

No. 11-864

**In The
Supreme Court of the United States**

COMCAST CORPORATION, *ET AL.*,

Petitioners,

v.

CAROLINE BEHREND, *ET AL.*,

Respondents.

*On Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit*

**BRIEF OF ECONOMISTS AS *AMICI CURIAE* IN
SUPPORT OF NEITHER PARTY**

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**BRIEF OF ECONOMISTS AS *AMICI CURIAE* IN
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INTEREST OF *AMICI CURIAE*¹

Amici are economists with over fifty years of combined professional experience related to economic analyses used in class action litigation to determine whether damages can be proven on a class-wide basis. Their experience cuts across a broad cross-section of

¹ All parties have consented to the filing of this brief through universal letters of consent on file with the Clerk. No counsel for a party authored this brief in whole or in part, and no person other than *amici* made a monetary contribution intended to fund the preparation or submission of this brief. *Amicus* Dr. John H. Johnson has been retained by Petitioner Comcast Corporation on two occasions in unrelated wage and hour class action litigation.

industries and areas of the law, including antitrust, labor and employment, consumer fraud, and product liability. They have testified on behalf of both plaintiffs and defendants in litigation.

Dr. John H. Johnson is the President and CEO of Edgeworth Economics, an economic consulting firm. He is also an Affiliated Professor at Georgetown University's Public Policy Institute. At Georgetown, Dr. Johnson teaches courses in Antitrust and Public Policy and in the Law and Economics of Discrimination in Public Policy. His academic research focuses on issues at the intersection of law and economics particularly related to class certification and damages calculations. Dr. Johnson's scholarship has been published widely, including in the *Journal of Labor Economics*, the *Antitrust Law Journal*, the *Industrial Labor Relations Review*, and the *Journal of Competition Law and Economics*. Dr. Johnson is an Associate Editor of the *Antitrust Law Journal*. He has testified as an expert in numerous proceedings in federal and state court.

Dr. Gregory K. Leonard is a Senior Vice President of Edgeworth Economics. He was formerly an assistant professor of Economics at Columbia University. He has written widely on the economics of competition and intellectual property. Dr. Leonard's numerous academic articles have been published in the *RAND Journal of Economics*, the *Journal of Econometrics*, the *Journal of Industrial Economics*, the *Journal of Labor Economics*, the *Antitrust Law Journal*, and the *Journal of Competition Law and Economics*, among other publications. He is a Senior Editor of the *Antitrust*

Law Journal. Dr. Leonard served as a consultant to and testified before the federal Antitrust Modernization Commission, and he has provided economic consulting services to the United States Department of Justice and the Ministry of Commerce of the People's Republic of China.

Together, Dr. Johnson and Dr. Leonard have co-authored watershed academic studies regarding the use of economic analysis in making class certification determinations, particularly in the antitrust field.²

Dr. Laila Haider is a Senior Vice President of Edgeworth Economics. She specializes in the economics of class certification in both antitrust and labor and employment. Dr. Haider has published her research in the *Journal of European Economic Association* and in *The Antitrust Practitioner*. She has served as an expert witness and has spoken widely on the role of economic analysis in class certification.

As a result of their extensive economic expertise in the area of class certification, *amici* are singularly positioned to offer this Court practical insights into how empirical economic testing, which is admissible under the rules of evidence and principles governing the introduction of expert testimony, can and does work in accordance with fundamental scientific

² See John H. Johnson & Gregory K. Leonard, *Rigorous Analysis of Class Certification Comes of Age*, 77 ANTITRUST L. J. 569 (2011); Fei Deng, *et al.*, *Economic Analysis in Indirect Purchaser Class Actions*, 26 ANTITRUST 51 (2011); John H. Johnson & Gregory K. Leonard, *Economics and the Rigorous Analysis of Class Certification in Antitrust Cases*, 3 J. COMPETITION L. & ECON. 341 (2007).

principles to allow courts to determine at the initial stages of litigation whether alleged class damages can reliably be shown through common proof. This economic testing also provides the exacting analysis that this Court has held must be undertaken before a putative class can be certified.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici take no position on the outcome of this particular litigation. They instead wish to advise the Court that scientifically rigorous economic models, admissible as evidence under *Daubert* standards, are available by which both litigants and courts can reliably determine at the class-certification stage the viability or inviability of computing and awarding damages on a class-wide basis. There thus is no economic or scientific reason why courts could not make a full, impartial, and thorough assessment of the propriety of class certification as to damages at the outset of cases, should this Court hold that Federal Rule of Civil Procedure 23 requires such proof. And those available economic models have the scientific rigor needed to be admissible as evidence. *Amici* take no position on whether, had those scientifically rigorous tools been employed here, they would have supported or foreclosed class certification.

1. The rigorous analysis and probing behind the face of pleadings that this Court has held must be conducted to determine whether a class should be certified under Rule 23 necessarily extends to damages claims in proposed Rule 23(b)(3) class actions. As is true with liability, common damages

issues must predominate over individual issues for a Rule 23(b)(3) class to be certified.

The predominance requirement, in turn, means that the plaintiff must establish that there is a common method for reliably and accurately measuring damages on a class-wide basis. But determining whether a common statistical method exists for measuring damages on a class-wide basis necessarily requires district courts to undertake a careful and exacting economic analysis. Most importantly, this analysis must be grounded in the facts adduced in class discovery and expert testimony at the class certification stage.

2. Regression analysis is an econometrics tool that can often provide a common method for measuring damages on a class-wide basis in Rule 23(b) class actions. But regression models must themselves be subjected to rigorous economic testing to ensure that they are a reliable means of proving damages on a class-wide basis in a given case.

The necessary testing of the reliability of a regression model can be accomplished through relatively straightforward and simple empirical methods that meet the standards of utility, established acceptance in the field, and reliability prescribed by *Daubert*. One reliable method is to have the proposed regression model run on both the class as a whole and separately on one or more sub-groups of the putative class. The results of those separate models are then compared to the results provided when the regression model was run class-wide. If this comparison shows a statistically significant difference between the sub-groups and the

class, then the class-wide regression model does not provide a sound method for measuring damages on a class-wide basis. In the absence of this type of testing and scrutiny, the regression analysis may mask critical distinctions among the putative class members, thus rendering the analysis unreliable.

Empirical testing of the regression analysis in this manner is neutral. It is neither pro- plaintiff nor pro- defendant, and it makes no assumptions either way about the propriety of class treatment. It is rooted instead in fundamental scientific principles used to assess the accuracy and reliability of statistical models based on the on-the-ground facts of the particular case. Scientifically reliable and admissible tools of economic analysis thus are readily available by which the parties and court could address the important issues raised with respect to the viability of class-wide damages in this case.

ARGUMENT

I. AVAILABLE ECONOMIC METHODS PROVIDE A SCIENTIFICALLY SOUND FRAMEWORK FOR DETERMINING THROUGH ADMISSIBLE EVIDENCE WHETHER DAMAGES TO PUTATIVE CLASS MEMBERS CAN BE MEASURED ON A CLASS-WIDE BASIS.

A. In Determining The Propriety Of Class Certification Under Rule 23(b)(3), Courts Must Conduct A Rigorous Analysis Of Whether Common Issues, Including Damages Issues, Predominate Over Individual Issues.

Rule 23 of the Federal Rules of Civil Procedure governs the certification of class actions in federal court. That Rule sets forth two sets of class certification requirements.

First, under Rule 23(a), the party seeking certification must show that “(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.” Fed. R. Civ. P. 23(a). All four requirements of Rule 23(a) must be met; otherwise, the class cannot be certified. *General Tel. of Southwest v. Falcon*, 457 U.S. 147, 161 (1982).

Second, the proposed class must qualify for one of the three categories of class actions specified in Rule 23(b)(1), (2), or (3). *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2548 (2011). The category under which class certification was sought in this case is Rule 23(b)(3). Pet. App. 12a. That Rule provides that a class action “may be maintained if *** the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.” Fed. R. Civ. P. 23(b)(3).

This Court recently reconfirmed that Rule 23’s class certification requirements are not a “mere pleading standard[s].” *Dukes*, 131 S. Ct. at 2551. Unlike Federal Rule of Civil Procedure 12(b)(6), which limits courts at the motion to dismiss stage to the four corners of the complaint, Rule 23 calls on courts at the class certification stage “to probe behind the pleadings”—an inquiry that will “frequently *** entail some overlap with the merits of the plaintiff’s underlying claim.” *Id.* at 2551-2252 (quoting *Falcon*, 457 U.S. at 160). “That cannot be helped” because determining whether Rule 23’s requirements are met “generally involves considerations that are enmeshed in the factual and legal issues” posed by the claim. *Id.* The Court has stressed, moreover, that the obligation of district courts to go beyond the contours of the pleadings in class certification proceedings requires “a rigorous analysis” to ensure that the Rule 23 requirements are in fact satisfied before a class is certified. *Id.* at 2551 (quoting *Falcon*, 457 U.S. at 161).

To be sure, this Court’s statements in *Dukes* and *Falcon* mandating a “rigorous analysis” of class certification motions were made with specific reference to Rule 23(a). *Dukes*, 131 S. Ct. at 2551; *Falcon*, 457 U.S. at 161. But there should be “no reason to doubt that what [this] Court [has] said about [the] Rule 23(a) requirements applies with equal force to all Rule 23 requirements, including those set forth in Rule 23(b)(3).” *In re Initial Public Offerings Sec. Litig.*, 471 F.3d 24, 33 n.3 (2d Cir. 2006); see also *In re Zurn Pex Plumbing Prods. Liab. Litig.*, 644 F.3d 614, 618 (8th Cir. 2011) (requirement that district courts conduct a “rigorous analysis” before certifying a class applies to Rule 23(b)), *petition for cert. filed*, 80 U.S.L.W. 3378 (U.S. Dec. 15, 2011); *Madison v. Chalemette Refining, L.L.C.*, 637 F.3d 551, 554 (5th Cir. 2011) (same). The same reasons of fairness, efficiency, and judicial administrability for which this Court found exacting analysis to be necessary under Rule 23(a) do not evaporate under Rule 23(b).

Indeed, if anything, Rule 23(b)(3)’s requirement that common issues “predominate” over individualized issues should be “far more demanding” than Rule 23(a)’s requirement that there be questions of law and fact that are common to the class members. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 624 (1997). That is because the Rule’s inquiry into whether common issues “predominate” over individual issues “tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation,” *id.* at 623, in a manner that is fair both to the individuals who will be bound by the class judgment and the defendants whose liability to large

numbers of individuals will be adjudicated on a collective basis, *see* Fed. R. Civ. P. 23 advisory committee's note, 39 F.R.D. 69, 102-103 (1966). Under the predominance inquiry, "it is not sufficient that common questions merely exist, as is true for purposes of Rule 23(a)(2)." 7AA Charles Alan Wright & Arthur R. Miller, *et al.*, *Federal Practice and Procedure* §1778, at 119-120 (3d ed. 2005). What matters instead for purposes of Rule 23(b)(3) is the nature of the overall "relationship between the common and individual issues." *Id.*

Rule 23(b)(3) thus dictates that courts give a class certification motion an especially "close look." *Amchem*, 521 U.S. at 615 (citation omitted). That extra scrutiny complements the procedural protections of Rule 23(b)(3)'s notice and opt-out provisions, which afford putative class members the opportunity to exclude themselves from the class and thus not be bound by the final judgment in the case. *Dukes*, 131 S. Ct. at 2558-2559.

Furthermore, the "rigorous analysis" of a class certification motion that this Court has called for must be conducted with respect to each of the elements of the putative class members' claims and the defenses to the claims. *See Dukes*, 131 S. Ct. at 2551; *M.D. ex rel. Stukenberg v. Perry*, 675 F.3d 832, 842 (5th Cir. 2012). That requirement of exacting scrutiny necessarily extends to the element of damages when, as in this case (Pet. App. 96a), that is the class-wide remedy the plaintiffs seek. *See Dukes*, 131 S. Ct. at 2558-2559. Indeed, the need to ensure that the damages claim is susceptible of class-wide litigation and computation is particularly

indispensable in Rule 23(b)(3) actions because that provision was specifically intended to serve as the vehicle for certifying class action damages cases. *See Dukes*, 131 S. Ct. at 2558-2559; *Amchem*, 521 U.S. at 614. Accordingly, as with the common liability issues in a Rule 23(b)(3) class action, the common damages issues must predominate over individual damages issues for the class to be certified.

B. To Satisfy The Predominance Requirement of Rule 23(b)(3), Plaintiffs Must Show That There Is A Common Method By Which To Litigate and Measure Class Members' Damages.

To satisfy the Rule 23(b)(3) predominance requirement with respect to damages, the plaintiff must demonstrate that damages can accurately be measured on a class-wide basis through the use of common proof. *See, e.g., In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 311, 325-326 (3d Cir. 2008); 5 James W. Moore et al., *Moore's Federal Practice*, § 23.45[2][b], at 23-223-23-224 (3d ed. 2012). Because, by definition, individualized damages assessments are not viable, this generally means that the plaintiff must show that there is a uniform methodology by which damages can be computed reliably and fairly for all members of the class.

The most typical way of doing so is through the use of appropriate data and statistical analysis that derive from common evidence and operate evenhandedly and accurately across the class. That type of common methodology can satisfy the Rule 23(b)(3) predominance requirement, even if the

actual calculation of each class member's own damages using the method has to be individually processed. *See, e.g., Sacred Health Sys., Inc. v. Humana Military Healthcare Servs. Inc.*, 601 F.3d 1159, 1179 (11th Cir. 2010); *Ward v. Dixie Nat'l Life Ins. Co.* 595 F.3d 164, 180 (4th Cir. 2010); *In re Hydrogen Peroxide*, 552 F.3d at 325-326; *Cordes & Co. Fin. Servs., Inc. v. A.G. Edwards & Sons, Inc.*, 502 F.3d 91, 106-107 (2d Cir. 2007); *Bell Atl. Corp. v. AT&T Corp.*, 339 F.3d 294, 303 (5th Cir. 2003); *Smilow v. Southwestern Bell Mobile Sys., Inc.*, 323 F.3d 32, 40-41 (1st Cir. 2003).³

In these and other Rule 23(b)(3) cases, economic analyses conducted by experts have been critical in allowing a court to determine at the outset of litigation whether a common method reliably can be used to measure class members' damages. *See, e.g., In re Hydrogen Peroxide*, 552 F.3d at 315-317; Richard Marcus, *Reviving Judicial Gatekeeping of Aggregation: Scrutinizing the Merits on Class Certification*, 79 GEO. WASH. L. REV. 324, 352-353 (2011); John H. Johnson & Gregory K. Leonard, *Economics and The Rigorous Analysis of Class*

³ The need for a common method by which damages reliably can be proven on a class-wide basis also ensures that class certification comports with Rule 23(b)(3)'s separate requirement that class treatment be "superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). The absence of such a method would render a class action unmanageable by forcing the district court to preside over as many mini-trials on damages as there are class members. *See Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 187 (3d Cir. 2001); *Fischer v. Dallas Fed. Sav. & Loan Ass'n*, 835 F.2d 567, 570 (5th Cir. 1988).

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Indeed, it is *amici's* experience that, in heeding this Court's admonition in *Falcon* and *Dukes* to "probe behind the pleadings" at the class certification stage, *Falcon*, 457 U.S. at 160; *Dukes*, 131 S. Ct. at 2551, district courts have come increasingly to rely on economic analyses in Rule 23(b)(3) class actions. That is because the nature of the inquiry has become increasingly complex, particularly in antitrust cases like this one, where courts have to discern the hypothesized "but for" causal impact of one of many potentially influential economic factors on thousands or (here) millions of plaintiffs over a defined period of time. That multi-faceted economic inquiry generally cannot be accomplished reliably—let alone rigorously—without the benefit of empirical testing using proper statistical methodologies.

C. Empirical Economic Testing Techniques Provide A Readily Available Tool For Rigorously Assessing, At The Certification Stage, Whether Class Members' Damages Can Be Proven On A Class-Wide Basis.

1. Empirical Economic Testing Techniques Furnish a Neutral Mechanism For Examining the Commonality of Damages.

The objective of an award of damages in civil litigation is to compensate the injured party for harm that was actually suffered, not to make some

globalized estimate of the harm inflicted. *See Bowen v. Massachusetts*, 487 U.S. 879, 895 (1988). In a civil antitrust case involving allegations of anticompetitive pricing like this case (Pet. App. 7a), the key to proving damages is determining what price the plaintiff would have paid but for the defendant's alleged anticompetitive conduct. Similarly, in an employment discrimination case, the key to proving damages is determining the compensation the plaintiff would have received but for the alleged discriminatory actions of the employer.

Those calculations necessarily require the construction of a hypothetical, counter-factual scenario evaluating what conditions would have existed in the absence of the defendant's alleged actions. In an antitrust case involving allegations of price fixing, the difference (if any) between the counter-factual "but-for" price and the actual price the plaintiff paid is the overcharge arising from the defendant's conduct, and that overcharge simultaneously reflects both antitrust injury and the amount of antitrust damages. *See ABA Section of Antitrust Law, Proving Antitrust Damages: Legal and Economic Issues* 3-15, 53-55 (2d ed. 2010).

In a class action case, the economic analysis needed to prove impact and damages by hypothesis must be based on a scientific methodology that can be applied reliably on a class-wide basis to measure *actual* individual harm. That is necessarily a more complex undertaking than proving impact and damage in a single plaintiff case because it involves identifying a common method, based on the use of aggregate data, that remains capable of yielding a

reliable “but for” result for different individuals, notwithstanding their varying circumstances.

Fortunately, as demonstrated in Sections C.3 and C.4, *infra*, courts can now critically evaluate the viability of a common method for measuring class-wide damages through the use of existing empirical testing techniques in the field of economics. Those tests are available at the class certification stage because they rely upon facts that can be adduced in discovery related to class certification. *See, e.g., Initial Public Offerings Sec. Litig.*, 471 F.3d at 41 (although districts courts have discretion to impose some limits on discovery at the class certification stage, they “must receive enough evidence, by affidavits, documents, or testimony, to be satisfied that each Rule 23 requirement has been met”).

Most importantly, those techniques operate evenhandedly. Put another way, they are neither pro-plaintiff nor pro-defendant. They simply provide a neutral, scientific mechanism for assessing when class-wide damages can, and when they cannot, be computed accurately. The outcome turns objectively on the underlying facts bearing on damages to which the techniques are applied. Testing of this sort is consistent with the fundamental scientific and evidentiary principle that competing propositions should be evaluated based solely on their grounding in the facts.

**2. Empirical Economic Testing
Techniques Have Sufficient Utility and
Reliability to be Admissible as Expert
Evidence.**

There is simply no economic or scientific reason why determinations addressing the viability of class-wide damages calculations should be based on the type of questionable economic evidence provided by the plaintiffs in this case, or for courts to postpone careful examination of the viability of class damages beyond the class certification stage. There are readily available to courts and parties scientifically proven, reliable, and objective economic methods for evaluating damages claims that satisfy the admissibility standards of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). See, e.g., *In re Hydrogen Peroxide*, 552 F.3d at 323 (discussing application of *Daubert* at class certification stage).

This Court has not squarely addressed whether *Daubert* applies to expert testimony at the class certification stage. In *Dukes*, however, this Court “doubt[ed]” whether the law could be otherwise. 131 S. Ct. at 2553-2554 (“The District Court concluded that *Daubert* did not apply to expert testimony at the certification stage of class-action proceedings. *** We doubt that is so[.]”).

In *amici’s* view, the Court’s suggestion in *Dukes* is correct. If expert testimony is introduced in support of, or in opposition to, a class certification motion, a court must necessarily decide whether, under *Daubert*, the expert is qualified and his or her testimony is reliable; otherwise, the court cannot

fully carry out this Court's mandate to conduct a rigorous analysis of the Rule 23 certification requirements. In other words, as the dissenting judge in the court of appeals recognized, a *Daubert* analysis of expert testimony on whether "the elements of a claim are capable of proof through evidence common to a class" goes hand-in-hand with the need for a district court to probe behind the face of the pleadings and touch upon the merits of the claim. Pet. App. 66a n.18 (Jordan, J., dissenting). See *American Honda Motor Co. v. Allen*, 600 F.3d 813, 817 (7th Cir. 2010) (per curiam) (district court's obligation to "make the necessary factual and legal inquiries and decide all relevant contested issues prior to certification" inexorably extends to determining if expert testimony on certification is reliable under *Daubert*); *Zurn Pex Plumbing Prods. Liab. Litig.*, 644 F.3d at 628 (Gruender, J., dissenting) ("Requiring a full *Daubert* analysis is a natural extension of the concept that class certification should not be conditional and should be permitted only after a rigorous application of Rule 23's requirements.").

But whether or not *Daubert* is the appropriate reference point legally, in *amici's* judgment, there is no scientific or economic reason to settle for less than that high-quality standard as the guide for the critically important and consequential decisions that courts make at the class certification stage.

3. Rigorous Economic Testing Is Necessary to Ensure the Reliability Of Regression Analysis Models for Class-Wide Damages Claims.

The viability of class-wide damages comes down to the fundamental question of whether there is an accepted, scientifically reliable method for calculating both the fact and the extent of injury, and hence damages, on a class-wide basis that relies with accuracy on common proof, rather than evidence that is unique or individual to each class member.

a. Econometrics, “the application of statistical methods to the study of economic concepts,” can provide that critical analysis and identify whether there is, in a particular case, an available means for class-wide computations. Daniel L. Rubinfeld, *Econometrics In The Courtroom*, 85 COLUM. L. REV. 1048, 1048 n.2 (1985). More specifically, regression analysis is a statistical tool commonly employed by econometricians in the damages context, and is now familiar to courts. *See, e.g., ATA Airlines, Inc. v. Federal Express Corp.*, 665 F.3d 882, 889-890 (7th Cir. 2011) (Posner, J.) (discussing application of regression analysis to show asserted damages in breach of contract action), *petition for cert. filed*, 80 U.S.L.W. 3669 (U.S. May 22, 2012).

Simply put, regression analysis is a methodology that identifies and measures the causal effect of one factor on another variable. *See* Alan O. Sykes, *An Introduction to Regression Analysis*, Univ. of Chicago Lectures in Law & Economics 1, 1 (E. Posner ed. 2000). That analysis makes it possible to estimate with scientific confidence how a given dependent

variable (such as compensation) will change as the underlying independent variables (such as years of experience, education, and, in the case of a discriminatory action, race, gender, or similar prohibited factor) change.

Regression analysis is now commonly used in class actions as a means to show the damages caused by allegedly anticompetitive conduct in antitrust cases, or the effect of race or gender on the terms and conditions of employment in an employment discrimination case. See Pierre Cremieux, *et al.*, *Proof of Common Impact in Antitrust Litigation: The Value of Regression Analysis*, 17 GEO. MASON L. REV. 939, 945 (2010) (“[T]he relevant regression estimates isolate and quantify the effect of the alleged antitrust violation.”); Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 150-151 (2009) (“The principal means for identification of such a [discrimination] pattern takes the form of statistical analysis of the defendant employer’s workforce in the aggregate, with the use of regression techniques to isolate the effect of the Title VII-prohibited variable within the array of nonprohibited variables that might influence such matters as pay and promotion.”).

In an antitrust case, the plaintiffs might use a regression analysis to show that a certain percentage of an increase in the price of (for example) oranges was caused by price fixing rather than cold weather or other causes of crop reduction. In some cases, a regression analysis could provide the necessary common method for measuring damages to the putative class of orange purchasers.

b. But regression analysis only works if it is based on valid assumptions. If the predicates for the analysis are inappropriate, then the analysis will yield an unreliable and misleading result concerning the commonality of predicted effects across the class. See John H. Johnson & Gregory K. Leonard, *Rigorous Analysis of Class Certification Comes of Age*, 77 ANTITRUST L. J. 569, 580-581 (2011). To illustrate, if a regression model assumes that a price increase for oranges applies to all orange purchasers in the same way, even though some orange producers actually have long-term contracts with fixed prices and other orange purchasers do not, then the model can yield an inaccurate common answer that incorrectly measures how the individual purchases of oranges were actually harmed. See Johnson & Leonard, *Rigorous Analysis, supra*, at 346. In other words, a regression analysis in that case might suggest that the harm from the alleged price fixing by orange growers affected the entire class of orange purchasers in a way that can be proven with evidence common to the class, when common proof may not be available because the orange purchasers within the class are not, in fact, similarly situated.

Fortunately, flaws like that (or perhaps like those that are asserted with respect to the plaintiffs' expert's analysis in this case, see Pet. Br. 44a-49a) can themselves be exposed through empirical testing. If the regression model, as applied to a sub-sample of data (such as the orange growers with long-term contracts), yielded demonstrably different results in its prediction of actual outcomes than the class-wide regression model, then the class-wide model would also be an unreliable predictor of "but for" damages

for the entire class. And if the flaws in the model cannot be rectified by, for example, specifying separate models for sub-classes, or including an independent variable that measures the effect of long-term contracts, the case is not susceptible to an award of damages on a class-wide basis.

Accordingly, appropriately employed and well-established economic analyses—particularly those that employ reserved sample groups to verify the testing model—are available for courts and litigants to vigorously examine, at the early class certification stage, whether class damages can genuinely and accurately be assessed on a class-wide basis.

c. Rigorous testing of regression models at the class certification stage can also reveal whether industry-specific economic conditions may affect the ability to prove damages on a class-wide basis. For instance, in some industries, supply and demand conditions may be sufficiently homogenous that a regression model showing the impact of the challenged conduct can provide common proof of class-wide damages. See Johnson & Leonard, *Economics and the Rigorous Analysis*, *supra*, at 345.

As economic scholarship has shown, however, supply and demand conditions in many industries are heterogeneous and multi-faceted. See Steven Berry, *et al.*, *Automobile Prices in Market Equilibrium*, 63 *ECONOMETRICA* 841 (1995); Guido W. Imbens & Jeffrey M. Wooldridge, *Recent Developments in the Econometrics of Program Evaluation*, 47 *J. OF ECON. LITERATURE* 5 (2009); James J. Heckman, *Microdata, Heterogeneity, and the Evaluation of Public Policy*, Nobel Memorial Lecture, 2000, *available at*

http://athens.src.uchicago.edu/jenni/econ311_2002/nobel_text.pdf. Thus, if market conditions vary widely, it will be more difficult to estimate damages or impact on a class-wide basis.

In short, in order to determine whether a putative class's damages can be established through common proof, a district court must be able to assess whether a given regression model's assumptions of common impact match the relevant facts on the ground in the relevant industry. See Johnson & Leonard, *Economics and the Rigorous Analysis*, *supra*, at 345 (“[B]efore using a specific economic theory, one must check to make sure it actually applies to the case at hand.”).

It is not enough for a court to conclude that a regression model is, in a factual vacuum, scientifically sound. The rules of evidence and *Daubert* are more meaningful than that. See Fed. R. Civ. P. 702(d) (expert witness may testify if “the expert has reliably applied the principles and methods to the facts of the case”); *Daubert*, 509 U.S. at 589, 597 (district court must serve “gatekeeping role” of “ensur[ing] that any and all scientific testimony or evidence admitted is not only relevant, but reliable”). The model must instead be shown to fit and to operate reliably within the factual realities of the case.

4. Available Statistical Testing Can Assess Whether a Proposed Regression Model Provides a Reliable Means of Proving Class-Wide Damages.

Courts can use available statistical models for empirical economic testing to determine with the

scientifically required rigor whether a proposed regression model fits the facts of the case. In the damages context, the purpose of such testing is to assess whether the regression model reliably estimates damages suffered by the victims of the alleged unlawful conduct (such as price fixing or discriminatory employment policies) in a common manner across the class.

a. One of the best statistical tests available entails running versions of the regression model on a reserved sub-sample of the putative class members. This is a relatively straightforward process. After a regression model is run class-wide, the model is then re-run against a sub-sample of the class. When the results of the class-wide test are compared to the results from the sub-sample model, economists can determine whether the class-wide model's assumption of common impact holds—that is, whether individual members are harmed at all, or to approximately the same degree, as the class-wide regression model would predict. See Michael O. Finkelstein and Hans Levenbach, *Regression Estimates of Damages in Price-Fixing Cases*, 46 *Law and Contemporary Problems* 145, 158 (1983).

If the results yielded by regression analysis for the sub-class differ in a statistically significant way from the results yielded for the entire class, then the class-wide model is not a sound method for estimating damages

In the orange-purchaser hypothetical, for example, the putative class representative might introduce a regression model that shows that orange

prices increased by five cents due to an overcharge, taking into account all other relevant factors (such as weather and imports). Running the model separately for sub-samples of individual class members, however, might reveal that in fact there is no commonality because half of the class (the long-term contract holders) paid no overcharge at all, and others paid widely varying overcharges.

Econometrics thus teaches that to test the proposition that the class-wide regression model is reliable, the model should be run separately on sub-samples to determine whether the general results mask statistically significant differences across subclasses. If those steps are not performed, as they may not have been here, then all a court could determine from the general regression model is that, at most, prices increased on average due to an overcharge. In such circumstances, however, the court would have no scientifically reliable evidence that the regression model can, in fact, provide common proof of damages for each class member. The science, indeed, might well show the opposite. *See* Cremieux, *supra*, at 948 (“In general, an expert opining on class certification issues should test, rather than assume, that the effects of an alleged violation are common across products and other relevant dimensions.”); *see also* Johnson & Leonard, *Economics and the Rigorous Analysis*, *supra*, at 351 (“[I]t would not be generally accepted among econometricians to claim that a reliable regression could be run in a given context without first examining the data, actually running regressions, and conducting econometric tests on those regressions.”).

b. Based on *amici's* work in numerous class certification proceedings, the relevant facts and datasets needed to conduct this type of empirically sound inquiry—such as transaction sales data (including information on prices charged and quantities purchased) and information on the supply and demand conditions in the industry in question—are routinely available through class certification discovery. That means that applying these scientifically sound and well-accepted regression models in the proper manner will not require changing the rules of class certification discovery or even intruding unduly into the merits of a case. Instead, relying only on the information obtained through discovery, scientifically sound empirical testing methods can establish whether, and to what extent, damages are capable of measurement on a class-wide basis using common proof.

A hypothesized price fixing case illustrates the methodology. The allegations are that the sellers conspired to fix the prices for a polymer resin. This resin is used by both automobile parts manufacturers and airplane parts manufacturers. The plaintiff might submit a regression model that assumes that each purchaser paid the same overcharge. In this example, the average would accordingly be calculated over the entire proposed class, including automobile parts manufacturers and airplane parts manufacturers. That common regression model would take class-wide data, from all purchasers in the class and calculate an average overcharge that is allegedly caused by the defendant's anticompetitive conduct, taking account of other market data in the industry as independent variables.

Suppose, however, that automobile parts manufacturers could easily substitute a ceramic material for the resin, should the resin prices increase, while airplane parts manufacturers have no feasible alternative. Because the automobile parts manufacturers can, without much difficulty, switch to an alternative, they have bargaining power with the resin sellers as well as alternative supply sources if costs get too high. They may, therefore, be able to avoid paying the overcharge. Running the regression model separately with just the automobile parts manufacturers' data would reveal whether the automobile parts manufacturers in fact paid any overcharge or whether the overcharging operated disparately on different sub-groups within the proposed class. When individual purchaser data is run through the model, it thus may show that none of the prices automobile manufacturers paid for polymer resin can be attributed to anticompetitive conduct.

That straightforward statistical testing demonstrates that the proposed common-proof methodology in the hypothetical polymer resin price fixing case is an unreliable measure of the overcharge for any particular class member and also an inaccurate sizing of the damage pool. Testing has exposed that the proposed common-damages methodology did not take account of an important structural difference between different purchasers in their responsiveness to price changes. Specifically, the overcharge measurement is unreliable because the average is calculated over the entire proposed class, which includes automobile parts manufacturers whose ability to switch to another

product, in fact, had insulated them from the overcharge.

In addition, the size of the damage pool—and the composition of the class—is inaccurate because it includes automobile parts manufacturers who did not suffer damages in common with other class members but, in fact, may have incurred no or markedly reduced damages. Further testing through the running of separate regression models for automobile parts manufacturers and airplane parts manufacturers would provide reliable evidence to the district court to allow it to correctly delineate the class in a way that includes only those purchasers that actually sustained damages, and to avoid the use of damages models that, while ostensibly “common,” are not scientifically accurate or reliable under the circumstances of the particular case.

Such empirical testing does not prejudge the availability, or lack thereof, of a common proof model in any given case. Rather, it uses the fundamental scientific approach of statistical testing to assess the accuracy and reliability of a predictive model, rather than merely assuming the answer to the question of whether common proof is available. That is vital because the validity of an economic analysis in the abstract is of no help if its application in a particular case is ill-fitted and unreliable. Courts thus need to use the economic tools at hand to ensure that genuine and durable commonality exists in the proof of damages across the entire proposed class. In *amici*'s view, such verification of regression models at the class certification stage is not only necessary for scientific reliability, but also beneficial because it provides a straightforward method of answering the

economic and computational questions facing the district court as it attempts to determine, under the rigorous analysis required by this Court, whether common issues predominate in a putative Rule 23(b)(3) class action.

D. District Courts Are Well-Equipped To Evaluate Empirical Evidence On Whether Damages Can Be Proven On A Class-wide Basis.

Such scientifically sound testing of economic models has increasingly proven its worth in identifying when and to what extent the damages of putative classes are susceptible to common proof on a class-wide basis. District courts have shown themselves adept at comprehending the economic evidence and analyses presented by the parties and making reliable determinations, based on admissible evidence, regarding the availability of common proof of impact and damages.

For example, in one antitrust case, a class action of graphics card purchasers was proposed that included both consumers and large wholesale purchasers (*i.e.*, computer manufacturers and retailers like Best Buy). In that case, the district court reviewed regression and correlation models that disaggregated large purchasers, consumer purchasers, and different products. *In re Graphics Processing Units Antitrust Litig.*, 253 F.R.D. 478, 493-495 (N.D. Cal. 2008). From that review, the district court was able to conclude that the averaging in the plaintiffs' common correlation model "masked important differences between products and purchasers" and, when the individualized data were

reviewed, “any supposed correlation evaporate[d].” *Id.* at 494.

Accordingly, the district court in *Graphics Processing* declined to certify the entire class, but determined that common issues did predominate, and common proof of impact and damages was available, for “a more limited class” of individuals who purchased graphics card directly from defendants online. 253 F.R.D. at 497. Empirical testing of the proposed common regression model against a sampling of individual purchasers thus provided the district court reliable evidence from which it could determine the appropriate scope of a class for which common issues did predominate. That approach afforded the plaintiffs the benefits of aggregate litigation for the properly qualified sub-class while protecting putative class members, the defendant, and the court from the toll exacted on the judicial process by the overly broad class adjudication of factually disaggregated claims or injuries.

In other cases, district courts have used empirical testing to determine that a common model of damages did not hold for the vast majority of class members and accordingly that the class could not be certified. In one case, the plaintiffs developed regression models that “grouped or pooled” all of the individual transaction data to develop “industry-wide regression results.” *In re Plastics Additives Antitrust Litig.*, No. 03-CV-2038, 2010 WL 3431837, at *15-16 (E.D. Pa. Aug. 31, 2010) (citation omitted). The district court relied on “regressions for a sampling [of] individual *** class members,” using the regression model proposed by plaintiffs, to conclude that “the single estimates produced by [the plaintiffs’]

regressions are in fact not representative of individual class member experience.” *Id.* at *16 (citation omitted). Accordingly, the models did not present a scientifically reliable method for establishing impact through common proof. *Id.* at 19; *see also Reed v. Advocate Health Care*, 268 F.R.D. 573, 591-592 (N.D. Ill. 2009) (finding “fundamental flaw” in regression model relying on averages and “result[ing] in a single estimated average percentage of [wage] suppression to be applied to all nurses in the class” when there was evidence “that the changes in defendants’ average base wages did not move in parallel”) (citation omitted).

Individualized analysis, on the other hand, sometimes confirms that “data variation” across the class “is not so extreme as to mask the absence of injury for a significant number of class members.” *In re Flonase Antitrust Litig.*, No. 08-CV-3301, 2012 WL 2277840, at *20 (E.D. Pa. June 18, 2012). In *Flonase*, the regression model was tested for “all three types of class members” to determine “whether [the] methodology was robust in assessing impact,” and was also tested against the individual data for each named plaintiff. *Id.* From that testing, the district court was able to conclude that the class had “shown that impact is capable of proof at trial through evidence that is common to the class rather than individual to its members.” *Id.* at *21.

In sum, empirical testing of the sort employed by the district courts in the cases canvassed here has provided a scientifically accepted means by which district courts can hew to the requirements of Federal Rule of Civil Procedure 23(b)(3) and *Dukes* while rigorously analyzing whether a proposed model

for common damages actually fits the facts of the case and adequately captures the economic characteristics of the putative class.

Those models, moreover, have the level of scientific reliability and acceptance in the field to meet *Daubert's* admissibility standards, thereby ensuring that the vitally important class certification judgment is made with the exactitude judgments of such consequence warrant.

In addition, because the models require only the type of information already obtained through class certification stage discovery, district courts can employ such testing to determine, at an early stage in the litigation, whether a proposed class-wide damages model accurately provides a method of proving damages that relies on common proof. Conducting this inquiry at the outset enables district courts to “right size” classes early, and to reach scientifically reliable conclusions regarding predominance in Rule 23(b)(3) class actions in a manner that is fair to all parties, absent class members, and the integrity of the judicial process itself.

CONCLUSION

Whatever the appropriate answer to the question presented under the law, the economic tools necessary to accurately assess through admissible expert evidence the viability of class damages claims at the class certification stage are readily available for courts to employ.

Respectfully submitted.

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