

FILED

NOT FOR PUBLICATION

SEP 03 2013

UNITED STATES COURT OF APPEALS

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

FOR THE NINTH CIRCUIT

ANDREW T. THOMASSON, on behalf of
himself and all others similarly situated;
REBECCA J. THOMASSON, on behalf of
themselves and all others similarly
situated,

Plaintiffs - Appellees,

v.

GC SERVICES LIMITED
PARTNERSHIP,

Defendant - Appellant.

No. 11-56100

D.C. No. 3:05-cv-00940-JAH-CAB

MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
John A. Houston, District Judge, Presiding

Argued and Submitted August 7, 2013
Pasadena, California

Before: TALLMAN, CLIFTON, and CALLAHAN, Circuit Judges.

Defendant GC Services Limited Partnership appeals the district court's
decision to certify a class comprising Plaintiffs Andrew and Rebecca Thomasson

* This disposition is not appropriate for publication and is not precedent
except as provided by 9th Cir. R. 36-3.

and 412 individuals whose telephone calls with Defendant's employees were monitored, allegedly without warning or consent. We granted Defendant's petition for interlocutory review pursuant to Federal Rule of Civil Procedure 23(f). We review a district court's class certification determination for an abuse of discretion. *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1018 (9th Cir. 2011). We reverse.

Class certification is proper only if Plaintiffs establish that the four prerequisites of Federal Rule of Civil Procedure 23(a) apply to the class they seek to certify. *Mazza v. Am. Honda Motor Co., Inc.*, 666 F.3d 581, 588 (9th Cir. 2012). Central to our decision is Rule 23(a)'s commonality requirement, which provides that one or more questions of law or fact must be common to the class. Fed. R. Civ. P. 23(a). To satisfy commonality, there must be significant proof that the entire class suffered a common injury. *Evon v. Law Offices of Sidney Mickell*, 688 F.3d 1015, 1029 (9th Cir. 2012). The common injury must be connected to the specific claim for relief. *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 981 (9th Cir. 2011). In addition, as Plaintiffs propose certification under Rule 23(b)(3), the common questions must predominate over individual questions.

Defendant argues that Plaintiffs have not established significant proof that Defendant acted uniformly across the class and thus there is no common contention

that is capable of classwide resolution. *See Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011). We agree.

Plaintiffs allege that Defendant violated the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692–1692p (2006), specifically 15 U.S.C. § 1692(e), by failing to warn call members that their calls may be monitored, which, Plaintiffs allege, caused people to reveal financial information. To establish the claim at issue here would require an individualized inquiry into hundreds of phone calls in order to determine whether and when any warning was given in each call. In the face of the evidence to the contrary submitted by Defendant, Plaintiffs did not and cannot establish that Defendant acted uniformly as to each member of the class by relying on 18 anecdotal reports of individual telephone calls. *See Wal-Mart*, 131 S. Ct. at 2553 (holding that 120 anecdotal reports did not constitute significant proof establishing a uniform policy).

That the class comprises individuals all of whom participated in telephone calls monitored by Defendant does not satisfy the commonality requirement.¹ *See Ellis*, 657 F.3d at 981 (holding that plaintiffs' commonality must connect to their

¹ All except Plaintiffs, that is. Because the failure to satisfy commonality defeats class certification, we do not address Defendant's other challenges to the class, including whether Plaintiffs' claims are typical of the class in light of the fact that there is no evidence that the calls of the proposed class representatives were actually monitored.

claim for class relief). Nor can a class proceed merely because it asks a common legal question. *See id.* (“[I]t is insufficient to merely allege any common question.”). Because this class would necessarily require an individualized inquiry into each telephone call with Defendant, it does not generate a common contention, let alone one that predominates, of such a nature that “determination of [the contention’s] truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.” *Wal-Mart*, 131 S. Ct. at 2551; *see also Local Joint Exec. Trust Fund v. Las Vegas Sands*, 244 F.3d 1152, 1161 (9th Cir. 2001) (holding that the factual record was sufficiently developed to evaluate whether Rule 23 requirements had been met without the need for remand on that issue).

Accordingly, this class cannot be certified. We reverse and remand with instructions to de-certify the class.

REVERSED and REMANDED.

United States Court of Appeals for the Ninth Circuit

Office of the Clerk
95 Seventh Street
San Francisco, CA 94103

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)

Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
 - ▶ A material point of fact or law was overlooked in the decision;
 - ▶ A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
 - ▶ An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ▶ Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ▶ The proceeding involves a question of exceptional importance; or
- ▶ The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms*.
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms*.

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
 - ▶ Thomson Reuters; 610 Opperman Drive; PO Box 64526; St. Paul, MN 55164-0526 (Attn: Jean Green, Senior Publications Coordinator);
 - ▶ and electronically file a copy of the letter via the appellate ECF system by using "File Correspondence to Court," or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

United States Court of Appeals for the Ninth Circuit

BILL OF COSTS

Note: If you wish to file a bill of costs, it **MUST** be submitted on this form and filed, with the clerk, with proof of service, within 14 days of the date of entry of judgment, and in accordance with 9th Circuit Rule 39-1. A late bill of costs must be accompanied by a motion showing good cause. Please refer to FRAP 39, 28 U.S.C. § 1920, and 9th Circuit Rule 39-1 when preparing your bill of costs.

_____ v. _____ 9th Cir. No. _____

The Clerk is requested to tax the following costs against: _____

Cost Taxable under FRAP 39, 28 U.S.C. § 1920, 9th Cir. R. 39-1	REQUESTED Each Column Must Be Completed				ALLOWED To Be Completed by the Clerk				
	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST	
Excerpt of Record			\$	\$			\$	\$	
Opening Brief			\$	\$			\$	\$	
Answering Brief			\$	\$			\$	\$	
Reply Brief			\$	\$			\$	\$	
Other**			\$	\$			\$	\$	
TOTAL:				\$	TOTAL:				\$

* Costs per page may not exceed .10 or actual cost, whichever is less. 9th Circuit Rule 39-1.

** Other: Any other requests must be accompanied by a statement explaining why the item(s) should be taxed pursuant to 9th Circuit Rule 39-1. Additional items without such supporting statements will not be considered.

Attorneys' fees **cannot** be requested on this form.

Continue to next page.

I, , swear under penalty of perjury that the services for which costs are taxed were actually and necessarily performed, and that the requested costs were actually expended as listed.

Signature

("s/" plus attorney's name if submitted electronically)

Date

Name of Counsel:

Attorney for:

(To Be Completed by the Clerk)

Date

Costs are taxed in the amount of \$

Clerk of Court

By: , Deputy Clerk