CASE NO. 18-1065

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

IN RE ASACOL ANTITRUST LITIGATION

UNITED FOOD & COMMERCIAL WORKERS UNIONS AND EMPLOYERS MIDWEST HEALTH BENEFITS FUND, ET AL.,
Plaintiffs,

TEAMSTER UNION 25 HEALTH SERVICES & INSURANCE PLAN, ET AL.,
Plaintiffs-Appellees,

v.

WARNER CHILCOTT LIMITED, ET AL.,
Defendants-Appellants,

ZYDUS PHARMACEUTICALS USA, INC., ET AL.,
Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS (NO. 1:15-CV-12730)

AMICUS BRIEF OF CIVIL PROCEDURE PROFESSORS IN SUPPORT OF APPELLEES' PETITION FOR PANEL REHEARING AND REHEARING EN BANC

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INTEREST OF AMICI CURIAE

Amici are professors of civil procedure who have written extensively about the use of class actions. Together, we share an interest in ensuring that the Federal Rules of Civil Procedure continue to be construed so as to ensure the "just, speedy and inexpensive determination of every action and proceeding." Fed. R. Civ. P. 1. [1]

SUMMARY OF ARGUMENT

Rule 23 of the Federal Rules of Civil Procedure does not compel a court to prohibit class actions whenever a small percentage of the class may not have suffered actual damages. Rather, the Rule has long permitted parties to resolve common issues in complex cases even where individual damages differ. We make three points to clarify how the Federal Rules of Civil Procedure and case management techniques are customarily and appropriately used to resolve such cases.

First, Federal Rule of Civil Procedure 23(b)(3) only requires that common issues "predominate" over individual issues in damage class actions. By its own terms, the Rule does not require that a class action *exclusively* raise common questions. It only requires that the court *weigh* the common issues against the individual ones to determine whether resolving the common questions will materially advance the litigation. Thus, class certification is often appropriate even

[1] No counsel for a party authored any part of this brief, and no person other than amici and their counsel made any monetary contribution toward the preparation or submission of this brief. All parties have consented to the filing of this brief.

when other important matters will have to be tried separately, such as damages or affirmative defenses peculiar to some individual class members.

Second, courts have avoided categorical rules in class actions, and instead, looked to the elements of the underlying cause of action to determine whether common questions predominate. In the context of antitrust class actions, proponents of a class often will satisfy predominance when they raise common questions of liability, market impact, and offer a common *method* for assessing individual damages, even if *decisions* about allocating individual damage awards remain.

Third, courts may use trial techniques to distinguish injured from uninjured parties. Among other things, courts may bifurcate the class action into two phases: (1) a "common issue" phase which resolves issues that are the same, or common, to all of the class members, and (2) an "individual issue" (or damages) phase which allows the court to resolve issues unique to individual class members.

I. COURTS WILL FIND COMMON QUESTIONS PREDOMINATE WHEN A CLASS ACTION MATERIALLY ADVANCES THE LITIGATION

To certify a class action in federal court, one must first satisfy the requirements of "numerosity, commonality, typicality, and adequacy of representation." Fed. R. Civ. P. 23(a)(1)-(4); *WalMart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2550 (2011). Class actions involving damage claims are typically governed by Rule 23(b)(3), which further requires a court to find that issues common to the

class "predominate" over individual issues and that the class action is "superior" to other forms of litigation. Fed. R. Civ. P. 23(b)(3); *WalMart*, 131 S. Ct. at 2558. Finally, courts often separate out another consideration in determining whether class certification is appropriate under 23(b)(3): whether or not the class action is "manageable."

Predominance does not require that a certain percentage of class members be identical to one another. William B. Rubenstein, 6 Newberg on Class Actions § 20:51 (5th ed. 2018) ("The predominance analysis is a pragmatic one. It is not a numerical test…"). Parties do not have to assert the same exact claims, defenses, or show that they are entitled to receive identical damages. *Butler v. Sears, Roebuck & Co*., 727 F.3d 796, 801 (7th Cir. 2013) (Posner, J.) ("It would drive a stake through the heart of the class action device ... to require that every member of the class have identical damages.").

By its own terms, Rule 23 recognizes that there often will be individual issues in class actions and calls for a comparison of "the questions of law or fact common to the class members" and "any questions affecting only the individual members." Fed. R. Civ. P. 23(b)(3). The predominance requirement calls "only for predominance, not exclusivity, of common questions." *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 140 (2d Cir. 2001) (Sotomayor, J.), *overruled on other grounds by In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d

24 (2d Cir. 2006).

Another way to think about this question is to ask whether resolving the common question would "materially advance" the litigation. Principles of the Law of Aggregate Litigation, § 2.02 cmt. a (2010); Manual for Complex Litigation (Fourth) § 21.24, at 273 (2004) (courts may certify common issues that "materially advances the disposition of the litigation"); Barbara J. Rothstein & Thomas Willging, *Managing Class Action Litigation: A Pocket Guide* 10 (2d ed. 2009) ("The test is whether the common issues advances the litigation as a whole, as opposed to leaving a large number of issues for case-by-case adjudication."). Accordingly, predominance will be met "even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members." *Tyson Foods v. Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016) (citing 7AA C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure §1778, pp. 123–124 (3d ed. 2005)).

II. PLAINTIFFS CAN ESTABLISH PREDOMINANCE WHEN THEY RAISE COMMON QUESTIONS OF LIABILITY AND A COMMON METHOD TO ESTABLISH INDIVIDUAL DAMAGES UNDER GOVERNING LAW

The Supreme Court has cautioned against "broad and categorical rules" that govern predominance. *Tyson Foods*, 136 S. Ct. at 1049. Instead, the analysis "begins, of course, with the elements of the underlying cause of action." *Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 809 (2011). For example, in

securities class actions, the generic presumption that investors will rely on a material representation means that plaintiffs may establish predominance when liability is a common question, even when they suffer different damages. *Id.* Similar presumptions under the Fair Labor Standards Act permit plaintiffs to establish predominance with common evidence of liability and statistical evidence of a wage-and-hour violation. *Tyson Foods*, 136 S. Ct. at 1049. *See also Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 625 (1997) ("Predominance is a test readily met in certain cases alleging consumer or securities fraud or violations of the antitrust laws.").

In antitrust cases, plaintiffs may show common issues predominate with common evidence of liability, market impact, and a common methodology for establishing damages. To satisfy the predominance requirement for both Section 1 and Section 2 claims under the Sherman Act, courts have required a showing of a conspiracy and that the impact of the alleged conspiracy is common to the class. *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 311 (3d Cir. 2008) (discussing Section 1 claims); *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1430 (2013) (discussing Section 1 and Section 2 claims). For example, in an action alleging price fixing by industrial diamond producers that sold thousands of products—some designed especially for particular customers and some with standard "list-prices"—the court found buyers who bought the list-price products could use common evidence to demonstrate the impact of price fixing on their businesses, despite

discounts, rebates, credits or special service arrangements negotiated by individual customers. *In re Industrial Diamonds Antitrust Litig.*, 167 F.R.D. 374, 382 (S.D.N.Y. 1996). But common proof of impact on the buyers of highly individualized "non-list" price products was not possible because the defendant's own conduct varied too much with respect to each business. *Id.*

Courts will find predominance met when plaintiffs can use common evidence to prove defendant engaged in other uniform anticompetitive conduct, including "monopolization, tying arrangements, vertical restraints, and price discrimination." Rubenstein, 6 Newberg on Class Actions § 20:52 (collecting cases); *see, also e.g.*, *In re High-Tech Employee Antitrust Litig.*, 985 F. Supp. 2d 1167, 1206 (N.D. Cal. 2013) (noting that the plaintiff's expert provided a statistical model that "followed a roadmap widely accepted in antitrust class actions that use evidence of general price effects plus evidence of a price structure to conclude that common evidence is capable of showing widespread harm to the class.").

To satisfy predominance, courts also require antitrust plaintiffs to have a valid model for establishing "classwide damages." But this does not mean that all class members must have the *same* damages (or damages at all). Rubenstein, *supra* at § 20:62 ("The fact that there may be thousands or millions of such damage *calculations* does not defeat the conclusion that common issues predominate; it is black-letter class action law that such damage calculations do not render the common

liability issue non-predominant"); *In re Nexium Antitrust Litig*., 777 F.3d 9, 21 (1st Cir. 2015) ("Even in cases where 'the issue of injury-in-fact [not just damages calculation] presents individual questions, ... it does not necessarily follow that they predominate over common ones and that class action treatment is therefore unwarranted.'"); *Kohen v. Pacific Inv. Mgmt. Co. LLC*, 571 F.3d 672, 677 (7th Cir. 2009) ("[A] class will often include persons who have not been injured by the defendant's conduct. . . Such a possibility or indeed inevitability does not preclude class certification.") (Posner, J.). Rather, class proponents must put forward a reliable "classwide method" for determining individual damages. *Id*. §§ 12:20 & 20:62 (collecting cases); *see also King Drug Co. of Florence, Inc. v. Cephalon, Inc*., 309 F.R.D. 195, 213 (E.D. Pa. 2015) (finding that "variations in damages among individual class members should not defeat predominance, particularly where Plaintiffs have provided a reliable aggregate damages model"). When plaintiffs propose a common method to resolve individual damages—"even leaving such calculations for a succeeding proceeding—proof of aggregate damages may suffice." Rubenstein, *supra* at § 12:20 (collecting cases).

A determination of predominance does not end the Rule 23(b)(3) inquiry. Courts often separate out other pragmatic considerations under 23(b)(3), including manageability. This is a question of whether as a practical matter a court can develop

a trial plan that can distinguish between those individuals who are harmed and those who are not using case management techniques.

The issue in this case is properly understood as a problem of manageability not predominance. Courts have long been able to manage class actions that protect defendant's right to a day in court using well-accepted trial techniques.

III. WELL-ACCEPTED TRIAL PRACTICES CAN PERMIT THE USE OF STATISTICAL TECHNIQUES WHILE PRESERVING A DEFENDANT'S RIGHT TO ASSERT INDIVIDUAL DEFENSES

For years, courts have certified classes raising common liability questions, while protecting defendants' right to assert individualized defenses. One approach that district courts have taken is to bifurcate issues that are the same, or common, to each class member from those issues that are unique for each individual class member. Bifurcation "insulates a party from the possible prejudice of jointly trying certain issues." Rubenstein, *supra* at § 11:4, at 13.

Given this benefit, it is no surprise that bifurcation is generally accepted in many different contexts. *See, e.g.*, *Tyson Foods*, 136 S. Ct. at 1050 (remanding to the district court to determine whether defendant's failure to accept class proposal to bifurcate liability and damage phases in FLSA trial "invited" error); *Chiang v. Veneman*, 385 F.3d 256, 273 (3d Cir. 2004) (Equal Credit Opportunity Act); *Bertulli v. Indep. Ass'n of Cont'l Pilots*, 242 F.3d 290, 298 (5th Cir. 2001) (Labor-Management Reporting and Disclosure Act and Railway Labor Act); *Beattie v.*

CenturyTel, Inc., 511 F.3d 554, 564–566 (6th Cir. 2007) (Federal Communications Act); *see also* Rubenstein, *supra* § 11:4, at 15 (noting that "trial bifurcation is widely accepted"). And, under Federal Rule of Civil Procedure 23(c)(4), class certification may be granted solely on the question of liability, leaving damages to be determined in another proceeding. *See* Rubenstein, *supra* § 20:62 (recommending certifying issue class for "nuanced" damage questions in antitrust cases).

Along with "(1) bifurcating liability and damage trials," a court may also protect individual issues by "(2) appointing a magistrate judge or special master to preside over individual damages proceedings; (3) decertifying the class after the liability trial and providing notice to class members concerning how they may proceed to prove damages; (4) creating subclasses; or (5) altering or amending the class." *See In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d at 141; *see also Espenscheid v. DirectSat USA, LLC*, 705 F.3d 770, 775 (7th Cir. 2013) (noting some of these possibilities); Rubenstein, *supra* § 11.9 ("perhaps the most common method, approved by courts in most circuits, is that the trial court refers the determination and distribution of damages claims to a magistrate judge or to a special master") (collecting cases). Such case management tools are also appropriate given the Circuits' approach "ascertainability," the requirement that a putative class be ascertainable by an "objective criteria." *Nexium*, *supra* at 19.

Given the availability of these tools to cordon off individual issues, a class

may obtain certification under Rule 23(b)(3) when liability questions—that are common to the class—predominate over damages questions, that are unique to class members. *Tyson Foods*, 136 S. Ct. 1050; *Beaton v. SpeedyPC Software*, — F.3d — , 2018 WL 5623931, at *9 (7th Cir. Oct. 31, 2018). When proponents of a class offer common evidence of liability and the class members' damages can be determined in "individual hearings, in settlement negotiations, or by creation of subclasses, the fact that damages are not identical across all class members should not preclude class certification." *Butler*, 727 F.3d at 801.

Bifurcation and similar trial practices do not result in a "trial by statistics." In *WalMart*, the Court rejected a trial plan in which "[a] sample set of the class members would be selected, as to whom liability" would be assessed, and then "the number of (presumptively) valid claims . . . would be multiplied by the average backpay award in the sample set to arrive at the entire class recovery—*without further individualized proceedings*." 131 S. Ct. at 2561 (emphasis added). Bifurcation does not require a court to apply the outcomes of a sample of cases per force to all of the cases, thereby preventing defendant from asserting an individual defense against other plaintiffs. The whole point of trial practices like bifurcation is to preserve *each party's* day in court with respect to individual issues. Accordingly, by protecting individual issues from such sampling, "bifurcation is the answer to the

problems found by" the Supreme Court in *WalMar*t. Rubenstein, *supra* § 11:7, at 27 (emphasis in original).[2]

CONCLUSION

Courts have long resolved class actions that present individual damage questions by relying on bifurcation and other established trial techniques consistent with the substantive law and Rule 23 of the Federal Rules of Civil Procedure.

Dated: November 20, 2018

Respectfully submitted,

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[2] We do not contend that Due Process or the Seventh Amendment jury right *requires* bifurcation or other trial procedures. "The use of aggregate damages calculations is well established in federal court and implied by the very existence of the class action mechanism itself." *In re Pharmaceutical Industry Average Wholesale Price Litigation*, 582 F.3d 156, 197 (1st Cir. 2009). Courts generally reject the argument that a defendant's rights are violated when plaintiffs demonstrate only aggregate damages. 4 Rubenstein, *supra* § 12:20 (collecting cases). *See also Mullins v. Direct Dig., LLC*, 795 F.3d 654, 670 (7th Cir. 2015) (Where class damages are determined based on the aggregate injury to the class as a whole, "the identity of particular class members does not implicate the defendant's due process interest at all. The addition or subtraction of individual class members affects neither the defendant's liability nor the total amount of damages it owes to the class.").

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 2,589 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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Dated: November 20, 2018

CERTIFICATE OF SERVICE

I hereby certify that on November 20, 2018, I caused the foregoing document to be filed through the CM-ECF system and sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF)

/s/ John Roddy
John Roddy