April 11, 2013

Molly C. Dwyer, Clerk
U.S. Court of Appeals for the Ninth Circuit
95 Seventh Street
San Francisco, CA 94103

Re: No. 12-16384, *Brady v. Deloitte & Touche, LLP*
Response to Deloitte's Rule 28(j) Letter

Dear Ms. Dwyer:

Deloitte asserts that *Comcast v. Behrend* "compels dismissal" because each "plaintiff's claim for damages necessitates an individualized determination." *Comcast* does no such thing. The plaintiffs there alleged four antitrust injury theories, only one of which was capable of classwide proof. Slip op. at 3. They had to show "that the damages resulting from *that injury*" could be measured using a "common methodology" because "any model supporting a 'plaintiff's damages case must be consistent with its liability case.'" *Id.* at 3, 7.

The plaintiffs' model, however, "failed to measure damages resulting from the particular antitrust injury on which" liability was premised, instead "assum[ing] the validity of all four theories of antitrust impact" even though only one "remained in the case." *Id.* at 8-9. Because this methodology "identifie[d] damages that [were] not the result of the wrong," Rule 23 was not satisfied. *Id.* at 10.

Here, by contrast, there is a single theory of liability, damages are tied directly to that theory, and damage calculations will be ministerial. Deloitte hasn't contended otherwise.

Deloitte's argument contradicts (1) the *Comcast* majority opinion, which stated that the case "turn[ed] on the straightforward application" of Rule 23, *id.* at 7; (2) the dissent, which noted that "the opinion breaks no new ground" and "should not be read" as Deloitte contends it should be, *id.* at 3; and (3) *Amgen v. Connecticut Retirement*, which explained that Rule 23(b)(3) "does *not* require a plaintiff seeking class certification to prove that each element of her claim is susceptible to classwide proof," 133 S. Ct. 1184, 1196 (2013).

Gupta Beck PLLC
1625 Massachusetts Ave, NW, Suite 500, Washington, DC 20036
P 202 470 3826 **F** 202 328 7030
guptabeck.com

The GVR order in *RBS v. Ross*—a case involving two classes, one with four liability theories—"is neither an outright reversal nor an invitation to reverse," *Cmtys. v. Mich. High Sch.*, 459 F.3d 676, 680 (6th Cir. 2006), and "does not even carry precedential weight," *Gonzalez v. Justices*, 420 F.3d 5, 7 (1st Cir. 2006). *See Youngblood v. West Virginia*, 547 U.S. 867, 872-73 (2006) (Scalia, J., dissenting). And *Wang v. Chinese Daily* simply reaffirms that blanket exemption policies are insufficient to establish predominance. 709 F.3d 829, 835 (9th Cir. 2013).

Sincerely,

/s/ Deepak Gupta

Deepak Gupta
Counsel for Plaintiffs-Appellants

cc: Counsel of Record

Gupta Beck PLLC
1625 Massachusetts Ave, NW, Suite 500, Washington, DC 20036
P 202 470 3826 **F** 202 328 7030
guptabeck.com