Case No. _____

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

IN RE HIGH-TECH EMPLOYEE ANTITRUST LITIGATION

Petition for permission to appeal from the United States District Court
Northern District of California
The Honorable Lucy H. Koh, Presiding
Case No. 5:11-2509-LHK

PETITION FOR LEAVE TO APPEAL A CLASS CERTIFICATION ORDER PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 23(F)

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The class certified in this wage-suppression antitrust case sweeps in 60,000 employees holding 2,400 diverse job titles at seven companies that produce markedly different goods and services. The conduct alleged to have commonly affected all 60,000 employees consists of six bilateral agreements in which pairs of defendants refrained from one method of recruiting each other's employees—cold calls. All other recruiting methods were unaffected. Plaintiffs do not allege that there was any impact on total hiring by the defendants. Defendants comprise only a tiny fraction of the employer pool for these diverse jobs; actual hiring from one another was only 1% of their total hires before, during, and after the agreements.

Only by committing several fundamental legal errors was the district court able to certify such a heterogeneous class. The district court viewed the standards governing class certification as "not altogether clear" and "somewhat unsettled." ER822(19).[1] Yet under Rule 23(b)(3), "[c]ommon questions of fact cannot predominate where there exists no reliable means of proving classwide injury in fact." *In re Rail Freight Surcharge Antitrust Litig.*, 725 F.3d 244, 252-53 (D.C. Cir. 2013). To be "common" under Rule 23, an issue must be "capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-*

[1] Defendants have filed public and sealed versions of the excerpts of record. Citations to materials that are partially under seal will first provide a pinpoint citation to the sealed materials, then a parenthetical pinpoint citation to the public version.

Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551 (2011).

Plaintiffs claim that the reduction in cold calls prevented employees from learning information that would have allowed them to bid up their salaries. But the district court permitted plaintiffs to rely on statistical methods that measured only average and aggregated effects. The methods were designed to mask critical differences among individuals and cannot possibly "resolve … the validity of each one of the claims." *Id.* The certification order rested on the theory that a raise for one or some employees would "ripple" throughout the class, but undisputed evidence shows that each class member's compensation is determined by highly individualized factors unsuited for classwide adjudication and that the compensation of individuals within a job title (let alone across jobs) did not rise and fall together.

The district court failed to conduct the "rigorous analysis" required before certifying a class. *See Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013); *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 980 (9th Cir. 2011). In approving an arbitrary impact and damages model that violated *Comcast*, the district court subjected defendants to a "Trial by Formula" that would deny them individualized defenses in violation of the Rules Enabling Act. *Dukes*, 131 S. Ct. at 2561. For instance, defendants will be prevented from proving that specific individuals would not have received any different compensation than they did, regardless of the alleged conspiracy, and thus did not suffer any antitrust injury.

The district court's divergence from the Supreme Court's and this Court's precedent is manifestly erroneous. And the errors are important. The certification order is slated for publication in the Federal Supplement, and has been highly publicized.[2] Its approval of the use of averages to substitute for common proof of impact and damages could be followed in almost any class action. And that approach squarely conflicts with decisions of federal courts in this and other Circuits. As a result, defendants now confront the imminent prospect of a class action conspiracy trial where they face more than $9 billion in potential trebled antitrust damages, which exerts obvious pressure to settle and foreclose appellate review.

QUESTIONS PRESENTED

1. Whether a class of over 60,000 employees from seven different companies may be certified based on methods of averaging and aggregation that would mask rather than resolve the individual issues as to impact and damages that would overwhelm any purportedly common questions.

2. Whether the formula approved by the district court impermissibly precludes defendants from presenting individualized defenses as to the existence of impact and the amount of damages, abridging defendants' substantive rights in violation of the Rules Enabling Act and Due Process Clause.

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[2] *See, e.g.*, Sakthi Prasad, *Lawsuit against Silicon Valley hiring practices gets class action status,* Reuters, Oct. 25, 2013; Joel Rosenblatt & Karen Gullo, *Apple, Google Must Face Group Antitrust Suit, Judge Rules*, Washington Post, Oct. 25, 2013.

BACKGROUND

This action followed a Department of Justice consent decree addressing six bilateral agreements by pairs of defendants not to cold call each other's employees. ER808(5). Plaintiffs seek damages for the same six bilateral agreements, which they, unlike the DOJ, claim were linked by an "overarching" conspiracy.

A. The 60,000 Absent Class Members Hold More Than 2,400 Different Job Titles Across Seven Disparate Technology Companies And Receive Highly Variable Compensation

Defendants are technology companies with employees throughout the country and world. Each defendant's business is distinct: semiconductors (Intel); digital media and marketing software (Adobe); visual effects, video games and sound for films (Lucasfilm); financial and tax preparation software (Intuit); web search and information organization technologies (Google); hardware, software and related services (Apple); and animated films (Pixar).

Absent class members include IT personnel, hardware engineers, web designers, safety engineers, graphic designers and customer support managers, among many other jobs. More than half of the class comprises Intel employees, most of whom work outside the Bay Area and whose compensation was set in relation to hundreds of companies based outside Silicon Valley. ER1453, 1464(675, 697).

Defendants hired at most 1% of their employees from one another (and, for

some pairs of defendants, as little as 0.01%) before, during, and after the class period. ER954, 1095(150, 291). Defendants compete for employees with scores of other name-brand companies—such as Microsoft, IBM, Hewlett-Packard, Cisco, Amazon, Oracle, Yahoo!, Electronic Arts, and Zynga—as well as start-ups, universities, and government agencies. ER231, 1455. While certain broad job categories may be common to defendants (i.e., software engineer), many others are not (i.e., a Lucasfilm sound engineer or Intel semiconductor-fabrication engineers). More than 33% of the absent class members are Intel semiconductor workers, whose skill sets would be of no interest to any other defendant. ER1366, 1452, 1492(588, 674, 685).

Defendants' compensation decisions are individualized. Each defendant set each class member's pay on a case-by-case basis, taking into account a variety of factors that center on individual performance, skills, and experience. ER1395(617). To varying degrees, those criteria were assessed within the context of base-salary ranges that guided managers' discretion. To the extent they used salary ranges for individual positions, those base-salary range were set independently for each individual job. ER1369-70(591-92). The ranges were broad—often over $60,000 and sometimes over $100,000—leaving plenty of room for differentiation among employees. ER1454. Defendants further differentiated among employees by awarding bonuses and equity grants. In 2009, for example, total an-

nual compensation for one Google job title varied by up to $640,000. ER1398, 1488(620, 721). Defendants also promoted strong performers into jobs with higher base-pay ranges.

B. The Alleged Agreements

Plaintiffs challenge six no-cold-call agreements that arose out of particular collaborative relationships between companies, such as overlapping board membership or joint product development. Plaintiffs concede every defendant was free to ***hire*** employees from every other defendant. Each defendant also was free to ***cold call*** all defendants with which it did not have an agreement, and to call or hire from the thousands of other non-defendant sources in the market. Class members, in turn, had many sources of information about the job market other than cold calls, such as information from new employees at their company, personal networks, job fairs, and Internet job sites. ER687-89.

C. Plaintiffs' Theory Of Classwide Impact

Plaintiffs moved to certify a nationwide class of nearly all of defendants' employees or, in the alternative, employees with "technical, creative, or research-and-development" job titles. Plaintiffs' theory of classwide impact was that the six bilateral agreements restricted some undetermined amount of information to *all* employees regarding job opportunities and market compensation. Absent these agreements, plaintiffs speculated, the recipients of hypothetical cold calls would

have spread the information to other employees via "water cooler chatter"—as plaintiffs' expert put it—ultimately causing defendants to raise compensation for everyone through supposedly rigid wage structures. Wage increases for some employees would purportedly translate into increases for all. ER906-08(103-05).

Plaintiffs supported their motion with a "conduct regression" that aggregated all defendants' compensation data, assumed the alleged agreements had the same effect at each defendant, and assigned to the agreements any unaccounted-for difference in compensation between the class period and the time before and afterward. Then, having calculated a purported aggregate damages number, plaintiffs presented a "common impact" model that eliminated individual variation in compensation through averaging. ER1151(347). Plaintiffs' expert admitted he had no basis to opine that the overall "information flow" to defendants' employees was reduced, ER677-78, or that any firm's compensation structure was "so rigid that raises for one or a few employees would necessarily propagate into raises for all or nearly all of the technical employees, absent the agreements." ER681-85.

D. The Certification Order

The district court initially granted the class-certification motion in part and denied it in part. The court refused to resolve disputed issues about plaintiffs' conduct regression, ruling that plaintiffs had provided a "plausible methodology for showing generalized harm to the Class as well as estimating class-wide damages"

and, therefore, that "Plaintiffs have satisfied their burden, for the purpose of Rule 23(b)(3), on the issue of damages." ER933(130). But the court declined to certify any class because nothing in the conduct regression or any of plaintiffs' other evidence supported the "theory that there was a rigid wage structure such that an impact to some of Defendants' employees would necessarily have resulted in an impact to all or nearly all employees." ER932(129).

Plaintiffs then filed a renewed certification motion. They offered a new statistical analysis that averaged compensation across job titles, thereby eliminating the wide variations in pay reflecting individualized factors. The court certified the class, concluding that documentary evidence of individual compensation decisions "paints a picture … that ***suggests*** that common proof ***could*** be used to demonstrate the impact of defendants' actions on technical class members." ER834(31) (emphases added). In light of this anecdotal evidence, the court found the deeply flawed statistical evidence was of "diminished" importance. ER872(69).

Intuit, Lucasfilm, and Pixar have settled with plaintiffs.

ARGUMENT

Interlocutory review of a class certification order is warranted if "the certification decision presents an unsettled and fundamental issue of law relating to class actions, important both to the specific litigation and generally, that is likely to evade end-of-the-case review," or the decision is "manifestly erroneous." *Cham-*

berlan v. Ford Motor Co., 402 F.3d 952, 959 (9th Cir. 2005) (per curiam). As explained below, those criteria are met here. A class certification order "premised on legal error" is an abuse of discretion. *Hawkins v. Comparet-Cassani*, 251 F.3d 1230, 1237 (9th Cir. 2001). The certification order here—which, like other applications of Rule 23, must be rigorously scrutinized (*Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 612-19 (1997))—rests on several fundamental errors.

A. The District Court Improperly Relied On Anecdotes And Averaging Rather Than Requiring A Method Of Common Proof of Antitrust Impact And Damages.

Rule 23(b)(3), which must be "satisf[ied] through evidentiary proof," *Comcast*, 133 S. Ct. at 1432, imposes "stringent requirements for certification that in practice exclude most claims." *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2310 (2013). The predominance requirement of Rule 23(b)(3) is a "vital prescription" for "assur[ing] the class cohesion that legitimizes representative action in the first place." *Amchem*, 521 U.S. at 623. Thus, district courts have a "duty to take a 'close look' at whether common questions predominate over individual ones." *Comcast*, 133 S. Ct. at 1432.

The district court recognized the need for further appellate guidance, noting that "the legal standards with respect to predominance are not altogether clear." ER822(19). Because the certification order suggests district courts in this Circuit remain unclear about the practical application of the Supreme Court's *Comcast* and

Dukes decisions, and because that order cannot be reconciled with those decisions and rulings of the other courts of appeals, this Court should grant review.

1. The district court applied a Rule 23(b)(3) predominance standard that is less stringent than the standard governing the commonality requirement under Rule 23(a)(2), finding that a question could be "common" for predominance purposes even if it could not generate a common answer.[3] ER825, 827, 887(22, 24, 84). But a question cannot be common within the meaning of Rule 23(a)(2) unless the question can generate an answer common to the class. *See Dukes*, 131 S. Ct. at 2550-51. And the Supreme Court has repeatedly instructed that predominance is a "far more demanding" inquiry than commonality. *Amchem*, 521 U.S. at 623–24; *Comcast*, 133 S. Ct. at 1432. The district court gave the words "questions of law or fact common to the class" less weight under Rule 23(b)(3) than Rule 23(a)(2), contrary to *Comcast*.

The district court also appeared to believe that a class could be certified so long as the alleged agreement alone could be determined in common, because it would be so "central" at trial. ER886(83). But "[t]he main concern of the predom-

[3] The district court relied (ER824-26(21-23)) in substantial part on two decisions holding that a purportedly common issue as to the nature of an alleged product defect satisfied the predominance requirement—despite intensely individualized issues as to the manifestation of the defect, damages, and other issues. *See Butler v. Sears, Roebuck & Co.*, 727 F.3d 796 (7th Cir. 2013), *pet for cert. filed* (U.S. Oct. 7, 2013); *In re Whirlpool Corp. Front–Loading Washer Prods. Liab. Litig.*, 722 F.3d 838 (6th Cir. 2013), *pet. for cert. filed* (U.S. Oct. 7, 2013).

inance inquiry under Rule 23(b)(3) is the balance between individual and common issues." *Wang v. Chinese Daily News, Inc.*, — F.3d —, 2013 WL 4712728, at *5 (9th Cir. 2013) (internal quotation omitted). The district court abused its discretion in relying on the commonality of the violation issue "to the near exclusion of other factors relevant to the predominance inquiry." *Id.* (internal quotation omitted).

Indeed, antitrust impact, or "injury in fact," is an essential element of an antitrust claim, and the ability to prove antitrust impact in common is a prerequisite to predominance in an antitrust case: "[c]ommon questions of fact cannot predominate where there exists no reliable means of proving classwide injury in fact." *Rail Freight*, 725 F.3d at 252-53. Even if liability issues were common, individualized issues of antitrust impact and damages would "inevitably overwhelm questions common to the class." *Comcast*, 133 S. Ct. at 1433.

Establishing a common injury through classwide proof for a broad employee class may be difficult or impossible: employees' circumstances tend to be individualized, as this Court recently recognized in remanding a class certification order for more rigorous consideration of "potentially significant differences among the class members" of a 200-employee, single-employer class. *Wang*, 2013 WL 4712728, at *3.[4] Yet the district court did not require plaintiffs to show how they

[4] Substantial variation in among employees has repeatedly precluded certification even of more cohesive putative classes in wage-suppression antitrust cases. *See Weisfeld v. Sun Chemical Corp.*, 210 F.R.D. 136 (D.N.J. 2002), *aff'd*, 84 F. App'x

could prove with classwide evidence that each member of the certified class "suffered the same injury." *Dukes*, 131 S. Ct. at 2551 (quoting *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 157 (1982)). Without a common injury, class proceedings cannot "'drive the resolution of the litigation'"; they merely necessitate future litigation to answer the individualized injury questions that inevitably remain. *Id.* (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 132 (2009)).

2. The district court allowed plaintiffs to attempt to show predominance for a sprawling putative class largely through the use of isolated anecdotal evidence, coupled with meaningless aggregated and averaged statistical analyses. In *Dukes*, the plaintiffs attempted to prove commonality for a sprawling class of employees through a combination of isolated anecdotes, meaningless statistics, and a novel theory of liability. *See* 131 S. Ct. at 2555. The Court flatly rejected that effort, holding that plaintiffs' evidence could not prove there was "a common answer to the crucial question" why each class member was "disfavored." *Id.* at 2552.

An average answer is not a common answer applicable to each individual class member. An average reflects the same impact and the same damages for top performers, average performers, people who were promoted or fired, and incoming

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257 (3d Cir. 2004); *Reed v. Advocate Health Care*, 268 F.R.D. 573 (N.D. Ill. 2009); *Fleischman v. Albany Med. Ctr.*, 2008 WL 2945993 (N.D.N.Y. July 28, 2008); *In re Comp. of Managerial, Prof'l, & Technical Emps. Antitrust Litig.*, 2003 WL 26115698 (D.N.J. May 27, 2003).

new hires who found the defendants' actual compensation sufficient to entice them to move. Yet the district court dismissed "the importance of [] statistical models . . . in light of the extensive documentary evidence." ER872(69). But a few anecdotes relevant to the impact of the agreements on a few employees among tens of thousands "prove nothing at all." *Dukes*, 131 S. Ct. at 2556 n.9.

In fact, none of the "extensive documentary evidence" cited by the district court addresses, much less resolves, the crucial question whether plaintiffs can establish classwide impact by common evidence.[5] Much of the evidence the court cited relates to the existence of the alleged no-cold-call agreements, which is irrelevant to impact. And as to impact, the district court cited unremarkable evidence that defendants generally paid employees within base-salary ranges and tried to compensate similarly performing employees similarly under "internal equity" policies. ER887(84). That evidence does not address plaintiffs' contention that changes to some employees' compensation would cause changes to the pay of others in the same job title, let alone across very different seniority levels or job functions at different companies. And those anecdotes plainly provide no means of proving that purported ripple effect with common evidence.

[5] If anything, the anecdotes offered by plaintiffs disprove common impact. For example, that Adobe decided to give a pay raise to a "'star performer'" who could "'easily get a great job elsewhere'" (ER841(38)) says nothing about whether the effect on *that* employee was accompanied by raises to any other employee, let alone the entire Adobe workforce.

And, to the extent the district court *did* credit plaintiffs' expert statistical evidence, the court failed to carefully scrutinize that evidence to determine whether it could establish that all class members suffered the "same injury." *Dukes*, 131 S. Ct. at 2551. The district court acknowledged that it had "concerns about the probativeness" of at least one of the statistical models it relied on to find predominance, but found that the evidence was not "so methodologically flawed as to warrant exclusion." ER872(69) (citations omitted). Mere admissibility is not enough to satisfy Rule 23. *Ellis*, 657 F.3d at 982 (limiting Rule 23 scrutiny "to a determination of whether Plaintiffs' evidence on that point was admissible" is "error."); *see also In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 315 n.13, 323 (3d Cir. 2008).

Rather, before certifying a class, the district court must resolve evidentiary disputes—including challenges to expert opinion testimony—and determine whether plaintiffs' evidence, in fact, establishes predominance. *Dukes*, 131 S. Ct. at 2552 n.6; *Comcast*, 133 S. Ct. at 1432-33. "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.

Had the district court taken the requisite "hard look" at plaintiffs' statistics, it could not have found that they could establish that the no-cold-call agreements commonly injured all class members. Plaintiffs first purported to show aggregate

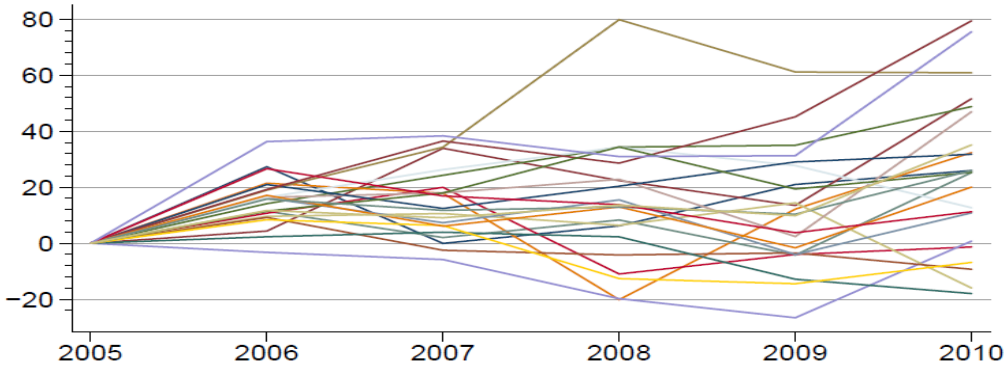
harm to the class through their "conduct regression" by improperly aggregating all defendants' compensation data, but when the same model is run defendant by defendant, it falls apart, showing ***overcompensation*** by various defendants. ER1010-12(206-08). Plaintiffs next sought to show such a common injury by proving that compensation was rigidly interlinked across job titles and localities, meaning that the suppression of one class member's salary would result in a "ripple" effect that suppressed the salaries of all class members. *See* ER1149(345).

Accordingly, plaintiffs' statistical models did not try to prove that ***individual*** compensation was linked; rather, their analyses rely on averaging that masks, rather than accounts for, differences among individuals. The district court thus permitted plaintiffs to assume away the key predominance questions they were required to prove. Plaintiffs' expert Dr. Edward Leamer ***admitted*** he used averages "because the individual data is likely to be dominated by forces that operate at the individual level." ER1151(347). The Supreme Court has held this type of statistical analysis does not establish common injury. *Dukes*, 131 S. Ct. at 2555.

Indeed, Dr. Leamer admitted that "'the inherent noise in the individual level data tends to drown out the signal of the internal pay structures [Plaintiffs] are trying to detect.'" ER874(71) (alteration in original). And the district court acknowledged that plaintiffs' method "may have masked some of the individual variations within each job title"; but the court then accepted the tautology that plaintiffs need-

ed to use averages to prove what they were trying to prove. *Id.* This was manifest error. As Judge Alsup has recognized, plaintiffs have the "burden to show that individual differences … could be accounted for, not that individual differences could be ignored." *In re Graphics Processing Units Antitrust Litig.*, 253 F.R.D. 478, 494 (N.D. Cal. 2008) (emphasis omitted); *see also generally Dukes*, 131 S. Ct. at 2550-51.

The actual data show there is no rigid salary linkage even for employees within a given job title at a single defendant, much less across job titles or companies. Even ***within*** job titles, the raw data clearly showed that compensation of employees trended in ***opposite*** directions in any given year. The chart below is one example from Intuit, (ER1217(461)), but defendants calculated compensation distributions for each job title at issue (ER1250(472)):



These data conclusively disprove plaintiffs' theory of a "rigid" wage structure.

3. Plaintiffs' failure to prove that there is a common question as to impact is compounded by their failure to show that "damages are capable of meas-

urement on a classwide basis." *Comcast*, 133 S. Ct. at 1432-33. As the Supreme Court held in *Comcast*, if the plaintiff provides no valid method for accurately calculating each class member's damages, "[q]uestions of individual damage calculations will inevitably overwhelm questions common to the class." *Id*. at 1433. District courts must take a "close look" at a damages model before certifying a class, a "close look" that models relying on "arbitrary" methods cannot survive. *Id.* at 1432. In contrast with *Leyva v. Medline Industries, Inc.*, 716 F.3d 510 (9th Cir. 2013), plaintiffs here offered no method that "would enable the court to accurately calculate damages … for each claim." *Id.* at 514. Instead, the district court accepted a damages methodology that improperly aggregated all defendants' compensation data to estimate classwide damages, then used formulaic averages that assumed harm to all individuals. ER1007-12(203-08). That "'rough justice'" approach (*Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137, 177 (N.D. Cal. 2004), *aff'd in part* 603 F.3d 571 (9th Cir. 2010) (en banc), *rev'd* 131 S. Ct. 2541 (2011)) ignored dozens of variables that affect the actual economic impact of the alleged agreements on any individual employee's salary, and conflicts with *Comcast*.

B. In Violation of the Rules Enabling Act and Due Process, The Certification Order Abridges Defendants' Substantive Rights To Present Individualized Defenses And Permits Uninjured Parties To Recover.

The district court further fundamentally erred in holding that, because plaintiffs invoked Rule 23(b)(3)—not (b)(2)—it did not need to consider whether certi-

fication would abridge the defendants' substantive rights in violation of the Rules Enabling Act. ER889(86). The district court's order does exactly that, preventing defendants from showing that particular class members were not injured at all, or that they were damaged by a less-than-average amount. By contrast, permitting plaintiffs to show impact and damages based on averages would permit uninjured parties to recover compensation they could never recover individually.

A class action is "a procedural right only," *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 332 (1980), which "leaves the parties' legal rights and duties intact and the rules of decision unchanged." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 408 (2010) (plurality opinion). Because the class action is a procedural device, "Rule 23's requirements must be interpreted in keeping with Article III constraints, and with the Rules Enabling Act, which instructs that rules of procedure 'shall not abridge, enlarge or modify any substantive right[.]'" *Amchem*, 521 U.S. at 613 (quoting 28 U.S.C. § 2072(b)). For these reasons, as the Third Circuit recently explained, "[a] defendant in a class action has a due process right to raise individual challenges and defenses to claims, and a class action cannot be certified in a way that eviscerates this right[.]" *Carrera v. Bayer Corp.*, 727 F.3d 300, 307 (3d Cir. 2013) (citing *Dukes*, 131 S. Ct. at 2561).

There is no way to square the district court's interpretation of Rule 23 with the Rules Enabling Act. The district court misconstrued *Dukes* as holding that the

Rules Enabling Act acts as a substantive constraint to certification of only a Rule 23(b)(2) class, with no effect on certification of (b)(1), (b)(3), or (c)(4) classes. *See* ER889(86). But the Supreme Court has repeatedly made clear that the general principles limiting Rule 23 apply to all class actions—no matter which subsection is involved. *See Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 845 (1999). "Rule 23 provides a one-size-fits-all formula for deciding the class-action question," *Shady Grove*, 559 U.S. at 399, and a Rule 23(b)(3) analysis "turns on the straightforward application of class-certification principles." *Comcast*, 133 S. Ct. at 1433.

The district court manifestly erred by openly "interpreting Rule 23 to 'abridge, enlarge or modify any substantive right.'" *Dukes*, 131 S. Ct. at 2561 (quoting 28 U.S.C. § 2072(b)). Due process entitles defendants to "litigate the issues raised" (*United States v. Armour & Co.*, 402 U.S. 673, 682 (1971)), which includes the opportunity to "present every available defense." *Lindsey v. Normet*, 405 U.S. 56, 66 (1972); *accord Carrera*, 727 F.3d at 307; *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 231–32 (2d Cir. 2008). Here, defendants are entitled to present evidence that class members were not injured (or were damaged less) through evidence of class members' individual circumstances, such as tenure, skill set, and job performance.

Moreover, the district court wholly ignored the critical due-process question of how classwide damages could be ***accurately*** calculated. As a classwide meas-

ure of damages, the court accepted Dr. Leamer's "formulaic method [for] quantifying the amount of suppressed compensation suffered by each class member." ER855(36). But "[r]oughly estimating the gross damages to the class as a whole and only subsequently allowing for the processing of individual claims would inevitably alter defendants' substantive right to pay damages reflective of their actual liability," *McLaughlin*, 522 F.3d at 231 (collecting cases). This is exactly what Dr. Leamer did here. This Court agrees that "allowing gross damages by treating unsubstantiated claims of class members collectively significantly alters substantive rights under the antitrust statutes," in violation of the Rules Enabling Act. *In re Hotel Tel. Charges*, 500 F.2d 86, 90 (9th Cir. 1974). The district court thus endorsed the "novel project" ***unanimously*** disapproved in *Dukes*: a resort to "Trial by Formula" to calculate an "entire class recovery[] without further individualized proceedings[.]" 131 S. Ct. at 2561. That approach also deepened a conflict among this Circuit's district courts.[6]

This Court should correct the district court's fundamental error.

CONCLUSION

The petition should be granted and the class certification order reversed.

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[6] *See Brown v. Wal-Mart Stores, Inc.*, No. 5:09-CV-03339 EJD, 2012 WL 5818300, at *3 (N.D. Cal. Nov. 15, 2012) (after *Dukes*, "the district courts of the Ninth Circuit have split on the issue of utilizing statistical sampling" and collecting cases). This Court withdrew an opinion resolving the issue. *See Wang v. Chinese Daily News, Inc.*, 709 F.3d 829, 836 (9th Cir.), *superseded.* 2013 WL 4712728, at *6 (9th Cir. 2013).

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ATTESTATION: The filer attests that concurrence in the filing of this document has been obtained from all signatories.

CERTIFICATE OF SERVICE

I am employed in the City and County of San Francisco, State of California in the office of a member of the bar of this court at whose direction the following service was made. I am over the age of eighteen years and not a party to the within action. My business address is Keker & Van Nest LLP, 633 Battery Street, San Francisco, CA 94111-1809.

On November 7, 2013, I served the following document(s):

PETITION FOR LEAVE TO APPEAL A CLASS CERTIFICATION ORDER PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 23(F)

DEFENDANT-PETITIONERS EXCERPTS OF RECORD, VOLUMES I-VIII

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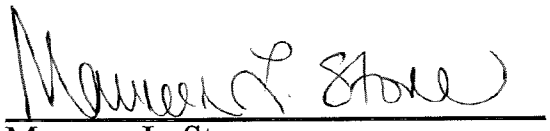
Executed on November 7, 2013, at San Francisco, California.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.



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