Case No. 13-80223

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IN RE HIGH-TECH EMPLOYEE ANTITRUST LITIGATION

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

AMICI CURIAE BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE CALIFORNIA CHAMBER OF COMMERCE, AND THE NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF PETITION FOR RULE 23(F) APPEAL OF CLASS CERTIFICATION ORDER

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *Amici Curiae* the Chamber of Commerce of the United States of America, the California Chamber of Commerce, and the National Association of Manufacturers state that they are not subsidiaries of any corporation, and no publicly held corporation owns 10% or more of their stock.

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INTERESTS OF THE *AMICI CURIAE* [1]

Amici Curiae, with the consent of all parties, respectfully submit this brief in support of Defendants-Petitioners' Rule 23(f) Petition to appeal the district court's class certification order (the "Order").

The Chamber of Commerce of the United States ("the Chamber") is the world's largest business federation, representing 300,000 direct members and indirectly representing an underlying membership of more than three million U.S. businesses and professional organizations. Among its members are companies and organizations of every size and in every industry sector. A principal function of the Chamber is to represent the interests of its members by filing *amicus* briefs in cases involving issues of vital concern to the nation's business community.

The California Chamber of Commerce ("CalChamber") is a nonprofit business association with more than 13,000 members, both individual and corporate, representing virtually every economic interest in the state. For over 100 years, CalChamber has been the voice of California business. Although CalChamber represents several of the largest corporations in California, 75% of its members have 100 or fewer employees. CalChamber acts on behalf of the

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[1] Pursuant to Rule 29(c)(5) of the Federal Rules of Appellate Procedure, *Amici* hereby state that this brief was not authored in whole or in part by counsel for any party, 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 *Amici*, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

business community to improve the state's economic and employment climate by representing business on a broad range of legislative, regulatory, and legal issues. CalChamber participates as *amicus curiae* only in cases, like this one, that have a significant impact on California businesses.

The National Association of Manufacturers ("the NAM") is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs nearly 12 million men and women, contributes more than $1.8 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for two-thirds of private-sector research and development. The NAM is the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

Amici support the Rule 23(f) Petition to ensure the district courts in this Circuit undertake the rigorous analysis required under Federal Rule of Civil Procedure 23 before permitting a case to proceed as a class action. As the Petitioners explain, the district court here certified a class composed of 60,000 employees holding 2,400 diverse job titles at seven different companies that produce a diverse range of goods and services. It did so based on purported average impact and a few anecdotal experiences regarding the alleged antitrust violations, and disregarded the predominance of individualized questions and

answers over common ones. *Amici* are concerned that the decision below will dramatically increase their members' exposure to class action lawsuits, including in cases where there is no proof that any meaningful number of putative class members has suffered any impact or damages caused by the alleged violation.

ARGUMENT

I. THE DISTRICT COURT'S EXPANSIVE INTERPRETATION OF RULE 23 MISAPPLIES SUPREME COURT PRECEDENT

Federal Rule of Civil Procedure 23 imposes "stringent requirements" that "in practice exclude most claims." *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2310 (2013). A class may *not* be certified where individual questions "will inevitably overwhelm questions common to the class." *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1433 (2013). An exacting application of Rule 23 is necessary because class actions are "'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" *Comcast*, 133 S. Ct. at 1432 (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979)).

The opinion below dramatically departs from these basic principles and contravenes Supreme Court precedent in both letter and spirit. The Supreme Court has held that a question can be "common" under Rule 23(a)(2) only if "'a classwide proceeding [can] generate common *answers*.'" *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011) (citation omitted). The Court has recently and clearly instructed that the Rule 23(b)(3) predominance requirement is an "even

more demanding" inquiry than Rule 23(a)(2)'s commonality requirement. *Comcast*, 133 S. Ct. at 1432; *see also Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623-24 (1997). But, contrary to this clear direction, the district court gave the words "questions of law or fact common to class members" in Rule 23(b)(3) virtually no weight. *See* Order at 15, 24, 83-84. The court recognized that finding commonality under Rule 23(a)(2) requires the availability of common answers, Order at 15, but failed to recognize the same requirement for Rule 23(b)(3) and emphasized "common evidence" instead of common answers, Order at 22-24. This approach is directly contrary to Supreme Court precedent. *See Dukes*, 131 S. Ct. at 2551; *Amchem Prods.*, 521 U.S. at 623-24.

The district court compounded that error by first giving one alleged common issue—whether there was an "overarching conspiracy" to engage in anticompetitive behavior—undue weight because defendants indicated that they would vigorously contest the existence of an antitrust violation. Order at 24, 83-84. Relying on price-fixing examples that are inapposite here, *see infra* pages 6-7, the court improperly concluded that the fact that defendants disputed this underlying question was sufficient on its own to render it a predominate question. Order at 83-84. The court then essentially elided the question of whether antitrust impact and damages required individualized proof for each putative class member by holding that statistical methods measuring only average and aggregate effects

across all class members were sufficient to show that common issues would predominate when evaluating the element of antitrust impact. *See* Order at 31-32, 51-52, 84. That holding contradicts both *Dukes*—which "requires the plaintiff to demonstrate that the class members 'have suffered the same injury,'" not merely that an injury to a few class members created an *aggregate* impact on the class, 131 S. Ct. at 2551 (citation omitted)—and *Comcast*, which teaches that the formula for calculating damages must be tailored to *individual* injury, *see* 133 S. Ct. at 1433-34. Indeed, if the district court's reasoning were correct, a broad class could be certified any time a plaintiff was able plausibly to allege a conspiracy, even if there was no evidence that any more than a few members have suffered injury. Such a rule cannot be reconciled with the clear teachings in *Dukes* and *Comcast.* Plaintiffs could attempt to use it to manufacture predominance not only in every antitrust case but in virtually any type of Rule 23(b)(3) action.

Although the court further attempted to justify its lax reading of Rule 23 in terms of efficiency, Order at 85-86, "[i]t is only where this predominance exists that economies can be achieved by means of the class action device." *See* Fed. R. Civ. P. 23(b)(3) advisory committee's note (1966). A careful predominance analysis can yield efficiency; a bare desire for efficiency cannot produce predominance.

II. THE DISTRICT COURT'S APPLICATION OF RULE 23 IS INCONSISTENT WITH DEFENDANTS' DUE PROCESS RIGHTS

Rule 23's class action prerequisites are not only designed to facilitate efficient, streamlined adjudication of claims, but are also intended to protect the due process rights of the parties. *Taylor v. Sturgell*, 553 U.S. 880, 901 (2008) (Rule 23's "procedural protections" are "grounded in due process"). Its requirements protect the rights of absent class members—who will (absent opting out) ultimately be bound by any class action settlement or verdict—to pursue their particular interests on their own terms, and the rights of defendants "'to present every available defense.'" *Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007) (quoting *Lindsey v. Normet*, 405 U.S. 56, 66 (1972)). Faithful adherence to the requirements of section (b)(3) is particularly important because this section contains essential "procedural safeguards" requiring courts to take a "close look" to ensure that common questions predominate over individual ones. *Comcast*, 133 S. Ct. at 1432.

By misapplying Rule 23(b)(3)'s requirements to sidestep questions that require individualized inquiry, the district court's Order is inconsistent with due process. *See* Order at 31-32, 78, 82-84. The ruling—if permitted to stand—would upend the law of class actions. In antitrust cases such as those cited by the district court, *see* Order at 83, the courts certified classes because the nature of the antitrust charge and the definition of the class were such that the courts found common

issues as to antitrust injury and damages. *See, e.g.*, *In re Static Random Access Memory (SRAM) Antitrust Litig.*, 264 F.R.D. 603, 611-15 (N.D. Cal. 2009). Not one of those cases supports the district court's decision to certify this class without first confirming that the evidence established an injury common to all class members susceptible to resolution through class-wide proof—*and* that *individual* damages could be calculated using a class-wide formula.

By holding that the questions of antitrust injury and damages each involved a common question because they "may be" addressed by statistical evidence, the court also committed the same error identified in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. at 2555. The Supreme Court made clear in *Dukes* that an aggregate determination of injury and damages based on the harm suffered by a small portion of the class would offend due process because it would likely result in a damages figure that reflects neither the number of plaintiffs actually injured by defendants nor the amount of economic harm suffered. *See id.* at 2555-56, 2558-59, 2561; *see also McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 231 (2d Cir. 2008), *abrogated on other grounds by Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639 (2008).

As *Dukes* shows, certification of a class based on a purported average plaintiff's experience will improperly affect the substantive rights of litigants. It will subject each of the individual absent class members to judgment based on aggregate "average" proof that may have no relevance to their individual factual

circumstances. It will undermine a defendant's ability to invoke defenses based on individualized circumstances of antitrust injury and damages. And, as a practical matter, it will change the burdens of proof for both plaintiffs (by effectively increasing the ease with which absent class members can prove their claims) and defendants (by effectively making them disprove liability for claims that absent class members are not personally prosecuting). *See* 28 U.S.C. § 2072(b) (procedural rules like Rule 23 cannot be used to "abridge, enlarge or modify any substantive right"); *Amchem*, 521 U.S. at 613 (holding that Rule 23 must be interpreted in accord with the Rules Enabling Act).

Moreover, where plaintiffs have opted not to sue individually and subject themselves to the jurisdiction of the court, but rather to remain "absent members" of a class action, it becomes virtually impossible for the defendant to defend itself. A person who is a member of an uncertified class is not a party before the court, *see Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2379-81 (2011), and even after a class has been certified, courts have been reluctant to permit discovery of absent class members, *see* Manual for Complex Litigation (Fourth) § 21.41, at 302-03 (2004). Thus, overbroad class certification impairs defendants' opportunity to raise potential defenses against absent persons who would be the beneficiaries of a class judgment. That is no way to conduct proceedings that the Supreme Court has repeatedly stressed should be undertaken cautiously to preserve due process rights.

III. IMPROPER CERTIFICATION OF OVERBROAD CLASSES IMPOSES COSTS AND BURDENS DISPROPORTIONATE TO THE CLAIMS AT ISSUE

By expanding both the availability of class certification and the size of the classes certified, the district court's erroneous rule, if applied in future cases, will permit plaintiffs' lawyers to extract what amounts to a rent from defendants in quantities far disproportionate to any actual damages suffered by the class members. The Supreme Court and the Judicial Conference Committee on Rules of Practice and Procedure have long recognized that the decision to certify any class has drastic ramifications and can be used to essentially force a defendant into settling. *See* Fed. R. Civ. P. 23(f) advisory committee's note (1998) ("An 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."); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752 (2011) (noting the *in terrorem* effect of class actions as "[f]aced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims").

This pressure to settle is felt acutely in large class actions like this case, where litigation can be prohibitively expensive, even when defendants have meritorious defenses. *See Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978) ("Certification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to

settle and to abandon a meritorious defense."). Any benefit from such overbroad class actions cannot outweigh the high costs associated with them, making them a net detriment to society. In 2012, American companies were forced to spend $2.06 billion on legal fees in class action lawsuits. Carlton Fields, *The 2013 Carlton Fields Class Action Survey* 7 (2013), available at http://www.classactionsurvey.com. Faced with litigating overbroad class actions, defendants may be forced to raise prices, lay off employees, or reduce employee benefits; some may even face the prospect of bankruptcy.

The principal beneficiary of a lax application of Rule 23 is the legal profession, which on average siphons off as much as 60 percent of a class action settlement. *See* A. Mitchell Polinsky and Steven Shavell, *The Uneasy Case for Product Liability*, 123 Harv. L. Rev. 1437, 1469-70 & n.137 (2010). In short, when courts fail to adhere to the requirements of Rule 23, everyone loses but the lawyers. This warrants clarifying the proper scope of class certification in an area of repeated litigation in this Circuit.

CONCLUSION

Amici respectfully request the Court to grant the Rule 23(f) Petition.

Dated: November 14, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system on November 14, 2013.

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