

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, No. 3:15-md-02670-JLS-MDD

**BRIEF FOR THE AMERICAN ANTITRUST INSTITUTE AS AMICUS
CURIAE IN SUPPORT OF PLAINTIFFS-APPELLEES**

ELLEN MERIWETHER
CAFFERTY CLOBES MERIWETHER
& SPRENGAL
205 N. Monroe St.
Media, PA 19063
(215) 864-2800 (phone)
meriwether@caffertyclobes.com

RANDY M. STUTZ
Counsel of Record
AMERICAN ANTITRUST INSTITUTE
1025 Connecticut Avenue, NW
Suite 1000
Washington, DC 20036
(202) 905-5420
rstutz@antitrustinstitute.org

Counsel for Amicus Curiae

August 21, 2020

CORPORATE DISCLOSURE STATEMENT

Pursuant to Appellate Rule 26.1(a), the American Antitrust Institute states that it is a nonprofit, non-stock corporation. It has no parent corporations, and no publicly traded corporations have an ownership interest in it.

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT.....	i
TABLE OF AUTHORITIES.....	iii
INTEREST OF AMICUS CURIAE.....	1
INTRODUCTION AND SUMMARY OF ARGUMENT	1
ARGUMENT.....	6
I. THE DISTRICT COURT CORRECTLY APPLIED EXISTING RULE 23 STANDARDS IN CERTIFYING THE CLASS.....	6
A. Rule 23 Does Not Require Plaintiffs to Prove Injury to Each Class Member as a Prerequisite to Certification	7
B. Defendants’ Outcome-Driven Standard for Merits Determinations at Class Certification Is Incorrect	8
C. <i>Tyson Foods</i> ’ Holding that Reliable Statistical Evidence Is Admissible in Class Proceedings Governs this Case.....	13
1. <i>Tyson Foods</i> Permits the Use of Reliable Statistical Evidence to Prove an Element of an Antitrust Claim	15
2. <i>Tyson Foods</i> Confirms that Defendants May Not Profit from Uncertainty Caused by Their Illegal Conduct.....	19
II. PROPERLY SPECIFIED REGRESSION ANALYSES MAY RELIABLY DEMONSTRATE CLASSWIDE IMPACT.....	23
CONCLUSION.....	28
CERTIFICATE OF SERVICE	
CERTIFICATE OF COMPLIANCE	

TABLE OF AUTHORITIES

CASES

<i>Amchem Prods., Inc. v. Windsor</i> , 521 U.S. 591 (1997).....	2
<i>Amgen Inc. v. Conn. Ret. Plans & Tr. Funds</i> , 568 U.S. 455 (2013).....	8, 9, 10
<i>Anderson v. Mt. Clemens Pottery Co.</i> , 328 U.S. 680 (1946).....	13
<i>Bigelow v. RKO Radio Pictures, Inc.</i> , 327 U.S. 251 (1946).....	19, 20, 21
<i>Briseno v. ConAgra Foods, Inc.</i> , 844 F.3d 1121 (9th Cir. 2017).....	7, 12
<i>Bus. Elecs. Corp. v. Sharp Elecs. Corp.</i> , 485 U.S. 717 (1988).....	22
<i>California v. Am. Stores Co.</i> , 495 U.S. 271 (1990).....	2
<i>Eastman Kodak Co. of N.Y. v. S. Photo Materials Co.</i> , 273 U.S. 359 (1927).....	19, 20
<i>Erica P. John Fund, Inc. v. Halliburton Co.</i> , 563 U.S. 804 (2011).....	14
<i>Hawaii v. Standard Oil Co. of Cal.</i> , 405 U.S. 251 (1972).....	2
<i>Hilao v. Estate of Marcos</i> , 103 F.3d 767 (9th Cir. 1996).....	12
<i>Ibe v. Jones</i> , 836 F.3d 516 (5th Cir. 2016).....	11
<i>Ill. Brick Co. v. Illinois</i> , 431 U.S. 720 (1977).....	3

<i>In re Air Cargo Shipping Servs. Antitrust Litig.</i> , No. 06-MD-1175 JG VVP, 2014 WL 7882100 (E.D.N.Y. Oct. 15, 2014).....	27
<i>In re Capacitors Antitrust Litig. (No. III)</i> , No. 14-CV-03264-JD, 2018 WL 5980139 (N.D. Cal. Nov. 14, 2018).....	25, 27
<i>In re High-Tech Emp. Antitrust Litig.</i> , 985 F. Supp. 2d 1167 (N.D. Cal. 2013).....	25
<i>In re Hydrogen Peroxide Antitrust Litig.</i> , 552 F.3d 305 (3d Cir. 2008).....	6, 10, 11
<i>In re Hyundai & Kia Fuel Econ. Litig.</i> , 926 F.3d 539 (9th Cir. 2019).....	17
<i>In re Linerboard Antitrust Litig.</i> , 305 F.3d 145 (3d Cir. 2002).....	25
<i>In re Polyurethane Foam Antitrust Litig.</i> , 314 F.R.D. 226 (N.D. Ohio 2014).....	27
<i>In re Scrap Metal Antitrust Litig.</i> , 527 F.3d 517 (6th Cir. 2008).....	23
<i>In re Static Random Access Memory (SRAM) Antitrust Litig.</i> , 264 F.R.D. 603 (N.D. Cal. 2009)	25
<i>In re Suboxone Antitrust Litig.</i> , No. 19-3640, 2020 WL 4331523 (3d Cir. July 28, 2020)	13
<i>In re TFT-LCD (Flat Panel) Antitrust Litig.</i> , 267 F.R.D. 291 (N.D. Cal. 2010)	25
<i>In re Urethane Antitrust Litig.</i> , 768 F.3d 1245 (10th Cir. 2014).....	22
<i>J. Truett Payne Co. v. Chrysler Motors Corp.</i> , 451 U.S. 557, 566–67 (1981)	21
<i>Messner v. Northshore Univ. Health Sys.</i> , 669 F.3d 802 (7th Cir. 2012).....	25

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.