No. 19-56514

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

OLEAN WHOLESALE GROCERY COOPERATIVE, INC., et al.,

Plaintiffs-Appellees,

v.

BUMBLE BEE FOODS LLC, et al.,

Defendants-Appellants.

On Appeal from the United States District Court for the Southern District of California, Case No. 3:15-md-02670-JLS-MDD

DEFENDANTS-APPELLANTS' BRIEF REGARDING REHEARING EN BANC

Christopher S. Yates
Belinda S Lee
Ashley M. Bauer
LATHAM & WATKINS LLP
505 Montgomery Street
Suite 2000
San Francisco, CA 94111
(415) 391-0600

Gregory G. Garre
Samir Deger-Sen
Shannon Grammel
LATHAM & WATKINS LLP
555 Eleventh Street, NW
Suite 1000
Washington, DC 20004
(202) 637-2207

Counsel for Defendants-Appellants StarKist Co. and Dongwon Industries Co., Ltd.

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INTRODUCTION

The panel in this case correctly held that the district court's class certification order cannot stand. That decision rests on several premises that are firmly supported by the decisions of this Court, other circuits, and the Supreme Court: first, that, while there is no "bright-line rule" for when the presence of uninjured class members defeats a finding of predominance, a class with 28% uninjured class members plainly "would be out-of-bounds," Op. 32-33; second, where, as here, the extent of uninjured class members swept up in a proposed class is disputed, a district court must resolve that factual dispute before certifying any class, *id.* at 33; third, where, as here, a plaintiff relies on representative evidence such as averaging assumptions to show injury, courts "must . . . rigorously analyze the use of such evidence to test its reliability and to see if the statistical modeling does *in fact* mask individualized differences," *id.* at 28; and, fourth, the class certification order in this case cannot stand because the district court did not conduct that inquiry. A contrary decision would bring this Circuit into direct conflict with the decisions of other circuits on when the presence of uninjured class members defeats class certification.

En banc review is not warranted.

BACKGROUND

This appeal arises from an antitrust suit against major suppliers of branded packaged tuna in the United States. Op. 10-11. Plaintiffs, purchasers of various

packaged tuna products, sought to certify three vast putative classes: (1) a class of hundreds of direct tuna purchasers, including mega-buyers like Costco and Amazon as well as regional and local distributors and retailers; (2) a class of millions of individuals who bought tuna for personal consumption from retailers ranging from big-box chains to mom-and-pop shops; and (3) a class of thousands of individuals and companies who bought bulk-sized tuna from certain distributors for resale as prepared foods (like tuna salad). *Id.* at 11, 13-14.

Despite the widely varying individual circumstances impacting the prices paid for tuna, Plaintiffs relied on statistical models that simply assumed that all direct purchasers were overcharged by the *same average percentages* as a result of the conspiracy. *Id.* at 11-12, 14. Based on that assumption, the direct purchaser class's model showed injury for 94.5% of that putative class. *Id.* at 12.

Yet, as Defendants' experts explained, that figure was inaccurate because Plaintiffs' averaging assumptions did not take into account the realities of the markets—specifically, that Defendants' packaged tuna prices are individually negotiated and that many direct purchasers have sufficient bargaining power to *resist* attempted price increases (thus leaving them uninjured by the alleged conspiracy, even if there was an increase in the "list price" for tuna). *See* Defs.' Br. 5-12.

To account for this reality, Defendants' expert ran the direct purchaser class's model with one modification: Instead of calculating a single average overcharge for

all direct purchasers, Defendants' expert allowed the overcharge to vary and calculated the overcharge for each direct purchaser individually. ER663; ER718-19; ER1026. After the averaging assumption was removed, Plaintiffs' model could show injury for just 72% of the class. ER1479-81; ER718-24. The model did not show injury to well-known retailers such as Trader Joe's. ER1481.[1]

Defendants' experts also showed that Plaintiffs' models suffered from other fundamental flaws—including a propensity for generating "false positives"—*i.e.*, impact where there could not be any, such as purported overcharges on packaged tuna purchased outside the alleged conspiracy period or sold by packaged tuna suppliers who (according to Plaintiffs themselves) did not participate in the conspiracy. *See* Defs.' Br. 24-25, 51-52.

The district court recognized that, if Defendants' expert was correct that the direct purchasers' "model [was] unable to show impact to over 28% of the class members," Plaintiffs "would unquestionably" fail to satisfy predominance. ER16. But the district court nonetheless deferred that question to a jury at trial on the belief that "determining which expert is correct is beyond the scope" of class certification and was "'ultimately a merits decision.'" ER23-24 (citation omitted); ER23 (noting that Defendants' "criticisms are serious and could be persuasive to a finder of fact").

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[1] Likewise, the individual consumer class's model did not show injury to direct purchasers Amazon, Save Mart, Big Lots, and Demoulas. ER1619.

The panel vacated the district court's certification decision and remanded for the court to revisit its predominance inquiry and "resolve the factual disputes concerning the number of uninjured parties in each proposed class." Op. 34-35. The panel held that the district court had abused its discretion in "declining to resolve the competing expert claims on the reliability of Plaintiffs' statistical model"—and "gloss[ing] over the number of uninjured class members." *Id.* at 30, 33.[2]

The panel did not adopt (and, indeed, Defendants did not advocate for) a categorical rule that representative evidence is impermissible. The panel recognized that such evidence "*may* be inappropriate," but it declined to hold that it "*necessarily* mask[s] a lack of predominance." *Id.* at 26, 28 (emphasis added). Instead, the panel stressed, "[c]ourts must still rigorously analyze the use of such evidence to test its reliability and to see if the statistical modeling does *in fact* mask individualized differences" among class members. *Id.* at 28. Thus, the panel explained, the district court here was required to rigorously analyze "Plaintiffs' experts' use of average assumptions" to determine whether the assumptions "*did* mask individual differences among the class members, such as bargaining power, negotiation position, and marketing strategies." *Id.* at 31-32.

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[2] The panel also suggested that the district court had erred in "improperly shift[ing]" the burden of persuasion "to Defendants to affirmatively disprove the claims made by Plaintiffs' expert." Op. 34 n.14.

The panel also held that to satisfy Rule 23(b)(3)'s predominance requirement, the party seeking certification (who bears the burden of proof on the issue) must show that "the number of uninjured class members [is] *de minimis*." *Id.* at 32 n.12. "If a substantial number of class members 'in fact suffered no injury,'" the panel explained, then "the 'need to identify those individuals will predominate.'" *Id.* at 29 (citation omitted). And because "Rule 23(b)(3) requires courts 'to make findings about predominance and superiority *before* allowing the class,'" the panel held that the district court erred by failing to consider whether the putative classes here swept in too many uninjured class members to permit certification. *Id.* at 33 (citation omitted). The panel emphasized, however, that it was not adopting "a numerical or bright-line rule" as to the proportion of uninjured class members that defeats a finding of predominance. *Id.* at 32. Instead, the panel observed, "it's easy enough to tell that 28% would be out-of-bounds." *Id.* at 33.

Accordingly, the panel vacated the district court's class certification order and remanded for the court to make the factual findings demanded by Rule 23 after rigorously analyzing Plaintiffs' representative evidence and holding Plaintiffs to their burden under Rule 23. *Id.* at 34-35.

ARGUMENT

The panel correctly concluded that the district court's class certification order cannot stand. In reaching that conclusion, the panel faithfully applied Supreme

Court and Ninth Circuit precedent, and its decision aligns with the precedent of other circuits. Indeed, a contrary decision would have placed this Circuit into conflict with the decisions of other circuits. No further review is warranted.[3]

I. THE PANEL CORRECTLY HELD THAT RULE 23 REQUIRES A DISTRICT COURT TO FIND THAT NO MORE THAN A *DE MINIMIS* NUMBER OF CLASS MEMBERS ARE UNINJURED BEFORE CERTIFYING A PUTATIVE CLASS

A. Predominance Is Not Satisfied If A Class Contains More Than A *De Minimis* Number Of Uninjured Class Members

Rule 23 imposes "stringent requirements" for class certification. Op. 15 (quoting *Am. Express Co. v. Italian Colors Restaurant*, 570 U.S. 228, 234 (2013)). The most "demanding" is Rule 23(b)(3)'s predominance requirement. *Comcast v. Behrend*, 569 U.S. 27, 33-34 (2013). That requirement commands that "the court find[] that the questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3).

As the Supreme Court recently explained, an "individual question is one where 'members of a proposed class will need to present evidence that varies from member to member,' while a common question is one where 'the same evidence will suffice for each member to make a prima facie showing [or] the issue is susceptible

[3] We focus here on the specific question raised by this Court's *sua sponte* order. If this Court were to grant rehearing en banc, however, the Court of course would have the opportunity to reconsider the panel's entire decision. *See* 9th Cir. R. 35, circuit advisory comm. note to Rules 35-1 to 35-3.

to generalized, class-wide proof.'" *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 453 (2016) (alteration in original) (citation omitted). The predominance requirement therefore demands that the essential elements of the class claims be "capable of proof at trial through evidence that [is] common to the class." *Comcast*, 569 U.S. at 30 (citation omitted); *see Walker v. Life Ins. Co. of the Sw.*, 953 F.3d 624, 630 (9th Cir. 2020) (discussing predominance requirement).

Antitrust "injury" is an essential *element* of the antitrust claims here. *See* 15 U.S.C. § 15 ("any person who shall be injured"); *see United Food & Com. Workers Union & Emps. Midwest Health Benefits Fund v. Warner Chilcott Ltd. (In re Asacol Antitrust Litig.)*, 907 F.3d 42, 51 (1st Cir. 2018); *In re Rail Freight Fuel Surcharge Antitrust Litig.–MDL No. 31 1869* (*Rail Freight I*), 725 F.3d 244, 252 (D.C. Cir. 2013); *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 311 (3d Cir. 2009). Thus, if there are more than a *de minimis* number of uninjured individuals in the putative class, then the injury element—and thus class-wide *liability*—will not be "capable of proof at trial through evidence that [i]s common to the class." *Comcast*, 569 U.S. at 30 (citation omitted); *see Castillo v. Bank of Am., NA*, 980 F.3d 723, 733 (9th Cir. 2020) (predominance requires "a common method of proof to determine liability"). Instead, as the panel correctly explained, "[i]f injury cannot be proved or disproved through common evidence, then 'individual trials are necessary to establish whether a particular [class member] suffered harm from the [alleged

misconduct],' and class treatment under Rule 23 is accordingly inappropriate." Op. 29 (alterations in original) (quoting *Rail Freight I*, 725 F.3d at 252).

The presence of more than a *de minimis* number of uninjured class members also creates an Article III standing problem. A putative class member has standing only if she has suffered an injury-in-fact at the hands of the defendant. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). "That a suit may be a class action . . . adds nothing to the question of standing . . . ." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 n.6 (2016) (alteration in original) (citation omitted). A more than *de minimis* number of class members thus creates a fundamental Article III defect as well. Op. 29 n.7 ("The presence of uninjured parties in a certified class also raises serious standing implications under Article III."); *Tyson Foods*, 577 U.S. at 466 (Roberts, C.J., concurring) ("Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not.").

It is therefore no surprise that this Court has previously held that, "[t]o ensure that common questions predominate over individual ones, the court must 'ensure that the class is not defined so broadly as to include a great number of members who for some reason could not have been harmed by the defendant's allegedly unlawful conduct.'" *Castillo*, 980 F.3d at 730 (quoting *Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1138 (9th Cir. 2016)); *see Torres*, 835 F.3d at 1136 ("[T]he existence of large numbers of class members" is a "flaw that may defeat predominance."); *Mazza*

v. American Honda Motor Co., 666 F.3d 581, 595-96 (9th Cir. 2012) (holding that predominance is defeated where "many class members" are not injured).

B. The Panel Correctly Held That The District Court Failed To Determine Whether The Presence Of Uninjured Class Members Precludes Class Certification In This Case

From the outset, the critical class certification issue in this case has been whether Plaintiffs' proposed classes sweep in too many uninjured class members—entities or individuals who were not actually harmed by any allegedly unlawful increase in the price of Defendants' tuna—to satisfy Rule 23. That issue dovetails with Plaintiffs' reliance on representative evidence—and, in particular, on generalized averaging assumptions—to show injury, notwithstanding the highly individualized differences among class members impacting the prices they paid for tuna products. The panel correctly held that "the district court abused its discretion in declining to resolve the competing expert claims on the reliability of Plaintiffs' statistical model" and "gloss[ing] over the number of uninjured class members." Op. 30, 33. Indeed, even the dissent ultimately "agree[d] that remand is required." *Id.* at 35 (Hurwitz, J., concurring in part and dissenting in part).

Because the packaged tuna market is characterized by individualized negotiations—and includes large nationwide companies, like Walmart, Costco, Target, Kroger, and Safeway, which do not pay "list" prices—it by no means follows that all class members were injured by Defendants' alleged conduct. Indeed, both

sides' experts agreed that the direct purchaser class *does contain* uninjured members. The disagreement was over the *extent* of uninjured members.

According to the direct purchasers' expert, 5.5% of the direct purchaser class was uninjured, while Defendants' expert opined that 28% of the class could not prove injury using that same model. As the panel explained, regardless of where the *de minimis* threshold ultimately lies, "it's easy enough to tell that 28% would be out of bounds." *Id.* at 33 (panel op.). "[I]f Plaintiffs' model is unable to show impact for more than *one-fourth* of the class members," the panel explained, "predominance has not been met." *Id.* at 32 (emphasis added).[4]

Far from novel, that holding *aligns* with this Court's prior precedent recognizing that the presence of uninjured class members may preclude a finding that "common questions predominate over individual ones." *Castillo*, 980 F.3d at 730; *see supra* 8-9. Moreover, the panel went out of its way to make clear that it was *not* adopting any "numerical or bright-line rule" as to when the presence of uninjured class members defeats predominance. Op. 32-33.

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[4] Like the panel, we focus here on the flaws with the direct purchaser class. But similar flaws infected the other putative classes as well. Op. 34. For example, indirect purchasers also pay widely divergent prices for packaged tuna, depending on whom they purchase the tuna from (Amazon vs. a convenience store), the pricing strategies that retailer employs ("loss leader" pricing below wholesale acquisition cost vs. "focal point pricing" at prices ending in 99¢), how much that retailer "passes through" any overcharge to consumers (0% vs. 100%), etc. Defs.' Br. 9-12.

II. A CONTRARY RULE WOULD CREATE A CIRCUIT CONFLICT

The panel's decision also aligns with the decisions of other circuits. As the panel explained, its decision is consistent with the "reported decisions involving uninjured class members." Op. 32. Even the dissent recognized that this Court's "sister Circuits" have adopted "*de minimis*" approaches in line with the panel's. *Id.* at 40 & n.2 (Hurwitz, J., concurring in part and dissenting in part).

In particular, the panel's decision aligns with decisions of the D.C. and First Circuits, both of which have held in the antitrust context that a more than *de minimis* number of uninjured class members will defeat predominance. In *In re Rail Freight Fuel Surcharge Antitrust Litigation* (*Rail Freight II*), the D.C. Circuit held that predominance is defeated if the number of uninjured class members is more than "*de minimis*." 934 F.3d 619, 624-25 (D.C. Cir. 2019). There, the district court determined that a class of 16,065 members—12.7% of whom were uninjured—did not satisfy the predominance requirement, because more than a "*de minimis*" number of class members were uninjured. *Id.* at 623-24. The D.C. Circuit agreed. Like the panel here, the D.C. Circuit explained that there is no rigid "upper limit" to *de minimis*. *Id.* at 624-25. Rather, the inquiry is "more nuanced" and considers "raw numbers as well as percentages." *Id.* at 625. But, as the D.C. Circuit explained, regardless of the specific threshold, "12.7 percent" of a class totaling 16,065

members is too many uninjured class members to permit certification. *Id.* at 623-25.[5]

Likewise, the First Circuit has recognized that there must be a *de minimis* threshold for uninjured class members. As Judge Kayatta explained for the court in *Asacol*, in a case "in which any class member may be uninjured, and there are apparently thousands who in fact suffered no injury," the "need to identify those individuals will predominate" and typically "render an adjudication unmanageable." 907 F.3d at 53-54. The First Circuit—like the panel here—held that this *de minimis* threshold was not rigid but must be defined in "functional terms." *Id.* at 54 (citation omitted). But, the court held, "somewhere around 10% of the class members" being uninjured exceeded the *de minimis* threshold. *Id.* at 47.

This case involves an even more extreme situation than *Rail Freight II* or *Asacol*. As the panel observed, the number of uninjured members in the putative direct purchaser class according to Defendants' expert—at least 28%—is more than *double* the percentage of uninjured class members in *Rail Freight II* (12.7%), nearly *triple* the percentage of uninjured class members in *Asacol* (10%), and about *five*

[5] The D.C. Circuit indicated that *even a* de minimis *number* of injured class members may defeat class certification. *See Rail Freight II*, 934 F.3d at 624. But here, as in *Rail Freight II*, it is unnecessary to resolve that issue given the large number of uninjured class members in the proposed classes.

times the percentage of uninjured class members other district courts have held defeated class certification (5-6%). Op. 32-33 n.13.

Some courts have gone further when it comes to enforcing Article III's standing requirement. The Eighth Circuit, for example, has held that "[i]n order for a class to be certified, each member must have standing and show an injury in fact." *Halvorson v. Auto-Owners Ins. Co.*, 718 F.3d 773, 778 (8th Cir. 2013); *see also Avritt v. Reliastar Life Ins. Co.*, 615 F.3d 1023, 1034 (8th Cir. 2010) ("[A] class cannot be certified if it contains members who lack standing."). Similarly, the Second Circuit has held that "no class may be certified that contains members lacking Article III standing." *Denney v. Deutsche Bank AG*, 443 F.3d 253, 264 (2d Cir. 2006); *see also Flecha v. Medicredit, Inc.*, 946 F.3d 762, 770 (5th Cir. 2020) (Oldham, J., concurring) ("Nothing in Rule 23 could exempt the class-certification stage from [Article III's standing] requirement."); *cf. Tyson Foods*, 577 U.S. at 460 (granting certiorari on the question "whether a class may be certified if it contains 'members who were not injured,'" but ultimately declining to address that question because it was not properly presented by the facts of the case (citation omitted)). In any event, while acknowledging Article III, the panel here simply recognized that a class with 28% uninjured members could not be certified.

There is no reason to grant en banc review to *create* a circuit conflict.

III. THE DISSENT'S CONCERNS ARE MISPLACED

Judge Hurwitz conceded that "a large percentage of uninjured plaintiffs may raise predominance concerns." Op. 39 (concurring in part and dissenting in part); *id.* at 40-41 (suggesting that the extent of uninjured class members is a "fact-based decision[] on predominance"). But the dissent nonetheless took issue with the panel's holding for three primary reasons. None supports en banc review.

First, the dissent noted that "[t]he potential existence of individualized damage assessments . . . does not detract from the action's suitability for class certification." *Id.* at 37 (quoting *Yokoyama v. Midland Nat'l Life Ins. Co.*, 594 F.3d 1087, 1089 (9th Cir. 2010)). But that conflates the questions of liability and damages—only the former of which is relevant to the panel's decision. As this Court has recognized, "damages" and "liability" are distinct issues. *See Castillo*, 980 F.3d at 730-32; *Senne v. Kansas City Royals Baseball Corp.*, 934 F.3d 918, 943 (9th Cir. 2019) ("[M]any of defendants' protests go to damages, not liability."), *cert. denied*, 141 S. Ct. 248 (2020). The question here is not "the extent of the damages suffered by each individual plaintiff at this stage." *Castillo*, 980 F.3d at 732. Rather, it is whether Plaintiffs have "been unable to provide a common method of proving the fact of injury and any liability." *Id.* That is a *liability*—and not a damages—question, and it goes to the heart of the predominance determination in this antitrust case. *See Comcast*, 569 U.S. at 30 (predominance requires plaintiffs to show "that the

existence of individual injury resulting from the alleged antitrust violation (referred to as 'antitrust impact') was 'capable of proof at trial through evidence that [was] common to the class'" (alteration in original) (citation omitted)).

Antitrust impact (or injury) is a distinct element of Plaintiffs' antitrust cause of action, and so must meet the predominance requirement like any other element of the liability equation. *See supra* 7-8; *Asacol*, 907 F.3d at 51 ("Proof of injury . . . is a required element of a plaintiff's case in an action such as this one."). And because injury is an element of liability, the dissent's contention that the district court could "certify[] a liability class, while leaving open which members of the class suffered damage from the defendants' illegal conduct," Op. 38 (Hurwitz, J., concurring in part and dissenting in part), is fundamentally incorrect. Here again, the D.C. Circuit's decision in *Rail Freight II* and the First Circuit's decision in *Asacol* underscore that the presence of a more than *de minimis* number of uninjured class members defeats a finding of predominance in antitrust class actions.

Second, the dissent suggested that the driving inquiry should be whether the district court can "economically 'winnow out' uninjured plaintiffs to ensure they cannot recover for injuries they did not suffer." *Id.* at 36. But Plaintiffs bear the burden of proving that a proposed class is not overbroad *before* any class is certified. Op. 33-34 (panel op.); *see Ellis v. Costco Wholesale Corp.*, 657 F3d 970, 984 (9th Cir. 2011). A "certify now, winnow later" approach is thus fundamentally

incompatible with the settled principle that a plaintiff must prove that Rule 23's requirements are met *before* class certification. *Cf. Asacol*, 907 F.3d at 53 (rejecting various proposed means of removing uninjured individuals from a class, and noting that one common proposed approach, a "'claims administrator's' review of contested forms completed by consumers," "would fail to be 'protective of defendants' Seventh Amendment and due process rights'" (citation omitted)).

Finally, the dissent claimed that "[t]he text of Rule 23 contains no" *de minimis* requirement. Op. 36 (Hurwitz, J., concurring in part and dissenting in part). But Rule 23(b)(3) explicitly states that the district court must "find[] that the questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). The question whether a particular individual has suffered an injury "affect[s] only [that] individual member[]." *Id*. Thus, if a class is certified containing uninjured members, "individual trials [will be] necessary to establish whether a particular [class member] suffered harm from the [alleged misconduct]." *Rail Freight I*, 725 F.3d at 252. And if the number of uninjured members is sufficiently large, then the "need to identify those individuals will predominate" over questions common to the class, Op. 29 (quoting *Asacol*, 907 F.3d at 53)—and thus defeat predominance. The panel's ruling is therefore firmly grounded in the text of Rule 23(b)(3).

Indeed, recognizing that a class cannot be certified if it has a more than a *de minimis* number of uninjured members is no more an "amendment" to Rule 23 than the principle that "commonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury,'" *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349-50 (2011) (citation omitted), or that Rule 23(b)(3)'s predominance inquiry requires that a plaintiff's damages model "must be consistent with its liability case," *Comcast*, 569 U.S. at 35 (citation omitted). Such principles are simply applications of Rule 23's requirements to particular problems that arise in class certification.

The panel therefore correctly rejected the suggestion—which the dissent itself acknowledged was at odds with the decisions of other circuits—that a district court could certify a class in which Plaintiffs failed "to show impact for up to 28% of the class." Op. 40-41 (Hurwitz, J., concurring in part and dissenting in part).

CONCLUSION

En banc review is not warranted.

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Respectfully submitted,

s/ Gregory G. Garre

Gregory G. Garre
Samir Deger-Sen
Shannon Grammel
LATHAM & WATKINS LLP
555 Eleventh Street, NW
Suite 1000
Washington, DC 20004
(202) 637-2207
gregory.garre@lw.com

Christopher S. Yates
Belinda S Lee
Ashley M. Bauer
LATHAM & WATKINS LLP
505 Montgomery Street
Suite 2000
San Francisco, CA 94111
(415) 391-0600

Counsel for Defendants-Appellants StarKist Co. and Dongwon Industries Co., Ltd.

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Federal Rule of Appellate Procedure 32(a)(5)-(6), Ninth Circuit Rule 32-1, and this Court's April 28, 2021 Order, Defendants-Appellants' Opening Brief is proportionately spaced, has a typeface of 14 point, and contains 4,119 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

s/ *Gregory G. Garre*
Gregory G. Garre