inquiries to determine whether each class member received varying additional written and oral disclosures contravenes this Court's precedent. For example, in *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013 (9th Cir. 2011), this Court explained that there is no "predominance" in a "California UCL case" if class members were—as here—"exposed to quite disparate information from various representatives of the defendant." *Id.* at 1020.

Similarly, in *Mazza v. American Honda Motor Co.*, 666 F.3d 581 (9th Cir. 2012), this Court held that a "presumption of reliance" is unwarranted, and reversed certification of UCL, FAL, and CLRA claims challenging alleged omissions because, as here, the class included "members who learned of the … allegedly omitted" information "before they purchased or leased" the defendant's automobiles. *Id.* at 596; *see also Cabral v. Supple LLC*, 608 F. App'x 482, 483 (9th Cir. 2015) (no presumption of reliance for UCL, FAL, and CLRA claims because plain-

tiff failed to prove that the "misrepresentation" was "made to all of the class members"); *Berger v. Home Depot USA, Inc.*, 741 F.3d 1061, 1068-69 (9th Cir. 2014) (same, given potential for "oral notice" by "employees" and variances in written disclosures), *abrogated in part on other grounds by Microsoft Corp. v. Baker*, 137 S. Ct. 1702 (2017).

Until now, the districts courts in this Circuit had faithfully applied these precedents. *See, e.g.*, *In re First Am. Home Buyers Prot. Corp. Class Action Litig.*, 313 F.R.D. 578, 606 (S.D. Cal. 2016) (no presumption of reliance because "[t]here are significant individual issues as to whether the putative class members were even exposed to, much less relied on, the alleged misrepresentations"), *aff'd*, 702 F. App'x 614 (9th Cir. 2017); *Philips v. Ford Motor Co.*, 2016 WL 7428810, at *16 (N.D. Cal. Dec. 22, 2016) (same for CLRA and fraud claims); *Lucas v. Breg, Inc.*, 212 F. Supp. 3d 950, 969-70 (S.D. Cal. 2016) (UCL, FAL, CLRA, and fraud); *Ehret v. Uber Techs., Inc.*, 148 F. Supp. 3d 884, 900-01 (N.D. Cal. 2015) (UCL); *In re Clorox Consumer Litig.*, 301 F.R.D. 436, 444-46 (N.D. Cal. 2014) (same); *Quezada v. Loan Ctr. of Cal., Inc.*, 2009 WL 5113506, at *8 (E.D. Cal. Dec. 18, 2009) (UCL and fraud). The

district court's decision here is thus out of line with those of its sister courts.

To make matters worse, the district court's presumption of reliance is also flatly inconsistent with decisions of the California appellate courts, which supply the relevant substantive law. Those courts have held that variances in communications with consumers through written, online, and oral channels preclude any presumption of reliance under the UCL, FAL, or CLRA. *See, e.g.*, *Tucker*, 145 Cal. Rptr. 3d at 359; *Knapp*, 124 Cal. Rptr. 3d at 573-76.

Because the district court's presumption of reliance notwithstanding class members' receipt of varying information cannot be squared with this Court's precedents, is out of line with the decisions of other district courts, and is in the teeth of California precedent circumscribing the substantive inquiry, this Court's review is urgently needed.

2. The ruling below deepened a conflict over whether reliance can be presumed in a case alleging both misrepresentations and omissions.

Review also is warranted to address the separate question whether consumer-protection claims are exempt from the rule that reliance cannot be presumed when a plaintiff alleges a mixture of misrepresen-

tations and omissions—which is the subject of a conflict among the district courts.

In *Poulos v. Caesars World, Inc.*, 379 F.3d 654 (9th Cir. 2004), this Court held that no "presumption of reliance" applies to "'mixed claims'" that rest on both alleged omissions (failures to disclose) and alleged affirmative misrepresentations. *Id.* at 666-67. This case involves such a "mixed claim[]" because McArdle's theory is that AT&T's ostensible failure to disclose that customers would be charged for unanswered calls was misleading only because its affirmative statements allegedly led customers to believe that they would not be charged if they did not answer their phones. Dkt. 301, at 2-4.

The district court refused to follow *Poulos*, which it maintained is limited to claims under RICO. Dkt. 345 at 25-26. But that cramped view of *Poulos* conflicts with the majority of district-court decisions in this Circuit, which have recognized that *Poulos* applies beyond the RICO context, including to fraud and consumer-protection claims such as McArdle's. *See, e.g.*, *Quezada*, 2009 WL 5113506, at *5 (E.D. Cal. Dec. 18, 2009) (applying *Poulos* to common-law fraud claim); *Gonzalez v. Proctor & Gamble Co.*, 247 F.R.D. 616, 623-26 (S.D. Cal. 2007) (same

for UCL, FAL, and CLRA claims); *Gartin v. S&M NuTec LLC*, 245 F.R.D. 429, 438 (C.D. Cal. 2007) (fraud); *see also, e.g.*, *Brown v. Nat'l Life Ins. Co.*, 2013 WL 12096508, at *5 (C.D. Cal. Oct. 15, 2013) (holding that reliance cannot be presumed in ERISA cases involving both omissions and misrepresentations).

By contrast, some district courts have agreed with the position adopted below. *See Wolph v. Acer Am. Corp.*, 2012 WL 993531, at *2-3 (N.D. Cal. Mar. 23, 2012); *Jonson v. Gen. Mills, Inc.*, 276 F.R.D. 519, 522 (C.D. Cal. 2011).

This Court's review is needed to resolve this conflict, which has caused confusion among courts in this Circuit. *See Badella v. Deniro Mktg. LLC*, 2011 WL 5358400, at *8 (N.D. Cal. Nov. 4, 2011) (stating that the disagreement over the applicability of *Poulos* to consumer-protection claims "gives the Court pause" and then denying class certification on other grounds).

B. The District Court's Approach To Predominance Violates Due Process And The Rules Enabling Act.

The district court's watering down of the predominance requirement also implicates a "fundamental issue" of class-certification law (*Chamberlan*, 402 F.3d at 955): whether the class-action device may be

used to strip defendants of the right to present individualized evidence negating class members' claims.

California law entitles AT&T to challenge reliance in an individual action by inquiring into other disclosures the customer received. *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1105 (9th Cir. 2003) (fraud); *Kwikset Corp. v. Super. Ct.*, 246 P.3d 877, 887-88 (Cal. 2011) (UCL and FAL); *Gutierrez v. Carmax Auto Superstores Cal.*, 228 Cal. Rptr. 3d 699, 724 (Ct. App. 2018) (CLRA). AT&T also would be able to inquire into other issues concerning injury and materiality in an individual action. *See* page 21 n.7, *supra*. Yet certifying the class deprives AT&T of the right to contest liability on these grounds because, during a class-wide trial, AT&T could not feasibly cross-examine each class member on these topics.

The Due Process Clause and the Rules Enabling Act, 28 U.S.C. § 2072, forbid stripping AT&T of its right to adduce material, class-member-specific evidence in this way. As the Supreme Court has explained, "'[d]ue process requires that there be an opportunity to present every available defense.'" *Lindsey v. Normet*, 405 U.S. 56, 66 (1972) (citation omitted). Moreover, "evidence [that] is relevant in proving a

plaintiff's individual claim … cannot be deemed improper merely because the claim is brought on behalf of a class," because "[to] so hold would ignore the Rules Enabling Act's pellucid instruction that use of the class device cannot 'abridge … any substantive right.'" *Bouaphakeo*, 136 S. Ct. at 1046 (quoting 28 U.S.C. § 2072(b)).[8]

In addition, the ruling below presents AT&T with an unfair no-win situation. The court stated that "[i]f a jury were to find" that the Terms of Service and domestic brochures alone "were likely to deceive the public, then McArdle could succeed on his UCL and FAL claims without establishing the individual reliance of absent class members." Dkt. 345, at 24. In other words, reliance can be presumed—allowing predominance to be satisfied—only if McArdle prevails. If AT&T prevails on this issue, however, reliance cannot be presumed, which defeats reliance—meaning that the class must be decertified, arguably leaving no one bound by the class judgment. A class action that AT&T can lose but not win violates Rule 23 and due process.

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[8] Furthermore, deferring these individualized issues until after the class trial would deprive AT&T of its Seventh Amendment "right to have juriable issues determined by the first jury impaneled to hear them …, and not reexamined by another finder of fact." *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1303 (7th Cir. 1995).

Because the decision below precludes AT&T from introducing individualized evidence and presents AT&T with a no-win scenario, review again is warranted.

CONCLUSION

The petition for leave to appeal should be granted.

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Respectfully submitted,

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