No. 07-552

IN THE

Supreme Court of the United States

SPRINT COMMUNICATIONS COMPANY L.P.
and AT&T CORP.,

Petitioners,

v.

APCC SERVICES, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF *AMICUS CURIAE* QWEST COMMUNICATIONS CORPORATION IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Page

CASES

Cited Authorities

Cited Authorities

Cited Authorities

Cited Authorities

MISCELLANEOUS

QWEST'S INTEREST

Qwest Communications Corporation ("Qwest") has a direct interest in the outcome of this appeal because Qwest is a defendant in a virtually identical lawsuit brought by these Respondents. This Court's ruling will directly affect a critical defense Qwest asserted in this other lawsuit.[1]

Qwest is one of the nation's largest providers of long-distance telecommunication services, including toll-free (800-number) services. Since 1996, when the Federal Communications Commission ("FCC") imposed requirements for carriers to pay compensation, Qwest has paid hundreds of millions of dollars in "dial-around compensation" to numerous payphone owners.

On the same day that APCC Services, Inc. and the other plaintiffs (jointly "Aggregators") filed their lawsuit against Petitioner Sprint Communications Company L.P. ("Sprint"), Aggregators also filed a virtually identical lawsuit against Qwest, *APCC Services, Inc. v. Qwest Communications Corporation*, No. 01-641 (D.D.C. filed Mar. 23, 2001) ("*APCC v. Qwest*"). Aggregators' lawsuit against Qwest proceeded on a different path from the cases against AT&T Corp. ("AT&T") and Sprint. The Judicial Panel on Multidistrict Litigation transferred the *APCC v. Qwest* case to the U.S. District Court for the Central District of California in 2002. The case was

1. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae* or its counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

transferred back to the District of Columbia in 2006—after AT&T and Sprint had already begun prosecuting the appeal that has led to their Petition. Consequently, Qwest is not a party to this appeal.

Nonetheless, this Court's disposition of AT&T's and Sprint's petition for a writ of *certiorari* directly affects Aggregators' case against Qwest. If this Court grants the petition and ultimately agrees with AT&T and Sprint that Aggregators lack standing, that ruling will result in the dismissal of Aggregators' case against Qwest as well. On the other hand, if this Court rules in Aggregators' favor, the lower court will be bound to follow that precedent, and Qwest will have no realistic opportunity to reverse this Court's ruling in later appeals of the *APCC v. Qwest* case.

For these reasons, Qwest submits this brief as *amicus curiae* in support of AT&T's and Sprint's Petition for a writ of *certiorari*.

SUMMARY OF ARGUMENT

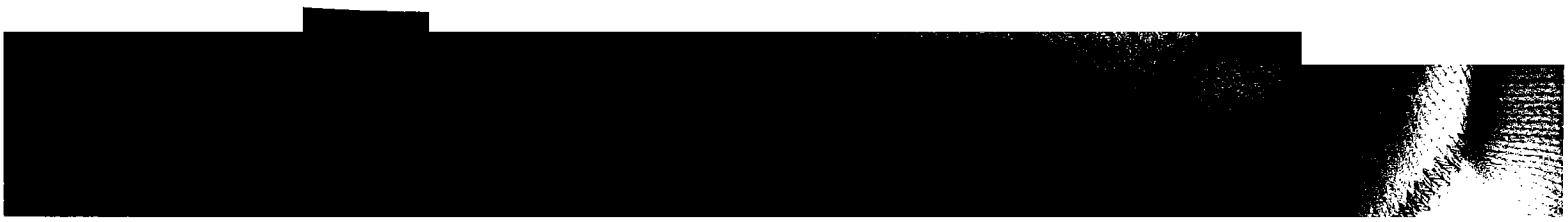
The D.C. Circuit's terse, superficial conclusion that Aggregators have an "interest" sufficient to satisfy Constitutional standing requirements is contrary to basic principles of civil procedure, and leads to unreasonable and unfair results. For instance, with Aggregators as plaintiff, Qwest and other defendants can obtain only very limited third-party discovery from the payphone service providers ("PSPs"), making it extraordinarily difficult for defendants to prove their affirmative defenses. Furthermore, it is unlikely that Qwest could collect on its counterclaims from Aggregators.

[redacted]

Aggregators' response is that these problems are the inevitable cost of efficiently combining 1,400 claims in a single lawsuit. However, that supposed efficiency results in Qwest being denied rights afforded by the Federal Rules of Civil Procedure. Aggregators' case against Qwest is a *de facto* class action, possessing all of the hallmarks of a class action, but without any of the protections or mandatory requirements of Rule 23. Allowing the case to proceed would create a dangerous precedent, encouraging other litigation agents to sidestep the class action rules and prosecute claims on behalf of numerous, disparate nonparties, while shielding those nonparties from discovery or counterclaims.

The D.C. Circuit's opinion deviates from other Federal Rules, in addition to Rule 23, and relies on old rules of standing, superseded by this Court's more recent pronouncements. The D.C. Circuit erroneously elevated Rule 17(a) to a jurisdiction-creating rule, in violation of the express limitation contained in Rule 82.

Qwest respectfully encourages this Court to grant the Petition, issue a writ of *certiorari*, and reverse the D.C. Circuit's opinion that Aggregators have standing.



ARGUMENT

I. Allowing Aggregators To Have Standing Deprives Qwest And Other Defendants Of Significant Procedural Guarantees Contained In The Federal Rules Of Civil Procedure

Allowing Aggregators to proceed with this lawsuit in their name, without the actual participation of the PSPs, creates severe procedural disadvantages for defendants such as Qwest and affords Aggregators an unfair tactical advantage.

A. First, if the Court rules that Aggregators have standing, Qwest and other defendants, such as AT&T and Sprint, would be deprived of the ability to take discovery from the claimants themselves—the PSPs. None of the important discovery tools contained in Federal Civil Procedure Rules 26 through 37 are available as to the PSPs in a meaningful fashion. Because the PSPs are not parties, defendants cannot serve them with written interrogatories or requests for admission. At best, defendants can serve Rule 45 subpoenas on the PSPs, but with 1,400 PSPs' claims at issue here, that would be physically and economically unrealistic. Few, if any, of the PSPs are subject to the personal jurisdiction of the district court in the District of Columbia, so the subpoenas would need to be served nationwide. Disputes about the scope of the subpoenas would be litigated in miscellaneous actions nationwide, likely in every federal judicial district. Courts around the country would have to individually resolve identical arguments about the proper scope of discovery under the subpoenas, leading to a patchwork of inconsistent results.

In AT&T's lawsuit with the Aggregators, the court authorized ***informal*** discovery on the PSPs, but the results proved that informal discovery is no replacement for the formal tools of the federal civil rules. Aggregators and AT&T sent "questionnaires" to all of the PSPs, effectively seeking information normally obtained through interrogatories and document requests. AT&T has reported that very few of the PSPs responded meaningfully, basically frustrating AT&T's efforts. Qwest and other defendants face the prospect of accepting haphazard results from informal discovery in lieu of the procedural guarantees to which all defendants are entitled under the Federal Rules. That unfairness demonstrates the fundamental problem of granting the Aggregators "standing" even though they have no direct interest in the lawsuit.

B. Second, if defendants prevail on their counterclaims, it cannot be guaranteed that they could collect on those counterclaims without filing actions around the country. While Aggregators allege that Qwest has underpaid dial-around compensation to the PSPs, Qwest has filed a counterclaim alleging that Qwest has in fact overpaid dial-around compensation in the past and is entitled to reimbursement of these overpayments. (AT&T and Sprint have filed similar counterclaims.) It is unclear if Qwest would be able to enforce a judgment on its counterclaim against Aggregators. The PSPs assigned to the Aggregators the right to pursue a ***collection*** action; nowhere is it apparent that the PSPs assigned their ***liabilities*** to the Aggregators. (*See* Appendix to Petition ("App.") 114-127.) A judgment that Aggregators, the counterclaim defendants, must reimburse Qwest could be illusory; Aggregators long ago

distributed Qwest's dial-around compensation to the PSPs, so Aggregators are not "holding the money." The district court would have to order Aggregators to pass a hat and take up a collection from the PSPs, and it is not difficult to predict that the PSPs' participation in such an order would be minimal.

Qwest, again, would be forced to file actions around the country to enforce the judgment of the district court. Besides the obvious expense and difficulty, the question arises whether some PSPs might even argue that the judgment on Qwest's counterclaim in the *APCC v. Qwest* lawsuit is not binding on them.

C. It is fundamentally unfair to procedurally hamper Qwest's defense of a federal lawsuit merely to accommodate the mechanism the PSPs employed to pursue their claims. The defendants in these lawsuits had no role in the PSPs' choice to assign their collection action to the third-party Aggregators; yet it is defendants that cannot effectively collect evidence directly from the PSPs to defend themselves or to collect judgments on any counterclaims. The D.C. Circuit did not appear to consider any of these problems, but tersely allowed the case to go forward on the grounds that the Aggregators have a supposed "interest" in the case.

II. The Aggregators Are Pursuing A *De Facto* Class Action Without Satisfying The Mandatory Requirements Of Rule 23

That a single lawsuit may be more efficient than 1,400 lawsuits does not mean that the single lawsuit is appropriate. This issue arises time and again with respect to class actions. Here, Aggregators and their PSP customers are attempting to consolidate class-wide claims into a single lawsuit without ever having to satisfy Rule 23's mandatory requirements for a class action.

A. This lawsuit is a *de facto* class action, bearing all of the hallmarks of such a case. A small number of named plaintiffs are pursuing claims on behalf of a class of 1,400 separate claimants. The claims result from a "common" issue—defendant Qwest's procedures and computer systems for tracking dial-around calls and paying compensation to the PSPs. Aggregators argue, in their effort to seek "associational" standing under *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1977), that their claims do not require the participation of the PSPs. Any class representative would make this same argument.

Congress and the federal courts have constructed important procedural safeguards to ensure that class actions proceed only if mandatory requirements are present. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997) ("Courts are not free to amend a rule outside the process Congress ordered, a process properly tuned to the instruction that rules of procedure 'shall not abridge . . . any substantive right.'") (quoting 28 U.S.C. § 2072(b)); Fed. R. Civ. P. 23 advisory committee's notes

(Rule 23 amended into modern form because "the original rule did not squarely address itself to the question of the measures that might be taken during the course of the action to assure procedural fairness"). Even though a single lawsuit is always more efficient, in many cases it is inappropriate because the nature of claims and defenses necessitates that individual suits be filed—even if that requires thousands of lawsuits. *See Amchem Prods.*, 521 U.S. at 597, 626 (denying certification of class of "hundreds of thousands, perhaps millions" for settlement purposes because "[i]n significant respects, the interests of those within the single class are not aligned"); *In re American Med. Sys., Inc.*, 75 F.3d 1069, 1079, 1090 (6th Cir. 1996) (class of 12,000 to 15,000 alleged members decertified where plaintiff established numerosity requirement of Rule 23 but no other requirements).

None of the procedural protections inherent in Rule 23 has been addressed here. The district court has never decided any motions under Rule 23 in the *APCC v. Qwest* lawsuit; Aggregators have never been forced to prove that the mandatory requirements of Rule 23 are present. *See Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1988 n.13 (2007) ("Rule 23 requires 'rigorous analysis' to ensure that class certification is appropriate.") (citing *General Tel. of Sw. v. Falcon*, 457 U.S. 147, 161 (1982) (class action "may only be certified if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied") and *In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24, 40 (2d Cir. 2006) ("It would seem to be beyond dispute that a district court may not grant class certification without making a determination that all of the Rule 23 requirements are met.")).

It is doubtful that this case could ever be certified as a class action. First, the requirement of "typicality" in Rule 23(a)(3) is not met, because the named plaintiffs (the Aggregators) do not have a "claim" of their own and thus are not "typical" of the class. *East Tex. Motor Freight Sys. Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977) ("As this court has repeatedly held, a class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class members.") (quoting *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 216 (1974)). Second, it is far from clear if a class could be certified under Rule 23(b)(3) given the individualized issues for particular PSPs. *See* Fed. R. Civ. P. 23(b)(3); *Amchem Prods.*, 521 U.S. at 622. Each PSP must present affirmative evidence of its entitlement to compensation, including ordering certain services from its local phone company that would allow Qwest and other IXCs to identify its payphones as being entitled to compensation. Qwest also has individualized affirmative defenses, such as contractual waivers many PSPs signed waiving their right to compensation from Qwest. These would provide grounds to deny certification under Rule 23.

Aggregators argue that a class would be certified despite these issues, but their rhetoric merely proves Qwest's point. A district court should hear both sides' arguments and decide if class certification is appropriate before allowing Aggregators to proceed with a lawsuit on behalf of the class of PSPs. That has never happened, and never will happen, if the Aggregators are deemed to have standing as assignees.

The Court should consider the hole in Rule 23 that the D.C. Circuit opinion has created. A class of claimants could assign their claims to a single third party precisely as PSPs have done here—as pass-through collection claims. Rule 23 would be avoided entirely, and none of the guarantees in Rule 23(a) or Rule 23(b)(3) would ever be addressed in the litigation.

Thus, Qwest, AT&T, and Sprint are being forced to defend a *de facto* class action when the case would not qualify as a class action. This is grossly unfair and yet another result of the Aggregators and PSPs' collusion to have Aggregators pursue the collection claims as assignees.

B. Aggregators and the PSPs affirmatively chose to avoid Rule 23 and instead have Aggregators pursue the claims as assignees.

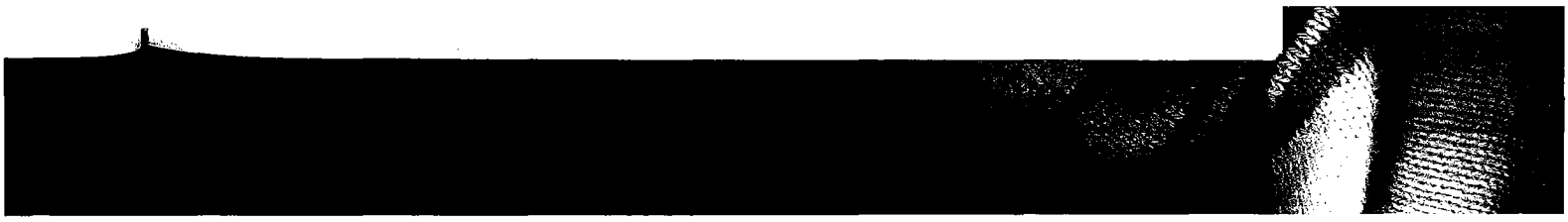
In 2003, six of the Aggregators' PSP customers filed their own lawsuit against Qwest for the very same dial-around compensation claims at issue in *APCC v. Qwest*. *D&B Tel. Co. v. Qwest Commc'ns Corp.*, No. 03-01443 (D.D.C. filed June 30, 2003) ("*D&B*"). The lawsuit was styled as a putative class action on behalf of a class of all of the PSPs whose claims are currently at issue in the *APCC v. Qwest* lawsuit. These six plaintiff PSPs characterized their lawsuit as "protective," in the event that Aggregators are ultimately deemed not to have standing. The same counsel for Aggregators in the *APCC v. Qwest* case filed the *D&B* case.

[redacted]

In the *D&B* case, the six PSPs moved for class certification, and the parties fully briefed Rule 23 requirements. All of the foregoing issues, and more, were addressed in these briefs.

Aggregators chose to abandon the class-action case, however, when this Court remanded the Aggregators' lawsuit against AT&T and Sprint—and, effectively, the lawsuit against Qwest—earlier this year. Counsel for the Aggregators and the six *D&B* plaintiffs told the district judge that they had no intention of pursuing the *D&B* class-action case—and the district judge stated that she considered the case "closed," and no further action would be taken. Shortly thereafter, in a brief to the district court, the Aggregators argued that the *D&B* case was filed without the PSPs' authority, and thus the federal court lacked subject-matter jurisdiction over it. Based on that statement, Qwest has filed a Motion to Dismiss under Rule 12(h)(3). The *D&B* plaintiffs do not oppose dismissal of the case without prejudice.

Aggregators thus have ensured that their claims will not be heard as a class action, even though that is exactly the kind of case they are pursuing. The D.C. Circuit never considered these problems when concluding that Aggregators have an "interest" sufficient to satisfy Constitutional requirements. The Court should not allow a party to have "standing" based on assignment where the result would be a unilateral dismantling of critical procedural safeguards in Rule 23.



III. Aggregators Rely On Doctrines And Cases That Do Not Reflect Modern Standing Principles

Besides these practical problems, the conclusion that Aggregators have standing is not consistent with current precedent.

A. Aggregators wade deep into this Court's distant precedent, citing two cases that are ***not standing*** decisions—*Titus v. Wallick*, 306 U.S. 282 (1939) and *Spiller v. Atchison, Topeka & Santa Fe Railway*, 253 U.S. 117 (1920). Aggregators assert that in *Titus* and *Spiller*, this Court "recognized that an assignee has standing regardless of whether it must account to an assignor . . . ," and that adopting Petitioners' position would require the Court to overrule *Titus* and *Spiller*. That Aggregators must reach so far back to rely on cases that have nothing to do with *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000), or other relevant cases, should speak loudly.

Neither *Titus* nor *Spiller* addressed whether the parties had Article III standing to bring suit. Indeed, neither decision contains any reference to the concept of "standing." If *Spiller* and *Titus* were binding precedent governing the standing of those who sue under an assignment to collect money for the assignor, this Court presumably would have cited them in *Vermont Agency*. But *Vermont Agency* made no reference to either *Spiller* or *Titus*. Indeed, this Court has never once cited either decision in a standing case.

Moreover, even if *Titus* and *Spiller* had addressed standing, the result in those cases would be different under the Court's modern standing jurisprudence as expressed in *Lujan* and *Vermont Agency*.

In *Titus*, Titus sued Wallick in New York state court and obtained judgment against him. 306 U.S. at 285. Titus then sued Wallick in Ohio state court to recover on that judgment. Federal court standing was thus not at issue in either of these state court proceedings. Evidence was introduced in the Ohio suit that, before filing the New York suit, Titus had assigned his claim to his brother, who then reassigned the claim back to him for purposes of collection. *Id.* at 286. The Ohio courts concluded that the reassignment for the purpose of collection was a mere power of attorney that had given Titus no right to prosecute the New York suit against Wallick and declined to enforce the judgment. This Court held that an assignment for collection was valid under New York law, and that it did not matter, for full faith and credit purposes, whether such an assignment would be valid under Ohio law if Titus had initially sued there. *Id.* at 288-89, 291. *Titus* did not mention and did not involve standing in federal court and was decided long before the development of modern standing jurisprudence.

Aggregators also rely on the even older case of *Spiller*. That litigation commenced in 1904 when the Cattle Raisers' Association of Texas, on behalf of its members, petitioned the Interstate Commerce Commission ("ICC") for reparations under section 13 of the Commerce Act, alleging that rates charged by a number of railroads for the shipment of cattle were

unjust and unreasonable. *Id.* at 124-25. This Court noted that the Commerce Act gave the ICC "a large degree of latitude" in processing reparation claims. *Id.* at 126, 131. The Commission issued an order in 1914 awarding reparations to Spiller, the Secretary of the Association. *Id.* at 120. When the railroads refused to pay, Spiller commenced an action in federal court to enforce the ICC's order. Spiller thus went to federal court in the same posture as Titus—to enforce a legal order of another tribunal. This Court concluded that Spiller had legal title to the reparation claims by virtue of assignments for collection from the cattle-raiser members. *Id.* at 134-35.

B. These cases may stand for the proposition that these two plaintiffs had a legal right to bring suit under the substantive law at the time, but they do not stand for the proposition that the plaintiffs had the now-requisite personal stake in the outcome of the suits under *Lujan* or *Vermont Agency*. This Court did not discuss standing as an Article III limitation until 1944 in *Stark v. Wickard*, 321 U.S. 288 (1944), and it was not until *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970), that a significant number of standing cases emerged.[2] Cass R. Sunstein, *What's Standing After Lujan?*

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2. This Court has never cited either decision in a modern-era standing case. In fact, this Court has not cited *Spiller* for any purpose since 1966, nor *Titus* since 1951. In the Courts of Appeals, the few cases citing *Spiller* in the last 30 years have cited it for its evidentiary rulings, not its discussion of assignments. *Titus* was cited in *Advanced Magnetics, Inc. v. Bayfront Partners, Inc.*, 106 F.3d 11 (2d Cir. 1997). But *Advanced Magnetics* did not cite *Titus* as a standing case. Instead, it cited *Titus* when discussing whether an assignee who was required to

(Cont'd)

Of Citizen Suits, "Injuries," and Article III, 91 Mich. L. Rev. 163, 169 (1992). At the time *Spiller* was decided, the analysis of whether a party was a proper plaintiff focused on *legal right*, not *injury-in-fact*, so it is useless for analyzing standing:

> [W]hat we now consider to be the question of standing was answered by deciding whether Congress or any other source of law had granted the plaintiff a right to sue. To have standing, a litigant needed a legal right to bring suit.
>
> The notion of injury in fact did not appear in this period. The existence of a concrete, personal interest, or an injury in fact, was neither a necessary nor a sufficient condition for a legal proceeding. People with a concrete interest could not bring suit unless the common law, or some other source of law, said so. But if a source of law conferred a right to sue, "standing" existed, entirely independent of "concrete interest" or "injury in fact."

Id. at 170.

(Cont'd)

remit to the assignor funds the assignee collected on the assignor's claims could sue on those claims "in its name." *Id.* at 17-18. Indeed, the Court framed its holding in real-party terms, not in terms of standing: "[W]e conclude that the district court properly ruled that the agreements were insufficient to transfer to [the assignee] ownership of the claims [of the assignors] and hence were insufficient to permit [the assignee] to sue on those claims in its name." *Id.* at 18.

Standing today depends on current precedent, not that from 1920. It is not a substitute for that analysis to point to earlier cases that were entertained without a discussion of a potential jurisdictional flaw. Such cases do not "provide binding precedent on that issue." *Republican Party of Guam v. Gutierrez*, 277 F.3d 1086, 1091 (9th Cir. 2002) (finding no federal question jurisdiction and rejecting argument that the court "must exercise jurisdiction because we have previously done so in three cases"); *see also Common Cause v. Federal Election Comm'n*, 108 F.3d 413, 416 (D.C. Cir. 1997) (stating that standing was an "open question" despite two prior cases in which Common Cause was allowed to challenge FEC action because both cases "predate the Supreme Court's decision in *Lujan*" and neither "include[d] a ruling on the issue of standing"). For the same reasons, *Titus* and *Spiller* are not binding precedent on the standing issue here.

C. The D.C. Circuit improperly applied *Titus* as well. It held that Aggregators have a sufficient "interest" for standing under *Lujan* because their interest is the same as a "real party in interest" under Rule 17(a), notwithstanding the fact that they must "account" for the full proceeds of the lawsuit to their customers. *APCC Servs., Inc. v. Sprint Commc'ns Co.*, 418 F.3d 1238, 1244-45 (D.C. Cir. 2005), *vacated and remanded*, 127 S. Ct. 2094 (2007). However, Rule 17(a) cannot itself provide jurisdiction, for the civil rules cannot extend jurisdiction where it otherwise is wanting. Fed. R. Civ. P. 82. The D.C. Circuit instead has to look elsewhere, beyond the text of the Rule, for the proposition that Aggregators have an interest sufficient to satisfy the requirements in *Lujan*. For that, the only cases the D.C. Circuit cited

were *Titus* and *Advanced Magnetics*—but, as just explained, these two cases have ***nothing*** to do with standing as it is articulated in *Lujan* and *Vermont Agency*. The D.C. Circuit's invocation of Rule 17(a), therefore, is not dispositive.

If the D.C. Circuit's conclusion about an "interest" under Rule 17(a) were true, then the Court's analysis in *Vermont Agency* was illusory. The *qui tam* relator would have had a "concrete interest" in the lawsuit due to the statutory assignment of the claim, without regard to whether the relator kept any proceeds of the lawsuit—indeed, if the D.C. Circuit were right, then the relator could have kept none of the proceeds but still had an interest sufficient to prosecute the case. But this Court very pointedly based its analysis in *Vermont Agency* on the specific fact that the relator, as assignee, retained a "bounty" (a substantial portion of the proceeds of the lawsuit) to satisfy the Constitutional requirement for standing as articulated in *Lujan*. *Vermont Agency*, 529 U.S. at 769-70.

IV. Denying Aggregators Article III Standing Will Not Upset Antitrust Or Bankruptcy Law

Aggregators argue that, if they do not have standing, then neither would bankruptcy trustees nor certain types of plaintiffs in specialized antitrust cases. Not so.

A. Bankruptcy trustees, who sue on behalf of the estate, are readily distinguishable from the Aggregators here. A bankruptcy trustee is an officer of the court. *King v. United States*, 379 U.S. 329, 337 & n.7 (1964); *In re Castillo*, 297 F.3d 940, 945-46 (9th Cir. 2002). Section

323 establishes the trustee as representative of the estate with the capacity to sue and be sued. 11 U.S.C. § 323. Congress has expressly recognized a trustee's standing to sue. 11 U.S.C. § 307 ("The United States Trustee may raise and may appear and be heard on any issue in any case or proceeding under this title. . . ."); *see also In re Donovan Corp.*, 215 F.3d 929, 930 (9th Cir. 2000).

Trustees litigate as representatives of the bankruptcy estate, an inchoate entity— recognized in the law by the Constitution (Art. I, § 8) and subsequently defined by federal statute—that holds the assets of the debtor. The trustee is the human being who acts on behalf of the bankruptcy estate, an incorporeal entity obviously incapable of itself participating in litigation. The personal interests of the trustee cannot be severed from those of the estate— unlike the Aggregators and their client PSPs, who merely engage in a business transaction.

Case law regarding bankruptcy trustee standing illustrates the point. The bankruptcy trustee satisfies Article III's "personal stake" requirement in litigation brought on behalf of the bankruptcy estate because the trustee "stands in the shoes of the bankrupt corporation" and has no interest other than those of the corporation. *Shearson Lehman Hutton, Inc. v. Wagoner*, 944 F.2d 114, 118 (2d Cir. 1991); 11 U.S.C. §§ 541-542. For purposes of suit, there is no distinction between the trustee and the estate. Indeed, the identity between trustee and estate is so integral to standing analysis that the trustee lacks standing to bring suit on behalf of any entity other than

the estate (such as a creditor), even if the claim is assigned to the trustee. *In re Bennett Funding Group, Inc.*, 336 F.3d 94, 102 (2d Cir. 2003).

B. Aggregators also liken themselves to antitrust associations. Although antitrust associations are sometimes formed to file claims assigned to them by members, this process results from special antitrust rules regarding the proper party to bring suit. For purposes of Article III standing, antitrust associations, like any other membership association, can sue only if they have a proprietary interest in a claim or because they satisfy the test for associational standing. *See, e.g., Associated Gen. Contractors of N.D. v. Otter Tail Power Co.*, 611 F.2d 684 (8th Cir. 1979).

Moreover, the antitrust laws themselves impose limits on the proper party to bring suit. Aggregators rely on a case that explains, "[w]hile an association may not sue on its own to assert the rights of its members *under the antitrust laws*, it may sue as assignee of the legal rights of others." *Pacific Coast Agric. Export Ass'n v. Sunkist Growers, Inc.*, 526 F.2d 1196, 1207-08 (9th Cir. 1975) (emphasis added); *accord Gulfstream III Assocs., Inc. v. Gulfstream Aerospace Corp.*, 995 F.2d 425, 438-39 (3d Cir. 1993) (Greenberg, J., concurring) (discussing rationale behind assignment of "antitrust injury"). Reflecting this doctrine, the cases Aggregators cite that substantively address claims assignments evaluate the assignments to determine whether the plaintiffs are the proper parties to bring suit *under the special rules governing antitrust. See Klamath-Lake Pharm. Ass'n*

v. Klamath Med. Serv. Bureau, 701 F.2d 1276 (9th Cir. 1983); *Pacific Coast*, 526 F.2d at 1207-08. Importantly, not one of these cases addresses Article III standing.

No basis exists to extend the laws of bankruptcy and antitrust litigation, developed in statutory regimes *sui generis*, outside of their unique contexts. A ruling that Aggregators lack standing will have no effect on the statutes and precedent underlying these other situations.

V. Aggregators Lack Associational Standing

Finally, Aggregators do not possess "associational standing" under *Hunt*. The D.C. Circuit correctly avoided this argument because it has no merit, for several independently dispositive reasons.

Aggregators fail the threshold requirement. Associational standing applies to a membership association, or its functional equivalent, "bring[ing] suit on behalf of its members." *Hunt*, 432 U.S. at 343-44. The Aggregators are not membership organizations. They are ***commercial*** for-profit entities, suing on behalf of ***their customers.*** No court has ever recognized "associational standing" on behalf of a commercial entity. Indeed, in the D.C. Circuit opinion under review, Judge Sentelle's dissent recognized that Aggregators are not "associations" as the term is used in *Hunt*. *APCC Servs.*, 418 F.3d at 1252. A toy store cannot sue a toy manufacturer on behalf of its customers who bought defective toys.[3]

3. One of the named plaintiffs, APCC Services, Inc., is the for-profit subsidiary of a trade association, the American Public Communications Council. The parent trade association is not a (Cont'd)

Even if Aggregators were an "association," the Aggregators cannot meet the third *Hunt* requirement—"neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt*, 432 U.S. at 343. As Qwest explained above, both proof of the claims as well as litigation of Qwest's affirmative defenses require evidence and testimony from each of the PSPs. *See* Part I *supra*. It is impossible to litigate these dial-around lawsuits without the full participation of the PSPs (although, of course, Aggregators will try nonetheless).

But singularly dispositive of the inapplicability of the third prong of *Hunt* is that the Aggregators seek monetary damages, which must be calculated individually for each of the PSPs. The Courts of Appeals have uniformly held that an association does not have standing to seek individualized monetary damages on behalf of its members. "[C]ourts . . . have consistently held that claims for monetary relief necessarily involve individualized proof and thus the individual participation of association members, thereby running afoul of the third prong of the *Hunt* test." *United Union of Roofers, Waterproofers, & Allied Trades No. 40 v. Insurance Corp. of Am.*, 919 F.2d 1398, 1400 (9th Cir. 1990) (noting

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(Cont'd)

party to any of these lawsuits, and the for-profit subsidiary cannot cloak itself in its parent's dressings. The distinction between parent and subsidiary is highlighted by the other four named plaintiffs in *APCC v. Qwest*—four commercial entities that are not affiliated with the trade association and have no possible basis to claim to be associations. The plaintiff for-profit subsidiary is exactly like its other four co-plaintiffs.

that the plaintiff union "acknowledges that no federal court has allowed an association standing to seek monetary relief [unpaid wages] on behalf of its members," and denying associational standing to union); *Sanner v. Board of Trade of the City of Chicago*, 62 F.3d 918, 923 (7th Cir. 1995) ("We are not aware of any cases allowing associations to proceed on behalf of their members when claims for monetary, as opposed to prospective, relief are involved."); *Pennsylvania Psychiatric Soc'y v. Green Spring Health Servs., Inc.*, 280 F.3d 278, 284 (3d Cir. 2002); *Telecommunications Research & Action Ctr. v. Allnet Commc'n Servs., Inc.*, 806 F.2d 1093, 1095 (D.C. Cir. 1986) *("TRAC")*.

Courts have held that individual participation of all members is required, even if the "individual calculation of damages for each [member] might be rather technical and uncomplicated" or "formulaic." *Sanner*, 62 F.3d at 923; *TRAC*, 806 F.2d at 1095. Here, calculation of the PSPs' claims is hardly "formulaic," but requires consideration of a myriad of facts unique to each PSP. This ends the inquiry under the third *Hunt* requirement.

[redacted]

CONCLUSION

For these reasons, Qwest respectfully submits that the Court should grant the Petition for a writ of *certiorari*.

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