No. 15-16173

United States Court of Appeals for the Ninth Circuit

JENNIFER DAVIDSON, an individual on behalf of herself, the general public and those similarly situated,

Plaintiff-Appellant,

– v. –

KIMBERLY-CLARK CORPORATION; KIMBERLY-CLARK WORLDWIDE, INC.; KIMBERLY-CLARK GLOBAL SALES, LLC,

Defendants-Appellees.

ON APPEAL FROM THE U.S. DISTRICT COURT FOR NORTHERN CALIFORNIA, OAKLAND, CASE NO. 4:14-CV-01783-PJH
THE HONORABLE PHYLLIS J. HAMILTON, CHIEF DISTRICT JUDGE

BRIEF FOR *AMICI CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NATIONAL ASSOCIATION OF MANUFACTURERS AND GROCERY MANUFACTURERS ASSOCIATION IN SUPPORT OF REHEARING *EN BANC*

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CORPORATE DISCLOSURE STATEMENT

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

The National Association of Manufacturers is a non-profit corporation. It has no parent corporation. No publicly held corporation owns ten percent or more of its stock.

The Grocery Manufacturers Association is a non-profit trade association. It has no parent corporation. No publicly held corporation owns ten percent or more of its stock.

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INTEREST OF *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. The Chamber 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. The Chamber represents the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the Nation's business community.

The National Association of Manufacturers ("NAM") is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs more than twelve million men and women, contributes $2.17 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for more than three-quarters of all private-sector research and development in the nation. The NAM is the voice of the manufacturing

[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no person other than *amici*, their members, or their counsel made any monetary contribution intended to fund the preparation or submission of this brief.

community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

Based in Washington, D.C., the Grocery Manufacturers Association ("GMA") is the voice of more than 300 leading food, beverage, and consumer product companies that sustain and enhance the quality of life for hundreds of millions of people in the United States and around the globe. Founded in 1908, GMA is an active, vocal advocate for its member companies and a trusted source of information about the industry and the products consumers rely on and enjoy every day. GMA and its member companies are committed to meeting the needs of consumers through product innovation, responsible business practices, and effective public policy solutions developed through a genuine partnership with policymakers and other stakeholders.

The panel's decision extends standing to consumers who allege that they were deceived in the *past* by a false label—and who do not currently buy the defendant's product—to seek a *prospective* injunction against false advertising. The panel's theory for imminent prospective injury is that such consumers may want to buy the defendant's products in the future but will not trust their advertising. Adopting such an expansive theory of standing would not only exceed the constitutional role of the federal courts, but would also encourage abusive, lawyer-driven litigation in which plaintiffs' lawyers pursue meritless claims in the

hope that the costs and risks of litigation will drive businesses to settle. Because many of *amici*'s members and affiliates are targets of consumer class actions, *amici* have a keen interest in the rigorous application Article III's standing requirements to ensure that such actions are aimed at addressing real harm—not just lining lawyers' pockets.

ARGUMENT

Defendant Kimberly-Clark manufactures toilet wipes and markets them as "flushable." Plaintiff Jennifer Davidson alleges that she paid a premium for these wipes on the understanding that they were "flushable," and later allegedly learned that they were not. It is undisputed that ever since Davidson came to believe that Kimberly-Clark's label was false, she has never again purchased the wipes. Davidson filed suit alleging causes of action for common-law fraud and violations of various California consumer-protection statutes, and seeks damages based on the claim that she paid a premium for the wipes because of the allegedly false "flushable" description.

Davidson also seeks forward-looking, injunctive relief, asking the district court to bar Kimberly-Clark from describing its wipes (as currently manufactured) as "flushable" in the future. The problem for Davidson's injunctive-relief claim, however, is Article III, which requires that a plaintiff seeking forward-looking relief allege a future injury that is actual and imminent, not hypothetical or

conjectural. And there is obviously no actual or imminent harm from Kimberly-Clark's allegedly false label when Davidson already believes the wipes' "flushable" description is false, and stopped purchasing them for that reason.

The panel nevertheless concluded that Davidson had standing, accepting as actual and imminent harm the allegation that "she will be unable to rely on the product's advertising or labeling in the future, and so will not purchase the product although she would like to." Op. 21; *see id.* at 16, 23-24. But that assertion of injury is by its terms conjectural and hypothetical. Davidson does not allege that she wants to purchase the Kimberly-Clark wipes already on the market—she thinks they are deceptively advertised. She instead asserts that *if* Kimberly-Clark someday produced a *different* product, she *might* like to purchase it but would not do so because she will not trust the company's description. The panel's decision clearly departs from established Supreme Court authority and brings this Court's law into conflict with that of several of its sister circuits.

These doctrinal flaws are reason enough to warrant the full Court's review, but the significant adverse practical consequences that will follow from the panel's decision render en banc rehearing indispensable. Plaintiffs' attorneys often seek forward-looking injunctive relief as a means of maintaining a class action where they may not be able to obtain certification for a backward-looking damages class. And under the panel decision, essentially every plaintiff alleging a deceptive-

advertising damages action will be able to articulate a theory of standing to seek injunctive relief. Consumer-fraud class actions are already notorious for benefiting attorneys and not consumers. The panel decision's relaxed standing requirement will make that problem much worse.

The petition should be granted.

I. The Panel's Decision Is Inconsistent With Well-Established Article III Standing Principles

"[N]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal court jurisdiction to actual cases and controversies." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006) (quotation omitted). "[S]tanding is one of several doctrines that reflect this fundamental limitation." *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009). The standing doctrine "requires federal courts to satisfy themselves that the plaintiff has alleged such a personal stake in the outcome of the controversy as to warrant his invocation of federal-court jurisdiction." *Id.* (quotation omitted). As the Supreme Court has explained, "the irreducible constitutional minimum of standing contains three elements." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). The plaintiff must have "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016).

The Supreme Court has held unambiguously that a plaintiff "must demonstrate standing separately for each form of relief sought," including injunctive relief. *Friends of the Earth, Inc. v. Laidlaw Envt'l Servs. (TOC), Inc.*, 528 U.S. 167, 185 (2000). Critical to the question here, mere "past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief." *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983) (quotation omitted). Instead, to maintain a claim for forward-looking relief, a plaintiff must show that she faces an "*actual* and *imminent*" threat of future injury—"conjectural or hypothetical" harms do not suffice. *Friends of the Earth*, 528 U.S. at 180-81 (emphasis added); *see Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) ("allegations of *possible* future injury are not sufficient" (quotation omitted)); *Lyons*, 461 U.S. at 109 (plaintiff must show she is "realistically threatened by a repetition" of past wrongful conduct). In other words, a plaintiff must show "that the injury is *certainly* impending." *Lujan*, 504 U.S. at 564 n.2 (quotation omitted).

The panel's decision turns those well-established principles on their head. The future harm alleged here self-evidently cannot be described as "actual" or "imminent." The panel noted that "Davidson has alleged that she desires to purchase Kimberly-Clark's flushable wipes," Op. 23, but the whole point of her lawsuit is that she believes the wipes currently on the market are *not* the kind of

"flushable" product she wants. In other words, taking Davidson's allegations as true, she will never purchase any "flushable" wipes that Kimberly-Clark currently manufactures. The panel allowed Davidson's injunctive-relief claim to go forward anyway based on the attenuated possibility that (i) Kimberly-Clark might at some point in the future alter the design of its wipes to make them truly "flushable" by plaintiff's standards, (ii) Davidson will want to purchase that new product, yet (iii) she might not do so because she might not know that it had been redesigned and would not be able to trust any "flushable" label attached to it. This is precisely the type of conjectural allegation of "possible" future injury the Supreme Court has rejected, *see Clapper*, 568 U.S. at 409, which is precisely why at least three courts of appeals have rejected the panel's theory of Article III standing. *See* Pet. for Rehearing En Banc 5-8; *Conrad v. Boiron, Inc.*, 869 F.3d 536, 542 (7th Cir. 2017); *Nicosia v. Amazon.com, Inc.*, 834 F.3d 220, 239 (2d Cir. 2016); *McNair v. Synapse Group Inc.*, 672 F.3d 213, 224-25 (3d Cir. 2012).

The petition should be granted to bring this Court's construction of Article III back in line with Supreme Court precedent and the decisions of other courts of appeals.

II. The Panel's Decision Invites Abusive, Lawyer-Driven Litigation That Harms Businesses And Provides Little If Any Benefit To Consumers

The panel's decision is also worthy of en banc review because of the serious adverse consequences it will invite. On the panel's view, any consumer who

alleges that a product is deceptively marketed and that she might buy the product if it were altered at some point in the future can allege Article III standing to seek injunctive relief. This would encompass nearly *every* consumer-fraud plaintiff, and indeed would appear to confer standing on any person who believes a product is deceptively marketed *regardless of whether they have ever purchased the product*. That will result in more litigation generally, but its main effect will be felt in class litigation, where plaintiffs sometimes succeed in certifying injunctive-relief claims even when their damages claims are frivolous or not amenable to class-wide treatment. And expansion of injunctive-relief class actions in general—and in the consumer-fraud context in particular—will result in more abusive litigation that does nothing to help consumers.

A. Consumer-Fraud Class Actions Are Prone To Abuse By Plaintiffs' Lawyers Hoping To Extract Settlements And Recover Attorneys' Fees

Over the last decade, there has been an explosion of consumer-fraud class actions challenging alleged "deceptive" and "misleading" marketing of everything from shampoo to potato chips. The number of consumer actions brought in federal court against food and beverage companies alone skyrocketed from 19 cases in 2008 to more than 102 in 2012,[2] and by 2016 there were more than 425 such cases

[2] Jessica Dye, *Food companies confront spike in consumer fraud lawsuits*, Reuters Legal (June 13, 2013).

active in federal courts.[3] Many more cases have been filed against manufacturers of everyday items including deodorant,[4] toothpaste,[5] dish soap and laundry detergent,[6] dietary supplements,[7] and skin care products.[8]

The lure of large settlements and steep attorneys' fees is the principal driver of these cases. As Congress concluded more than a decade ago, the class-action device is frequently used to extract "settlements in which the attorneys receive excessive attorneys' fees with little or no recovery for the class members themselves." S. Rep. No. 109-14, at 14 (2005). Indeed, many settlements do not even *purport* to secure any benefit for the asserted class. Class-action lawyers can sometimes obtain a settlement without even filing a complaint simply by sending a business a demand letter. *See The Food Court* 38-39. And even after a lawsuit is filed, a substantial number of putative consumer class actions are voluntarily dismissed, "which typically indicates a private settlement under which the

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[3] U.S. Chamber Institute for Legal Reform, *The Food Court: Trends in Food and Beverage Class Action Litigation*, at 1 (Feb. 2017), http://www.instituteforlegalreform.com/uploads/sites/1/TheFoodCourtPaper_Pages.pdf (hereinafter "*The Food Court*").

[4] *E.g.*, *de Lacour v. Colgate-Palmolive Co.*, No. 1:16-cv-08364 (S.D.N.Y.).

[5] *E.g.*, *Martin v. Colgate-Palmolive Co.*, No. 1:15-cv-1214 (E.D.N.Y.).

[6] *E.g.*, *In re The Honest Company Inc., Sodium Lauryl Sulfate (SLS) Marketing & Sales Practices Litig.*, No. 2:16-ML-02719 AB (C.D. Cal.).

[7] *E.g.*, *Barrera v. Pharmavite LLC*, No. 2:11-cv-04153-CAS (C.D. Cal.).

[8] *E.g.*, *Goldemberg v. Johnson & Johnson Consumer Cos.*, No. 7:13-cv-03073-NSR-LMS (S.D.N.Y.).

plaintiffs' lawyers and individual plaintiff get paid, but consumers receive nothing." *Id.* at 4.[9]

The picture does not look substantially better even when a case is resolved on a class-wide basis. The plaintiffs' lawyers who brought the case may "receive millions in fees" in such a settlement, while "consumers are usually eligible to seek a nominal cash payment, product vouchers, or products in the mail." *The Food Court* 4. For instance, in a settlement to resolve claims that StarKist under-filled its tuna cans, class counsel was awarded $3.6 million in fees, while consumers were eligible to receive either $4.43 in tuna vouchers or a check for approximately $1.97 per claim. *Hendricks v. Starkist Co.*, 2016 WL 5462423, at *5, *13 (N.D. Cal. Sept. 29, 2016). Similarly, in a case involving alleged misrepresentations about Duracell batteries, the court approved a settlement awarding class counsel more than $5.6 million in fees and expenses, while consumers could recover between $6 and $12 per household—an arrangement under which Gillette ultimately paid class members a total of just $344,850. *Poertner v. Gillette Co.*, 2014 WL 4162771, at *1, *5 (M.D. Fla. Aug. 21, 2014), *aff'd*, 618 F. App'x 624

[9] *See also* Mayer Brown LLP, *Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions*, at 5 (Dec. 11, 2013), http://www.instituteforlegalreform.com/uploads/sites/1/Class-Action-Study.pdf (hereinafter "*Do Class Actions Benefit Class Members?*") (reporting that thirty percent of putative consumer and employee class action lawsuits filed in or removed to federal court in 2009 had been voluntarily dismissed as of September 2013).

(11th Cir. 2015).[10] And when Kellogg settled a putative class action challenging its marketing of Rice Krispies and Cocoa Krispies cereals, the court awarded class counsel fees of $879,237 to be paid out of a settlement fund from which class members could recover a maximum of $15 per household. *Weeks v. Kellogg Co.*, 2013 WL 6531177, at *29-30 (C.D. Cal. Nov. 23, 2013). In addition to providing only minimal compensation to the class members whose rights they purport to vindicate, these settlements often have little to do with the merits of the underlying claims, because the high costs of litigation mean that class actions "are virtually never resolved through judgments on the merits." *Do Class Actions Benefit Class Members?*, *supra*, at 7, 10.

Indeed, this dynamic—where settlements are the norm, and plaintiffs' lawyers commonly recover substantial fees even when class members receive little or nothing—has resulted in a rash of so-called "consumer-protection" suits involving increasingly absurd claims. To provide just a few examples:

***Nutella Litigation*:** In 2011, a California mother filed a putative class action alleging that she was duped into believing that Nutella, a chocolate-hazelnut spread, was "healthy and beneficial to children." *In re Ferrero Litig.*, 794 F. Supp. 2d 1107, 1110 (S.D. Cal. 2011). Despite the facial implausibility of the contention

[10] *See also* Roger Parloff, *Should Plaintiffs Lawyers Get 94% of A Class Action Settlement?*, Fortune (Dec. 15, 2015), http://fortune.com/2015/12/15/supreme-court-fee-abuses/.

that anyone could reasonably believe the product was a health food, the makers of Nutella agreed to settle the case, and the plaintiffs' lawyers received nearly twice as much in fees ($985,920) as all of the class members combined received through the settlement fund ($550,000). *See In re Ferrero Litig.*, 2012 WL 2802051, at *4 (S.D. Cal. July 9, 2012) (approving settlement). Two nationwide class actions asserting similar claims under New Jersey law were also settled, with the company agreeing to pay class members who submitted a valid claim $4 per jar (up to a maximum of $20), while class counsel was awarded more than $1.1 million in fees. *See In re Nutella Mktg. & Sales Practices Litig.*, 589 F. App'x 53, 56-57 (3d Cir. 2014) (affirming approval of settlement).

***Subway "Footlong" Litigation*:** In 2013, after an Australian teenager discovered that his "Footlong" sandwich was only eleven inches in length and posted a photo on Facebook, plaintiffs' lawyers across the U.S. filed nine cases alleging that Subway engaged in misleading marketing, which were consolidated in an MDL. *In re Subway Footlong Sandwich Mktg. & Sales Practices Litig.*, 869 F.3d 551, 553-54 (7th Cir. 2017). Early discovery revealed that the claims were meritless, as the vast majority of Subway Footlong sandwiches were at least twelve inches long, "all of Subway's raw dough sticks weigh exactly the same," and "the length of the bread has no effect on the quantity of food each customer receives." *Id.* at 554. Still, to settle the claims, Subway agreed "to institute a number of

practices designed to ensure, to the extent practicable, that its sandwich rolls measure at least 12 inches long," and the district court approved the injunctive-relief-only settlement along with an award of $520,000 in fees to class counsel. *Id.* at 554-55. Subway's counsel explained that the company made the business decision to settle "in the midst of a media frenzy."[11]

***"Crunchberries" and Froot Loops Lawsuits*:** Plaintiffs have filed at least eight lawsuits in California involving alleged deceptive marketing of "Cap'n Crunch with Crunchberries" and "Froot Loops" cereals on the ground that the products do not contain "real, nutritious fruit." *See, e.g.*, *Videtto v. Kellogg USA*, 2009 WL 1439086, at *1 (E.D. Cal. May 21, 2009) (Froot Loops); *Sugawara v. Pepsico, Inc.*, 2009 WL 1439115, at *1 (E.D. Cal. May 21, 2009) (Cap'n Crunch).[12] The plaintiffs in these cases alleged, for example, that they were misled by the use of the word "Froot" in the cereal's name, and by the box's "depiction of brightly colored ring-shaped cereal" that supposedly "resembl[es] fruit." *McKinnis v. Kellogg USA*, 2007 WL 4766060, at *3 (C.D. Cal. Sept. 19, 2007).

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[11] Jonathan Stempel, *Subway 'Footlong' Settlement Gets Appeals Court Grilling*, Reuters (Sept. 8, 2016), https://www.reuters.com/article/subway-settlement/subway-footlong-settlement-gets-appeals-court-grilling-idUSL1N1BK25H. The district court's decision approving the settlement was later reversed. *In re Subway*, 869 F.3d at 557.

[12] *See also* Kevin Underhill, *California Plagued With 'Frooty' Lawsuits*, Forbes (July 22, 2010), https://www.forbes.com/2010/07/22/froot-loops-cereal-lawsuits-opinions-columnists-kevin-underhill.html.

***Krispy Kreme Lawsuit*:** In December 2016, a plaintiff filed a putative class action alleging that Krispy Kreme engaged in "false and misleading business practices" because its "Chocolate Iced Raspberry Filled," "Maple Ice Glazed," "Maple Bar," and "Glazed Blueberry Cake" doughnuts do not contain real raspberries, maple, or blueberries, depriving consumers of the health benefits of those ingredients. *See* Class Action Compl. ¶¶ 23-25, *Saidian v. Krispy Kreme Doughnuts, Inc.*, No. 2:16-cv-08338 (C.D. Cal. filed Nov. 9, 2016) (reciting alleged health benefits of raspberries, maple syrup, and blueberries). In February 2017, a California district court denied Krispy Kreme's motion to dismiss, reasoning that "[w]hether a reasonable consumer would be deceived by a particular statement is generally a factual question" that cannot be decided on the pleadings. *Saidian v. Krispy Kreme Doughnut Corp.*, 2017 WL 945083, at *3 (C.D. Cal. Feb. 27, 2017).

As these examples amply demonstrate, the flurry of consumer-class-action lawsuits filed in recent years includes many cases that do not address any real harm to consumers and appear to be designed solely to extract settlements and collect attorneys' fees. While some of these cases surely should be dismissed on the pleadings, the examples above show that Rule 12(b)(6) does not by itself solve the problem, placing additional pressure on companies to settle even meritless suits to avoid further litigation risk and expense.

B. The Panel's Decision Will Fuel Abusive Consumer-Fraud Litigation By Providing Plaintiffs' Lawyers An Easy Path To Settlement And Fees

These well-known problems associated with consumer class actions are about to get much worse in this Circuit. Under the panel's decision, nearly every plaintiff alleging that she was deceived by product marketing in the *past* will have standing to seek an injunction simply by alleging that she might want to purchase one of the defendant's products in the future but would be unable to trust its product descriptions. Indeed, since standing for a forward-looking injunction is independent of standing for past harms, the panel's theory would seem to mean that *any* person in the Ninth Circuit who believes a product is deceptively marketed could seek an injunction *regardless* of whether he or she has purchased the product in the past. That theory affords plaintiffs' attorneys an easy means of seeking prospective relief on behalf of a class in cases where they cannot establish past injury on a class-wide basis.

Plaintiffs in consumer-fraud cases commonly encounter obstacles that prevent them from obtaining certification of a damages class under Rule 23(b)(3). Those plaintiffs, for example, may be unable to persuade a court that they can prove reliance, causation, and damages on a class-wide basis, precluding a finding that common issues predominate. *See, e.g.*, *In re ConAgra Foods, Inc.*, 302 F.R.D.

537, 576-80 (C.D. Cal. 2014); *Weiner v. Snapple Beverage Corp.*, 2010 WL 3119452, at *6 (S.D.N.Y. 2010).

Plaintiffs' attorneys facing those obstacles may instead elect to focus on a Rule 23(b)(2) class. Courts have often treated Rule 23(b)(2) as a less onerous hurdle to class certification than Rule 23(b)(3), which creates incentives for plaintiffs' lawyers to fashion claims for injunctive relief in addition to (or even instead of) damages. *See* Andrew J. Trask, *Wal-Mart v. Dukes: Class Actions and Legal Strategy*, 2011 Cato S. Ct. Rev. 319, 325 (2011) ("while courts in the 1990s and 2000s enforced Rule 23(b)(3) stringently, they were less rigorous about enforcing Rule 23(b)(2)"); *Class Actions As an Alternative to Regulation: The Unique Challenges Presented by Multiple Enforcers and Follow-on Lawsuits*, 18 Geo. J. Legal Ethics 1311, 1331 (2005) (panel discussion) ("the perception—and maybe this is reality—has kind of permeated the bar, that it's a little bit easier to get a class certified under Rule 23(b)(2) than it is under Rule 23(b)(3)").

The problem is that certification of a class seeking injunctive relief often leads to recovery for lawyers but not consumers. With the possibility of monetary recovery for the class out of the picture, many defendants will agree to provide relatively low-cost prospective injunctive relief and pay the plaintiffs' attorneys' fees to make a case go away. In the Subway Footlong case, for example, when discovery demonstrated "no compensable injury, the plaintiffs' lawyers shifted

their focus from a damages class under Rule 23(b)(3) to a class claim for injunctive relief under Rule 23(b)(2)." *In re Subway*, 869 F.3d at 553. The parties then reached a settlement agreement under which class counsel was awarded more than half a million dollars in fees while the class received nothing but a "worthless" injunction. *Id.*

The Seventh Circuit ultimately invalidated that settlement, but it is not the only example. To take a recent one, a federal district court judge in Kansas signed off on an award of $18.9 million in attorneys' fees related to 29 settlements in multidistrict litigation alleging that oil companies and fuel retailers overcharged for gasoline that expanded on hot days, even though the settlement did not provide for any payment to the class. *See In re: Motor Fuel Temperature Sales Practices Litig.*, 2016 WL 4445438 (D. Kan. Aug. 24, 2016).[13]

There are, in other words, very strong incentives for plaintiffs' lawyers "to bring low-merit class actions that can be quickly settled for illusory injunctive relief plus attorneys' fees." Erin L. Sheley & Theodore H. Frank, *Prospective Injunctive Relief and Class Settlements*, 39 Harv. J. L. & Pub. Pol'y 769, 779 (2016). And now that essentially any person who can bring a claim in the Ninth

[13] *See also* Stan Parker, *Attys Ok'd For $19 Million In Fees For 'Hot Fuel' MDL Settlements*, Law 360 (Aug. 24, 2016), https://www.law360.com/articles/832243/attys-ok-d-for-19m-in-fees-for-hot-fuel-mdl-settlements.

Circuit has standing to file a consumer action for injunctive relief, the floodgates will open to more litigation that benefits only lawyers.

* * *

While classes seeking injunctive relief, particularly in the consumer-fraud context, have shown themselves rife for abuse, there used to be a significant limit on such classes—the Article III standing rule requiring actual and imminent injury before a claim for injunctive relief can move forward. That limitation is now gone, and the panel's decision clears the way for plaintiffs' lawyers to recover attorneys' fees based on injunctive relief that provides little real value to consumers, further encouraging abusive litigation in an area where there is already far too much. The effects of these meritless lawsuits are felt throughout the economy, harming businesses and consumers alike. Litigation costs and settlement payouts are ultimately passed along to consumers in the form of higher prices, to employees in the form of lower wages, and to investors in the form of lower returns. In the end, nobody wins—except the lawyers. The high risk of abuse in the consumer-class-action realm underscores the importance of diligently enforcing the requirements of Article III. The full Court should grant review and reaffirm those requirements.

CONCLUSION

The petition for rehearing en banc should be granted.

Dated: November 13, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Circuit Rule 29-2(c)(2) because this brief contains 4,199 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

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 2016 in Times New Roman 14-point font.

Dated: November 13, 2017

/s/Anton Metlitsky
Anton Metlitsky

CERTIFICATE OF SERVICE

I hereby certify that on November 13, 2017, I caused a copy of the foregoing document to be served on all counsel of record via the CM/ECF system for the United States Court of Appeals for the Ninth Circuit.

Dated: November 13, 2017

/s/Anton Metlitsky
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