No. 18-15890

In the
United States Court of Appeals
For the
Ninth Circuit

KATHLEEN SONNER, on behalf of herself and all others similarly situated,

Plaintiff–Appellant,

v.

PREMIER NUTRITION CORPORATION, FKA JOINT JUICE, INC.,

Defendant–Appellee.

Appeal from an Order of the United States District Court
for the Northern District of California, Hon. Richard Seeborg
D.C. Case No. 3:13-cv-01271-RS

BRIEF OF *AMICUS CURIAE* PUBLIC JUSTICE IN SUPPORT OF APPELLANT'S PETITION FOR REHEARING OR REHEARING *EN BANC*

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CORPORATE DISCLOSURE STATEMENT

Public Justice is a nonprofit corporation headquartered in Washington, D.C. It has no parent company and has issued no stock.[1]

INTERESTS OF AMICUS

Public Justice, a national public-interest law firm, is dedicated to pursuing justice for victims of corporate and governmental misconduct. It specializes in precedent-setting and socially significant cases designed to advance consumers' and victims' rights, civil rights and civil liberties, occupational health and employees' rights, the preservation and improvement of our civil justice system, and the protection of the poor and the powerless. This case is particularly concerning to Public Justice because the panel decision—if not corrected—would interfere with the fair and consistent administration of law when plaintiffs proceeding in federal court allege state-law violations.

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

PRELIMINARY STATEMENT

The decision in this case should concern anyone concerned with federalism. By limiting restitution for Californians proceeding in federal court, the panel decision upends settled systems of private law enforcement and intrudes on state sovereignty. The holding that victims of unfair or deceptive practices cannot obtain restitution unless they prove damages are inadequate would hold federal plaintiffs to a standard at odds with substantive state law. The panel decision restricts the ability of injured consumers and competitors to seek recoveries approved by the Legislature, rolling back the state's traditional police powers and impeding the uniform administration of justice. Under this ruling, many plaintiffs, unable to proceed in state court as a result of the Class Action Fairness Act of 2005 (CAFA), would forfeit a remedy that would be available to them in state court. And, contra *Erie*, this difference in access to remedy would result solely from the accident of being in federal court. Rehearing is needed to restore equipoise in this important area.

SUMMARY OF ARGUMENT

The panel opinion disregards the general rule that "when forum state law defines the underlying substantive right, state law also governs the availability of equitable remedies." 19 Wright, Miller & Cooper, *Federal*

Practice and Procedure § 4513 (3d ed. 2018). State law defines the conditions for obtaining a remedy created by state law, and California statutes governing marketplace norms, like the Unfair Competition Law, Bus. & Prof. Code § 17200 *et seq.* (UCL), do not condition the availability of restitution upon a damage award being inadequate. *See Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 437 (1996) (holding that "when New York substantive law governs a claim for relief, New York law and decisions guide the allowable damages"). Restitution awards entered by federal judges and paid by wrongdoers demonstrate that the opinion of the *Sonner* panel is flawed, inconsistent with prevailing law, and in urgent need of correction.

ARGUMENT

I. THE PANEL DECISION IMPROPERLY INVADES STATE SOVEREIGNTY BY PRESCRIBING CONDITIONS FOR STATE-CREATED REMEDIES.

In displacing the standard for securing relief for violations of state law, the panel decision discards California's remedial framework and usurps its sovereign authority to prescribe and define laws to protect its citizens. The decision holds that a condition for equitable relief in federal court is the lack of a suitable legal remedy even when the state law the defendant violated was intended to be enforced to order restitution *without*

that condition.

Under what circumstances victims of state-law violations may have their losses restored is an issue committed to a state's lawmaking bodies. California's Legislature decided to allow restitution for a violation of the UCL (among other laws) even if the injured party can also recover damages. The panel's erroneous holding would allow the fact of federal venue (often forced on class plaintiffs) to prevent defrauded people from getting their money back, resulting in one set of substantive remedies in federal court and a different one in state court.

Lest there be any doubt that the panel's decision creates an intra-circuit conflict warranting rehearing under Rule 35(a)(1), in another recent case this Court held that the availability of damages does *not* preclude federal plaintiffs from seeking restitution under California statutory law:

> Defendants' argument that Plaintiffs cannot seek equitable relief under the UCL or FAL, given an adequate legal remedy under the CLRA, is foreclosed by statute. The UCL, FAL and CLRA explicitly provide that remedies under each act are cumulative to each other.

Moore v. Mars Petcare US, Inc., No. 18-15026, — F.3d —, 2020 WL 4331765, at *9 n.13 (9th Cir. July 28, 2020) (citations omitted).

This reasoning is correct under *Erie* because the standards for

entering relief are part of the state law that defines a corresponding right. Consequently, state law provides "the standards which govern the remedy" and "the federal . . . judge must stand in the shoes of a state court judge when ruling" on these substantive matters. *Lipsky v. Commonwealth United Corp.*, 551 F.2d 887, 895 (2d Cir. 1976) (citations omitted) (discussing conditions for rescission); *see also Gasperini*, 518 U.S. at 437; *Weathersby v. Gore*, 556 F.2d 1247, 1258 (5th Cir. 1977) (in diversity suit, applying Mississippi's "general rule applicable when specific performance is requested"). Even the Supreme Court case relied on by the panel recognizes that, "since a federal court adjudicating a state-created right solely because of the diversity of citizenship of the parties is for that purpose, in effect, only another court of the State, it cannot . . . *substantially affect the enforcement of the right as given by the State*." *Guaranty Tr. Co. of N.Y. v. York*, 326 U.S. 99, 108–09 (1945) (emphasis added); *see Davidson v. Kimberly-Clark Corp.*, 889 F.3d 956, 970 (9th Cir. 2018). Thus, until this case, it was clear that in determining whether to enforce a remedy for an invasion of a state-created right, federal courts must act as their state counterparts would:

> [*Erie*'s] basic philosophy is that a federal court exercising its diversity jurisdiction to adjudicate rights created by the state sits as another court of that state and should

> reach the same result as the state courts would reach in deciding the identical issue. . . . Thus, to avoid serious differences in outcome, we must determine and follow the probable remedial treatment [plaintiff] would have received in a state court.

McLeod v. Stevens, 617 F.2d 1038, 1041 (4th Cir. 1980) (internal citations, alterations, and quotation marks omitted).

But if the panel decision in this case stood, federal courts would *not* follow the remedial treatment that California consumers and businesses injured by unfair trade practices would receive in state court. Under applicable statutes, a victim of such practices proceeding in state court need not prove a negative by showing the inadequacy of legal remedies to obtain equitable relief. *See Allied Grape Growers v. Bronco Wine Co.*, 249 Cal. Rptr. 872, 884–85 (Ct. App. 1988) (finding "no merit" to the contention that because an adequate remedy at law existed, injunctive relief under the UCL was unavailable); *In re Marriage of Van Hook*, 195 Cal. Rptr. 541, 550–51 (Ct. App. 1983) (holding that "inadequacy of a remedy at law need not be shown to obtain injunctive relief authorized by statute . . . where the statutory conditions for issuance are satisfied").

The panel held that California's standard for entry of relief authorized by California law does not apply in federal court even though the district court did not reach that issue. *Compare Mullins v. Premier Nutrition Corp.*,

No. 13-CV-01271-RS, 2018 WL 510139 (N.D. Cal. Jan. 23, 2018) (decision below), *with Potrero Hills Landfill, Inc. v. Cty. of Solano*, 657 F.3d 876, 889 (9th Cir. 2011) ("[B]ecause the court below did not reach [the] argument, we have no exercise of discretion to review."), *and Duffy v. Riveland*, 98 F.3d 447, 457 n.8 (9th Cir. 1996). Moreover, in *Begay v. Kerr-McGee Corp.*, 682 F.2d 1311 (9th Cir. 1982), where this Court addressed an Arizona law that gave the state's Industrial Commission exclusive jurisdiction over the claims, the Court recognized that "[w]hether these provisions of Arizona workers compensation law are viewed as . . . depriving the state courts of jurisdiction, or rather as a *limitation of remedy*, it is evident that they are 'substantive' provisions which, under *Erie*, a district court sitting in diversity is bound to follow." *Id*. at 1317–18 (emphasis added) (footnote omitted). The limitation on remedy imposed here is equally substantive.

Similarly, because entry of a state-sanctioned injunction is a matter of state substantive law, state rather than federal standards apply to that remedial determination. *See Lord & Taylor, LLC v. White Flint, L.P.*, 780 F.3d 211, 215 (4th Cir. 2015) (state substantive law applied to injunctive-relief request); *City of New York v. Golden Feather Smoke Shop, Inc.*, 597 F.3d 115, 121 (2d Cir. 2010) (explaining that if a statute makes "conduct, in and of itself . . . harmful to the public" then "[r]equiring a party seeking a

statutorily-sanctioned injunction to make an additional showing of irreparable harm . . . is not required"); *Capital Tool & Mfg. Co. v. Maschinenfabrik Herkules*, 837 F.2d 171, 172 (4th Cir. 1988) ("All that need be proved is a violation of the statute"); *System Ops., Inc. v. Scientific Games Dev't Corp.*, 555 F.2d 1131, 1143 (3d Cir. 1977) (holding in diversity action that state law controlled whether special damages were a condition precedent to a permanent injunction against product disparagement).

The conditions for awarding restitution for state-law violations likewise are substantive—*i.e.*, up to the state to set—because vindicating the rights of injured parties depends on meeting those conditions. As with an injunction, a restitution award "is often so inextricably interwoven with the substantive right invaded that the denial of the remedy would be tantamount to the denial of the right." *Kaiser Trading Co. v. Associated Metals & Minerals Corp.*, 321 F. Supp. 923, 931 (N.D. Cal. 1970) (internal quotation marks and citation omitted). For this reason, state law surrounding the restitution remedy runs with the accompanying state-law right. *See, e.g.*, *Sebastian v. Provident Life & Acc. Ins. Co.*, 73 F. Supp. 2d 521, 528 (D. Md. 1999) (noting that the defendant "focuse[d] on restitution as a remedy and correctly contend[ed] that Maryland remedial law applies under *Erie*"); *B. J. McAdams, Inc. v. Boggs*, 439 F. Supp. 738, 751 (E.D. Pa.

1977) (where the plaintiff asserted the right to a certificate and all profits generated by it as a matter of equity, seeking a constructive trust, "the substantive law governing this restitution issue is that of Pennsylvania").

Applying the substantive principle of California law that plaintiffs need not show damages are inadequate to have their losses restored does not limit the federal courts' freedom to act, divest them of power to fashion remedies, or impair any federal interest. It is the panel's holding, instead, that would curtail federal courts' authority, undermining equal administration of law.

II. THE PANEL'S HOLDING WOULD INTERFERE WITH STATE LAW ENFORCEMENT AND IS INCONSISTENT WITH RESTITUTION ORDERS IN FEDERAL COURT.

Since restitution, regardless of whether damages are available, "actually is part of [California's] framework of substantive rights or remedies," no federal rule can or should override that framework. *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 419 (2010) (Stevens, J., concurring in part and concurring in the judgment).

The UCL, for example, gives the court broad authority to enter whatever "orders or judgments . . . may be necessary *to restore* to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition." Cal. Bus. & Prof. Code §

17203 (emphasis added). Hence the Legislature specifically provided for court-ordered restitution: "[T]he overarching legislative concern [was] to provide a *streamlined* procedure for the prevention of . . . unfair competition"; and the possibility of damage claims "would tend to thwart this objective . . . ." *Cortez v. Purolator Air Filtration Prod. Co.*, 23 Cal. 4th 163, 173–74 (2000) (citations omitted). The state supreme court also "has repeatedly recognized the importance of . . . private enforcement" of the UCL. *In re Tobacco II Cases*, 46 Cal. 4th 298, 313 (2009) (citation omitted).

The panel's judicial override of settled California law and policy would be especially harmful where streamlined restitution is best suited to redress and prevent violations. A defendant may be able to make an abstract argument that damages or some other form of relief is "adequate," but in practical reality, the substantive remedy of restitution is often the optimal remedy available to deceived consumers. Restitution is the *only* type of monetary relief that private parties can obtain under the UCL, *see Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1144 (2003), and business conduct may violate the UCL's unfair prong, entitling injured consumers and competitors to recover, even if the same conduct does not violate state antitrust or false advertising law. The UCL has "independent force" and section 17200's use of the disjunctive means a "practice is

prohibited as 'unfair' . . . even if not 'unlawful' . . . ." *Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal. 4th 163, 180–81 (1999) (reiterating that, "given the creative nature of the scheming mind, the Legislature evidently concluded that a less inclusive standard would not be adequate") (citations omitted); *see also Progressive W. Ins. Co. v. Yolo Cty. Super. Ct.*, 37 Cal. Rptr. 3d 434, 453 (Ct. App. 2005) (concluding "section 17200's 'unfair' prong should be read more broadly in consumer cases because consumers are more vulnerable to unfair business practices than businesses and without the necessary resources to protect themselves from sharp practices.").

These facets of California law—and plaintiffs' frequent inability to pursue major cases in state court—would intensify the harmful effects of the panel's decision on law enforcement. *See* Jordan Elias, *Cooperative Federalism in Class Actions*, 86 Tenn. L. Rev. 1, 5 (2018) (noting that "CAFA shifted into federal court the bulk of class actions alleging state-law violations from misleading advertising, bait-and-switch schemes, hidden fees and interest-rate hikes, underpayment of employees, and consumer warranty and privacy breaches."). Defendants have already seized on *Sonner*—pre-mandate issuance—to demand wholesale dismissal of UCL claims. *E.g.*, Motion to Dismiss, *In re MacBook Keyboard Litig.*, No. 5:18-cv-

02813-EJD (N.D. Cal. July 16, 2020), ECF No. 221 at p. 3 of 5 (Apple Inc. arguing in product-defect suit that "[o]n June 17, 2020, the Ninth Circuit held for the first time that federal common law, not state law, applies to the equitable relief claims of a class of California consumers under California's Unfair Competition Law").

The panel opinion thus changes the law. Indeed, it would *sub silentio* abrogate federal-court restitution awards involving a range of misconduct, creating a conflict of law of which the panel appeared unaware. For instance, a federal court sitting in diversity ordered Wells Fargo to pay $203 million in restitution for abusive checking account practices. *Gutierrez v. Wells Fargo Bank, N.A.*, 730 F. Supp. 2d 1080 (N.D. Cal. 2010). The bank had been pooling a customer's daily debit-card transactions and resequencing them from highest to lowest dollar amount to drain accounts and charge strings of expensive overdraft fees. *Id*. at 1083–85. The bank had told its customers that debit transactions pulled money out of their accounts instantly. *Id*. at 1128. The district court found that "gouging and profiteering" motivated the bank's conduct, which targeted the poorest segment of its customer base, and enjoined the conduct and ordered restitution to the defrauded account holders under the UCL. *Id*. at 1104. The award returned all losses, and because Wells Fargo kept computerized

records, class members' accounts were automatically credited by reference to a chronological posting of transactions. *Id*. at 1138–40. Neither the district court's post-trial opinions,[2] nor this Court's opinions upholding the award of restitution under California law,[3] considered whether the class representatives had an adequate legal remedy.

The decision here would eliminate or reduce federal judges' discretion to enter these kinds of judgments, relaxing the standard for acceptable marketplace behavior. The decision therefore not only invades California's sovereignty but also would weaken the salutary deterrence its consumer protection laws are designed to promote. *See Korea Supply Co.*, 29 Cal. 4th at 1148 ("[T]he Legislature considered deterrence of unfair practices to be an important goal").

CONCLUSION

Public Justice respectfully urges rehearing to restore the balance between federal and state law on the important question of what law governs the entitlement to equitable relief of plaintiffs proceeding in federal court under state law.

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[2] 730 F. Supp. 2d 1080 (N.D. Cal. 2010); 944 F. Supp. 2d 819 (N.D. Cal. 2013).

[3] 589 F. App'x 824 (9th Cir. 2014), *cert. denied*, 136 S. Ct. 1512 (2016); 704 F.3d 712 (9th Cir. 2012).

Respectfully submitted,

Dated: July 30, 2020

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Ninth Circuit Rule 29-2(c)(2), containing 2,736 words. The brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6). The text appears in 14-point Cambria, a proportionally spaced serif typeface.

Dated: July 30, 2020

/s/ Jordan Elias

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CERTIFICATE OF SERVICE

I hereby certify that on July 30, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit, via the appellate CM/ECF system. Counsel for the parties and other case participants are registered CM/ECF users and will be served by the appellate CM/ECF system.

Dated: July 30, 2020

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