Nos. 15-2385 & 15-2386

United States Court of Appeals for the Seventh Circuit

KLEEN PRODUCTS LLC, ET AL.,
individually, and on behalf of all others similarly situated,

Plaintiffs-Appellees,

v.

INTERNATIONAL PAPER CO., ET AL.

Defendants-Appellants,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

UNOPPOSED MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA TO FILE A BRIEF AS *AMICUS CURIAE* IN SUPPORT OF REVERSAL

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Attorneys for *Amicus Curiae*

Fed. R. App. P. And Circuit Rule 26.1
Disclosure Statement

The undersigned, counsel of record for *amicus* the Chamber of Commerce of the United States of America, hereby furnishes the following information in accordance with Rule 26.1 of the Federal Rules of Appellate Procedure and Rule 26.1 of the Circuit Rules of the United States Court of Appeals for the Seventh Circuit:[1]

(1) The full name of every party or *amicus* the attorney represents:

The Chamber of Commerce of the United States of America.

(2) If such party or amicus is a corporation:

(i) Its parent corporation, if any:

None. The Chamber of Commerce of the United States of America has no parent corporations.

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[1] Disclosures for each counsel for *amicus* are included in the proposed brief.

(ii) A list of stockholders that are publicly held companies owning 10% or more of stock in the party:

None. No publicly held company has any ownership interest in the Chamber of Commerce of the United States of America.

(3) The names of all law firms whose partners or associates have appeared for the party or *amicus* in the case or are expected to appear for the party in this Court:

Holwell Shuster & Goldberg LLP.

Unopposed Motion For Leave To File Brief As *Amicus Curiae*

Pursuant to Federal Rule of Appellate Procedure 29(b), *amicus curiae* the Chamber of Commerce of the United States of America respectfully moves this Court for leave to file the attached *amicus curiae* brief in support of reversal. *Amicus* notified all counsel of its intent to file an *amicus curiae* brief and received consent from counsel for Defendants-Appellants; counsel for Plaintiffs-Appellees do not oppose this motion.

Under Rule 29 of the Federal Rules of Appellate Procedure, the Court may grant leave for the filing of an *amicus curiae* brief, and a party requesting leave must state its "interest," and "the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case." Fed. R. App. P. 29(b).

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before the Congress, the Executive Branch, and the courts. To that end,

the Chamber regularly files *amicus* briefs in cases raising issues of concern to the nation's business community. The Chamber has filed *amicus* briefs for over three decades in courts throughout the country, including in this Court. *See, e.g.*, *Harris v. Comscore, Inc.*, No. 13-8007 (May 28, 2013); *Ruppel v. CBS Corp, et al.*, No. 12-2236 (July 7, 2012). The Chamber's briefs have been described as "helpful" and "influential" by courts[2] and commentators.[3]

This appeal implicates the standards for certifying a class consistent with the requirements of Federal Rule of Civil Procedure 23(b)(3). Because the Chamber's membership consists of large and small businesses around the country, many of its members have been subject to the threat of unwarranted class-action litigation and the dis-

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[2] *See, e.g.*, *Kedy v. A.W. Chesterton Co.*, 946 A.2d 1171, 1179 n.8 (R.I. 2008); *Scott v. Cingular Wireless*, 161 P.3d 1000, 1004 (Wash. 2007).

[3] David L. Franklin, What Kind of Business-Friendly Court? Explaining the Chamber of Commerce's Success at the Roberts Court, 49 SANTA CLARA L. REV. 1019, 1026 (2009); *see also id.* (quoting Supreme Court practitioner Carter Phillips: "The briefs filed by the Chamber in that Court and in the lower courts are uniformly excellent. They explain precisely why the issue is important to business interests. . . . Except for the Solicitor General representing the United States, no single entity has more influence on what cases the Supreme Court decides and how it decides them than the [Chamber.]").

torted settlement pressure, divorced from the merits of the underlying action, that accompanies class certification. Accordingly, the Chamber has an abiding interest in ensuring that courts adhere to the strictures of Rule 23, reserving class treatment for only those cases that merit it.

The Chamber's *amicus* brief will help inform the Court's resolution of this appeal. The proposed *amicus* brief provides a "unique perspective" that "can assist the court of appeals beyond what the parties are able to do," *Nat'l Org. for Women v. Scheidler*, 223 F.3d 615, 617 (7th Cir. 2000) (citing *Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1063 (7th Cir. 1997)), by providing the Chamber's perspective on the legal issues and directly addressing the underlying policy rationale for the requirements of Rule 23.

Class actions are exceptional; they are litigation by proxy. They dispose of the claims of absent class members and magnify the liability to which defendants are exposed. Certification of a class action without requiring full satisfaction of Rule 23 unfairly distorts the ordinary incentives of litigants in a way that can cause perverse results, like exaggerrated settlements on weak claims. It also dramatically increases litigation costs. The risks and costs of class-action litigation hit large and

small businesses alike, as the Chamber's brief explains. The Chamber's brief connects these policy considerations to the district court's analysis of the predominance requirement of Rule 23(b)(3), showing why the district court's failure to conduct the "rigorous analysis" the Supreme Court has required (*Comcast Corp. v. Behrend*, 133 S.Ct. 1426, 1432 (2013)) implicates exactly those policy concerns.

Then-circuit judge Samuel Alito cogently explained the reasons why *amicus* briefs providing a unique perspective can benefit the appellate process:

> Even when a party is very well represented, an amicus may provide important assistance to the court. "Some amicus briefs collect background or factual references that merit judicial notice. Some friends of the court are entities with particular expertise not possessed by any party to the case. Others argue points deemed too far-reaching for emphasis by a party intent on winning a particular case. Still others explain the impact a potential holding might have on an industry or other group." Luther T. Munford, *When Does the Curiae Need An Amicus?*, 1 J. App. Prac. & Process 279 (1999). . . .

Neonatology Assocs., P.A. v. Comm'r of Internal Revenue, 293 F.3d 128, 132 (3d Cir. 2002) (Alito, J.), *aff'd*, 299 F.3d 221 (3d Cir. 2002). The considerations identified by Justice Alito strongly support admission of the Chamber's brief.

CONCLUSION

For the foregoing reasons, the motion for leave to file a brief as *amicus curiae* should be granted. If such relief is granted, the Chamber requests that the accompanying brief be considered filed as of the date of this Motion's filing.

Dated: August 17, 2015

Respectfully submitted,

By: /s/ Daniel M. Sullivan
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CERTIFICATE OF SERVICE

I hereby certify that on August 17, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

By: /s/ Daniel M. Sullivan
Daniel M. Sullivan

BRIEF

Nos. 15-2385 and 15-2386

United States Court of Appeals
for the
Seventh Circuit

KLEEN PRODUCTS LLC, *et al.*,

Plaintiffs-Appellees,

– v. –

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THE HONORABLE JUDGE HARRY D. LEINENWEBER

BRIEF OF *AMICUS CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF REVERSAL

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 15-2385; 15-2386

Short Caption: Kleen Products, LLC v. International Paper Co.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

[ ] **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

The Chamber of Commerce of the United States of America

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Holwell Shuster & Goldberg LLP

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

N/A

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

Attorney's Signature: s/ Vincent Levy Date: 08/17/2015

Attorney's Printed Name: Vincent Levy

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ____ **No** X

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

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N/A

Attorney's Signature: s/ Daniel M. Sullivan Date: 08/17/2015

Attorney's Printed Name: Daniel M. Sullivan

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** X **No** ____

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 15-2385 & 15-2386

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ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

Attorney's Signature: s/ Benjamin F. Heidlage Date: 8/17/2015

Attorney's Printed Name: Benjamin F. Heidlage

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** _____ **No** X

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INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before the Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus* briefs in cases raising issues of concern to the nation's business community.[1]

This appeal implicates the standards for certifying a class consistent with the requirements of Federal Rule of Civil Procedure 23(b)(3). Because class certification exposes businesses to substantial aggregated liability, the Chamber has an abiding interest in ensuring

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[1] Pursuant to Fed. R. App. P. 29(c)(5) *amicus* certifies that no counsel for a party authored this brief in whole or in part; and no such counsel or any party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than *amicus*, its members, and its counsel, made a monetary contribution intended to fund its preparation or submission. Pursuant to Federal Rule of Appellate Procedure 29(a), all parties to this appeal have been requested to consent to the filing of this brief, counsel for Defendants-Appellants consent, and counsel for Plaintiffs-Appellees do not oppose.

that courts adhere to the strictures of Rule 23, reserving class treatment for only those cases that merit it.

INTRODUCTION

The Supreme Court has given a strict mandate to the federal district courts to carefully police the application of Rule 23. They must conduct a "'rigorous analysis'" to ascertain whether a plaintiff has "affirmatively demonstrate[d] . . . compliance with the Rule" through "*fact[s]*" rather than allegations, because Rule 23 is not "a mere pleading standard." *Wal-mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 2551–52 (2011). If that means the district court must wade into the merits, so be it; "[t]hat cannot be helped." *Id.* at 2551.

When it comes to Rule 23(b)(3) classes, which are reserved for "situations in which 'class-action treatment is not as clearly called for,'" district courts must take a particularly "'close look' at the predominance and superiority criteria." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 615 (1997). "If anything, Rule 23(b)(3)'s predominance criterion is even more demanding than Rule 23(a)." *Comcast Corp. v. Behrend*, 133 S.Ct. 1426, 1432 (2013). Predominance "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Am-*

chem, 521 U.S. at 623. District courts must insist that plaintiffs meet this standard by showing as a factual matter that the claims of the entire class can, more likely than not, be *resolved* together, with the same evidence.

Scrupulous adherence to this gatekeeping function is essential to ensure the fair application of Rule 23. Class actions are exceptional; they are litigation by proxy. They dispose of the claims of absent class members and magnify the liability to which defendants are exposed. Certification of a class action without requiring full satisfaction of Rule 23 unfairly distorts the ordinary incentives of litigants in a way that can cause perverse results, like exaggerated settlements on weak claims.

The district court here failed to fulfill its gatekeeping function with the rigor the law demands. It certified a class of diverse companies that purchased a variety of products at various times over a six-year period. The putative class's claims—that defendants conspired to increase prices in violation of the antitrust laws—raise the prospect of an $11 billion judgment. Yet the court did not ensure that plaintiffs satisfied Rule 23(b)(3).

First, the district court improperly ignored plaintiffs' inability to prove classwide injury by labeling it a merits question. According to the district court, antitrust impact was a common question because plaintiffs *might* be able to show that a price index (as opposed to the actual prices class members paid) was affected on some occasions—but not others—by supposedly collusive conduct. But that will not be enough to demonstrate that each class member was harmed through higher prices, or which class members were harmed. The district court rejected these objections as mere merits issues, but that shortcut is impermissible—the district court had an obligation to confirm that classwide proof is possible; if that analysis overlaps with the merits, it cannot be avoided. *Wal-mart Stores*, 131 S.Ct. at 2551–52.

Second, when the district court addressed damages, it recognized that plaintiffs' damages model could generate (at best) only an average overcharge without providing any way to assign damages to any particular class member. It thought this approximation sufficient, even if the number approximated bore no relation to the harm any class member actually suffered because, according to the court, individual damages issues do not preclude certification. Neither Rule 23 nor the policies it re-

flects support that proposition, and the Supreme Court has rejected it. *Comcast Corp.*, 133 S.Ct. at 1433.

In short, however much the district court referred to the case law and however long its opinion was, it elided critical steps. It did not "find" that common questions predominate over individual ones because it did not assess whether the common evidence could actually resolve all class members' claims. Its decision should be reversed or, at a minimum, vacated and the case remanded.

ARGUMENT

I. Rule 23(b)(3) Demands A Rigorous Analysis To Ensure That Common Questions Predominate

A. A Rigorous Analysis Requires Proof That Common Questions Predominate *In Fact*

Class "certification is proper only if the 'trial court is satisfied, after a rigorous analysis, that the prerequisites of'" Rule 23, including the predominance requirement, are satisfied. *Comcast Corp.*, 133 S.Ct. at 1432 (quoting *Wal-mart Stores*, 131 S.Ct. at 2551). But satisfying this standard means more than saying it. Rule 23 is not "a mere pleading standard." *Id.* (quotation marks omitted). Accordingly, plaintiffs seeking class certification under Rule 23(b)(3) must "affirmatively demonstrate [their] compliance with the Rule—that is, [they] must be prepared to

prove that there are *in fact*" common questions that predominate over individual ones. *Wal-mart Stores*, 131 S.Ct. at 2551; *see also Comcast*, 133 S.Ct. at 1432.

Therefore, the district court must evaluate the plaintiff's evidence and consider whether "[t]he nature of the evidence . . . will suffice to *resolve* [the] question[s]" presented in the action. *Blades v. Monsanto Co.*, 400 F.3d 562, 566 (8th Cir. 2005) (emphasis added). The district court may not simply postpone an evaluation of plaintiff's proof to the merits; rather, "a district court must formulate some prediction as to how specific issues will play out in order to determine whether common or individual issues predominate in a given case." *In re New Motor Vehicles Can. Exp. Antitrust Litig.*, 522 F.3d 6, 20 (1st Cir. 2008); *see also In re Wilborn*, 609 F.3d 748, 755 (5th Cir. 2010) (Rule 23(b)(3) "requires the court to assess how the matter will be tried on the merits.").

Nor does a plaintiff pass "go" simply by presenting *some* common evidence; the plaintiff must present evidence that, if believed, actually *answers* the question. "What matters to class certification," after all, "is not the raising of common questions—even in droves—but, rather the capacity of a classwide proceeding to generate common *answers* apt to

drive the resolution of the litigation." *Wal-Mart*, 131 S.Ct. at 2551 (quotation marks omitted). And the answers must be applicable across the board—to *all class members*. Thus, "[c]ourts frequently have found that the [predominance] requirement was not met where, notwithstanding the presence of common legal and factual issues that satisfy the commonality requirement, the resolution of individual claims for relief would require individualized inquiries." *Dunnigan v. Metro. Life Ins. Co.*, 214 F.R.D. 125, 138 (S.D.N.Y. 2003).

B. The Rigorous Analysis Requirement Is A Critical Safeguard Against Class Action Abuse

The settled directive to strictly apply the predominance requirements of Rule 23(b)(3) comports with sound policy. Class actions are litigation by proxy: They purport to resolve the rights and claims of parties not before the court through litigation by self-declared representatives. "Rule 23(b)(3)," in particular, is "an adventuresome innovation," one "designed for situations in which" representative litigation "is not as clearly called for." *Comcast*, 133 S.Ct. at 1432 (internal quotation marks omitted); *see also Amchem Products*, 521 U.S. at 614–15 (same). And so it must be shown in each case that the specific claims merit class treatment; that the rights of unrepresented persons should be finally

determined in their absence; and, potentially, that an aggregated liability should be imposed at once. Absent class members are entitled to demand strict adherence to Rule 23; due process requires as much. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985).

Defendants, too, are entitled to insist that district courts adhere to Rule 23(b)(3)'s mandate. The improper certification of a class will unfairly subject a defendant to "astronomical damages" risk, and "place enormous pressure on the defendant to settle even if the suit has little merit." *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482, 484 (7th Cir. 2012); *see also Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978) (class treatment "may so increase . . . potential damages liability and litigation costs that [a defendant] may find it economically prudent to settle and to abandon a meritorious defense"); *CE Design Ltd. v. King Architectural Metals, Inc.*, 637 F.3d 721, 723 (7th Cir. 2011) ("Certification as a class action can coerce a defendant into settling on highly disadvantageous terms regardless of the merits of the suit.").

Indeed, the Advisory Committee, in explaining the purpose of the provision allowing interlocutory appeals like this one, has noted that

"[a]n order granting certification . . . may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability." Fed. R. Civ. P. 23(f) advisory committee's note to the 1998 amendments. "[W]hen damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable." *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740, 1752 (2011).

This case is a prime example. The potential liability here is alleged to be $11 billion. By way of comparison, defendant International Paper had net earnings in 2014 of $536 million, while defendant Weyerhaeuser Company had net earnings in that same year of $1.826 billion. *See* International Paper Co., Annual Report (Form 10-K), at 15 (Feb. 26, 2015); Weyerhaeuser Co., Annual Report (Form 10-K), at 32 (Feb. 13, 2015). Obviously, "even a small chance of a devastating loss" could "pressure[]" the "defendants . . . into settling [these] questionable claims." *AT&T Mobility*, 131 S.Ct. at 1752; *see also* Deborah R. Hensler and Thomas D. Rowe, Jr., Beyond "It Just Ain't Worth It": Alternative Strategies For Damage Class Action Reform, 64 LAW & CONTEMP. PROBS. 137, 138 (2001) ("To avoid litigation costs and small risks of

large judgments, some defendants are willing to settle even very weak claims for their nuisance value."). Indeed, "a 10 percent exposure to a ten billion dollar verdict counts as real money, even today." Richard A. Epstein, Class Actions: Aggregation, Amplification, and Distortion, 2003 U. CHI. LEGAL F. 475, 496 (2003).

The crippling exposure that class certification threatens also forces businesses to spend massive amounts of money on litigation defense. "With each increase in risk level (from routine to complex to high-risk to bet-the-company), the potential exposure jumps dramatically (well into the billions) as do fees paid to outside counsel." The Carlton Fields Jorden Burt Class Action Survey: Best Practices in Reducing Cost and Managing Risk in Class Action Litigation 3 (2015), *available at* http://classactionsurvey.com/pdf/2015-class-action-survey.pdf (last visited Aug. 16, 2015). "In 25 percent of bet-the-company class actions, companies spend more than $13 million per year per case on outside counsel. In 75 percent of such actions, the cost of outside counsel exceeds $5 million per year per case." *Id.* at 14.

These risks and costs are not just a problem for big businesses. Studies show that small businesses are "particularly hit[]" by class liti-

gation, and they tend to lack "the resources to fight." 151 Cong. Rec. 1664 (Feb. 8, 2005) (statement of Sen. Grassley); *see, e.g.*, U.S. Chamber Institute for Legal Reform, Tort Liability Costs for Small Business 9 (July 2010), *available at* http://www.instituteforlegalreform.com/uploads/sites/1/ilr_small_business_2010_0.pdf (last visited Aug. 16, 2015). Indeed, according to a recent study, small businesses paid 81% of business tort-liability costs. *Id.*

In short, strict adherence to Rule 23(b)(3)'s commands at the class-certification stage is essential to protect against the *in terrorem* effect of unwarranted class-certification orders and reserves the magnification of potential liability for those cases where class treatment is truly warranted.

C. The Rigorous Analysis Requirement Has Particular Force In The Antitrust Context

In *Comcast*, the Supreme Court demonstrated what adherence to Rule 23(b)(3)'s predominance requirement means in an antitrust case. The plaintiffs had proposed four theories of antitrust impact, three of which the district court rejected. *See* 133 S.Ct. at 1430–31 & 1431 n.3. In seeking class certification, the plaintiffs submitted a regression model that was designed to compare actual prices with those "that would

have prevailed but for [the defendants'] allegedly anticompetitive activities." *Id.* at 1431. The model, however, "did not isolate damages resulting from any one theory of antitrust impact." *Id.* Yet the district court certified a class, and the court of appeals affirmed, holding that it was enough that the plaintiffs had presented *some* method to calculate damages; requiring them to match that method to the theory of antitrust impact would improperly delve into the merits. *Id.*

The Supreme Court rejected this reasoning in the strongest terms. *First*, the Supreme Court reaffirmed that the district court has an obligation to determine whether common questions *in fact* predominated, and it faulted the court of appeals for "refusing to entertain arguments against [the] damages model that bore on the propriety of class certification, simply because those arguments would also be pertinent to the merits determination." *Id.* at 1432–33. This approach, the Supreme Court instructed, "ran afoul of [Supreme Court] precedents requiring precisely that inquiry." *Id.*

Second, the Supreme Court held that, at the class certification stage, a district court must "conduct a rigorous analysis" to determine whether an antitrust plaintiff's *method* of calculating damages applies

to the entire class and is "consistent with its liability case." *Id.* at 1433. The damages model in *Comcast* failed that test because it did not measure harm derived solely from the theory of antitrust impact remaining in the case; instead, it "identifie[d] damages that are not the result of the wrong." *Id.* at 1434. And this was not only a problem with the plaintiffs' case on the merits. It meant that the plaintiffs' damages model "c[ould not] possibly establish that damages are susceptible of measurement across the entire class for purposes of Rule 23(b)(3)." *Id.* at 1433. Therefore, the Supreme Court held, "[q]uestions of individual damage calculations . . . inevitably overwhelm[ed] questions common to the class." *Id.*

The core of *Comcast*'s reasoning, then, is to reiterate that a court must evaluate the merits if necessary to apply Rule 23, and that the need for individualized methods of calculating antitrust damages—as opposed to differing results across the class of a common method—can overwhelm any common questions so as to defeat certification of a Rule 23(b)(3) class. A district court has the "duty" at the class-certification stage "to take a 'close look'" to determine whether a plaintiff's damages

method is sound. *Id.* at 1432. Here, as explained below, the district court failed to discharge its duty.

II. The District Court Failed To Conduct The Rigorous Analysis Required To Conclude That Questions Answerable With Common Evidence Predominate

While the district court quoted the relevant case law and standards, it elided the necessary analysis at critical junctures. Specifically, the district court used two improper shortcuts: (A) on antitrust impact, it did not determine whether the plaintiffs' evidence, if believed, would actually show impact for the class as a whole, because it considered that analysis to be a "merits" inquiry; and (B) the district court ignored key defects in plaintiffs' damages model on the mistaken theory that those defects are mere "damages issues" that, per se, cannot affect certification.

The end result of this analytical corner-cutting was to presume, because plaintiffs marshalled *some* common evidence, that common questions would *in fact* predominate. That is precisely what Rule 23(b)(3) and the case law applying it prohibit, and what the sensible policies embodied in those authorities abhor.

A. The District Court Failed To Find That Common Evidence Could Show Antitrust Impact For All Class Members

The district court failed to properly assess predominance regarding antitrust impact. Dismissing the many flaws that defendants had identified with plaintiffs' econometric model, the court ignored the model altogether and relied on the remainder of plaintiffs' evidence of impact. *See* SA 20, 23.[2] But the court stretched that evidence beyond what it could bear, even were it believed. Thus, the court thought it sufficient that plaintiffs presented evidence—"mostly duplicative of their conspiracy evidence"—that defendants had engaged in certain anti-competitive conduct that was somehow correlated with nine increases in a Pulp and Paper Weekly ("PPW") price index, which supposedly influences some actual prices. SA 24, 33–35. (The Court accepted that, on six other occasions, the same conduct did *not* affect the PPW index. SA 35.)

Even taken on its own terms, this evidence does not go the distance. "[E]conomic theory and empirical evidence suggest that antitrust violations are likely to result in a range of impacts—from none for some plaintiffs to significant impact for others—and thus underscore the im-

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[2] "SA" refers to the Short Appendix filed with defendants' opening briefs.

portance of distinguishing between proving impact and proving common impact." Pierre Cremieux et al., Proof of Common Impact in Antitrust Litigation: The Value of Regression Analysis, 17 GEO. MASON L. REV. 939, 956 (2010). Here, the record does not "show that [plaintiffs] can prove, through common evidence, that *all* class members were in fact injured by the alleged conspiracy." *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244, 252 (D.C. Cir. 2013) (emphasis added); *see also Comcast Corp.*, 133 S.Ct. at 1435.

1. At the outset, it must be emphasized that the district court did not rely on any econometric evidence in analyzing antitrust impact. The plaintiffs did offer an econometric model with their motion for class certification. The model, presented by plaintiffs' expert, Dr. Mark Dwyer, was supposed to connect the alleged collusion to the injuries—increased prices paid—that they claim class members suffered. SA 42–43 (explaining that Dr. Dwyer's regression model was designed to show the impact of "the alleged conspiracy" on "the price of Containerboard Products"). But, as defendants demonstrated, that model could not satisfy plaintiffs' burden on antitrust impact because it could not show that every member of the class was in fact injured by the alleged misconduct.

Dismissing this fundamental defect, the court reasoned that because antitrust impact concerned only "whether the plaintiffs were harmed" rather than "by how much," and, because "[p]laintiffs do not rely *solely* on their econometric damages model for their impact proof," criticisms of that model were "ineffective" at the class certification stage. SA 20, 23 (quotation marks omitted and emphasis added). The court thus chose to ignore the econometric evidence, as proof of impact, altogether.

The district court's decision to brush aside defendants' objections to plaintiffs' only econometric evidence of antitrust impact constitutes reversible error. "[D]efendants' critique of the damages model as prone to false positives . . . is not just a merits issue." *Rail Freight*, 725 F.3d at 253. Nor is it just a damages issue—the model purported to show both whether *and* by how much members of the class were injured. In this circumstance, the instructions of *Comcast* are unmistakable. As the D.C. Circuit has put it: "No damages model, no predominance [on antitrust impact], no class certification." *Rail Freight*, 725 F.3d at 253.

2. That mistake aside, the common evidence that the Court *did* consider on antitrust impact cannot prove that *all* class members suf-

fered antitrust injury, which means that individual issues remain, and predominate. Specifically, no evidence substantiates the district court's assumption that increases in the price index affected all or nearly all potential class members. The district court explained that "(1) Defendants largely rely on the PPW index in setting prices, and (2) in most individually negotiated contracts, the PPW index factored into the negotiated price." SA 37.

But even if the PPW index was generally used in setting prices, it does not follow that *every* increase in the index price affects *every* customer. For example, a customer who negotiated a contract based on the PPW *before* the index increased would not have suffered any harm. Likewise, a purchaser who negotiated a contract based on the index after one of the six *failed* price announcements also would not have suffered any harm. Thus, there was no evidence connecting the price paid by all class members to the increases in the index price.

The district court also improperly assumed that every price increase that class members experienced was caused by improper conduct. Again, there is no evidence to support that assumption. To the contrary, plaintiffs' own experts conceded that market prices were a

function of other factors as well. Defts' Br. at 10.[3] It is therefore likely that certain class members experienced price increases solely because, for example, *demand* increased, and not because of anything defendants did, as plaintiffs' expert recognized. *See id.* at 10, 21. And, critically, there is nothing in plaintiffs' evidence that will enable a finder of fact to tell the difference.

This should suffice to preclude certification. Consider, for example, a securities-fraud class action. It is well established in such cases that "without the [fraud-on-the-market] presumption of reliance . . . . [e]ach plaintiff would have to prove reliance [i.e., causation] individually, so common issues would not predominate over individual ones." *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S.Ct. 2398, 2416 (2014). So too here: Without the presumption that the district court manufactured, there is no basis to conclude that plaintiffs will be able to establish causation on a common basis, so that predominance is lacking. In both situations, the link between the alleged misconduct and the price at which

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[3] "Defs' Br." refers to the brief of Defendant's-Appellants International Paper Company, Georgia-Pacific LLC, Weyerhaeuser Company, and Temple-Inland Inc., which appears, as redacted, at entry 18-3 in the docket for No. 15-2385.

plaintiffs purchased (or here, another step removed, a price index with a dubious connection to actual prices) is missing.

The district court acknowledged the shortcomings in plaintiffs' evidence—going so far as to concede that it was possible that "most class members were not impacted by the alleged conspiracy"—but the court viewed these shortcomings as problems for the merits and "not before the court" "at the class certification stage." SA 39. "That reasoning flatly contradicts [the] cases requiring a determination that Rule 23 is satisfied, even when that requires inquiry into the merits of the claim." *Comcast*, 133 S.Ct. at 1433. Plaintiffs had the burden to show at the class-certification stage that common questions predominated. They did not, and that is what matters.[4]

3. The district court's approach should also be rejected on policy grounds. If adopted, it would permit plaintiffs to evade *Comcast* and *Wal-Mart* in antitrust cases involving consolidated industries, inviting extortionate settlements based on the threat of trebled class damages.

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[4] Defendants ably explain why the district court's reliance on *In re Urethane Antitrust Litig.*, 768 F.3d 1245 (10th Cir. 2014), and the court's failure to address contrary authority, were in error. *See* Defts' Br. at 32–34. *Amicus* agrees with that analysis but does not repeat it here.

Price indexes and surveys exist for virtually every industry, and such price indexes and surveys are often used by industry participants as one factor (among many) in setting prices. To take one example, the Bureau of Labor Statistics publishes "[a]bout 10,000 [Producer Price Indexes (PPIs)] for individual products and groups of products [that] are released each month." Producer Price Indexes, Frequently Asked Questions (FAQs), Bureau of Labor Statistics http://www.bls.gov/ppi/ppifaq.htm (emphasis added). "PPIs are available for the output of nearly all industries in the goods-producing sectors of the U.S. economy—mining, manufacturing, agriculture, fishing, and forestry—as well as natural gas, electricity, construction, and goods competitive with those made in the producing sectors, such as waste and scrap materials." *Id.* PPI data is commonly used by businesses in setting and negotiating prices. *Id.*

Moreover, in highly concentrated markets such as this one, it is unsurprising that the index would follow at least some price announcements by market participants. Under the district court's approach, a plaintiff could cobble together an industry-wide class, no matter how diverse the industry or potential class members, solely by pointing to a

single, generally referenced price index and alleging that it was affected by improper conduct at a single point in time. Rule 23 demands more.

B. The District Court Ignored *Comcast v. Behrend* By Deeming It Irrelevant That Damages Must Be Assessed Individually

The district court similarly cut short the necessary predominance analysis with respect to damages. At critical points, the court allowed plaintiffs to use assumption rather than fact to connect their damages method to the measure of each class member's damages, and excused this approach by blithely remarking that, anyway, "individualized damages issues . . . alone will not defeat class certification." SA 54 (citing *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 801 (7th Cir. 2013)). That sentiment was particularly significant given that the district court had evaded defendants' objections to plaintiffs' econometric model as a method of proving antitrust impact by (improperly) characterizing those objections as mere damages issues. SA 16, 20–21, 23; *supra*, 16–17.

Yet Rule 23 does not permit such shortcuts; "actual, not presumed, conformance with [the] Rule [] remains," as ever, "indispensable." *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 160 (1982) (referring to Rule 23(a)); *see also Comcast*, 133 S.Ct. at 1432 ("If anything, Rule

23(b)(3)'s predominance criterion is even more demanding than Rule 23(a)."). Plaintiffs were required to show that common issues in fact predominated, and they did not.

Plaintiffs' damages expert (Dr. Dwyer) used a regression model to calculate average overcharges, supposedly screening for non-collusive factors, and then multiplied the average overcharges by the total number of purchasers to get an *aggregate* damages number, rather than assessing damages based on what class members actually paid. *See* SA 44–50. The district court acknowledged that this damages model could not be applied to individual class members because "'the price predicted by [the] regression model would not indicate whether or not the customer had been damaged,'" nor, by extension, by how much. SA 53 (quoting defendants' briefing below). The court offered two answers to that fundamental problem, but neither justifies class treatment.

The district court's first response—that, because this is a "complicated antitrust case," plaintiffs could "'use estimates and analysis to calculate a reasonable approximation of their damages,'" SA 54 (quoting *Loeb Indus., Inc. v. Sumitomo Corp.*, 306 F.3d 469, 493 (7th Cir. 2002))—is unavailing. *Loeb* had nothing to do with the standard for

class certification; the portion of the opinion the district court cited addressed whether, in a case brought by *individual* plaintiffs, antitrust damages were so speculative as to be incapable of proof. And, in the class-certification context, "[i]t is now clear . . . that Rule 23 not only authorizes a hard look at the soundness of statistical models that purport to show predominance—the rule commands it." *Rail Freight*, 725 F.3d at 255. Plaintiffs cannot avoid deficiencies in their econometric models by promising to come up with some way to estimate damages later.

The only other answer the district court offered was to point out that defendants' objections merely raised "individualized damages issues," and that the presence of such issues "alone will not defeat class certification." SA 54. As *Comcast* made clear, however, there is no special rule excusing plaintiffs from showing that common damages issues in fact predominate over individual damages issues. The lack of a common method for determining damages across the board can defeat class certification, and here it does.

Thus, while it is often said, as the district court repeated, that "the existence of individual damage issues does not *automatically* defeat class certification," SA 40 (emphasis added), it does not follow that *no*

amount of individual damage issues can defeat class certification. The devil is in the details. If "individual damage issues" means that a common damages methodology will yield differing *results* for each class member based on individual characteristics (e.g., the number of shares purchased by class members in a securities class action), that by itself may not preclude class treatment. This Court indicated as much in *Butler v. Sears, Roebuck & Co.*, where "[t]he only individual issues concern[ed] the *amount* of harm to particular class members." 727 F.3d at 799 (emphasis added).

But if the plaintiffs' damages model cannot identify and calculate damages for members of the class at all, then the individualized inquiries will overwhelm common questions. In other words, where the common evidence fails to tell the factfinder which numbers to plug in to calculate class members' individual damages, then there is no available method—at least no *common* method—to identify damages. That absence creates a high risk that a court will simply jury-rig a presumption of damages, such as the "Trial by Formula" that the Supreme Court rejected in *Wal-mart v. Dukes*, 131 S.Ct. at 2561, or indeed the aggregate damages device the district court here adopted.

In such circumstances, the justification for class treatment disappears. Rule 23(b)(3) was adopted "for situations in which class-action treatment is not as clearly called for" but "where class suit may nevertheless be convenient and desirable." *Amchem*, 521 U.S. at 615 (quotation marks omitted). Certifying a class where individual damages issues predominate is neither "convenient" nor "desirable." It creates at best false economies, while sacrificing legitimate defenses of defendants and the rights of absent class members, and imposing on defendants unreasonable costs and exaggerated settlement pressures.

* * *

Despite the length of its opinion, the district court did not discharge its duty to determine in fact whether common issues or individual issues predominated. The result runs afoul of the policies animating Rule 23 and the case law applying it—this case has the distorted incentives and *in terrorem* exposure of an $11 billion class action, without the assurance that all class members' claims, and all defendants' legitimate defenses, can be heard together and fairly resolved. Class certification was improper.

CONCLUSION

The judgment of the district court should be reversed or, at a minimum, vacated and the case remanded.

Dated: August 17, 2015

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The foregoing brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(B) because it contains 5249 words, excluding those parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

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Dated: August 17, 2015

/s/ Daniel M. Sullivan
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CERTIFICATE OF SERVICE

I hereby certify that on August 17, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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