No. 13-80223

In the

United States Court Of Appeals

For the

Ninth Circuit

IN RE HIGH-TECH EMPLOYEE ANTITRUST LITIGATION

Response to 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

PLAINTIFFS' RESPONSE TO PETITION FOR LEAVE TO APPEAL A CLASS CERTIFICATION ORDER PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 23(f)

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I. PRELIMINARY STATEMENT

Defendants' petition should be denied. The conspiracy here, and the overwhelming, common evidence of that conspiracy, is not in doubt. From 2005 to 2009, the leaders of Northern California's largest and most powerful companies agreed to reduce competition for workers by entering into an interconnected web of secret, bilateral agreements not to solicit ("cold call") each other's workforces. ER 829-832 (26-29). In the case of Pixar and Lucasfilm, the agreement struck by Edward Catmull and George Lucas went back 20 years. ER 828-829 (25-26). As the district court observed, the seven Defendants here agreed to consent decrees ending this illegal conduct after the United States Department of Justice found out about it. ER 808 (5).

This conduct reduced the compensation of Defendants' workers—as the DOJ found in its Competitive Impact Statement. SER 687, 689. Although Defendants play up "manager discretion" and "differentiation" of Class member pay, the data and evidence show otherwise. In reality, Class member pay was almost entirely determined by their job title and other objective common factors, and Defendants administered their pay systems according to that job title structure. ER 843-846, 852, 863-866, 874 (40-43, 49, 60-63, 71). By reducing competition among them, Defendants kept their compensation down. Indeed, the overwhelming record of emails and

deposition testimony by Defendants' senior executives—dismissed by Defendants as "anecdotal"—shows that this was the whole point of the agreements. ER 828-833 (25-30, 35-38). As the person who struck the first such agreement with George Lucas admitted, cold calling "messes up the pay structure. It does. It makes it very high. . . . That's just the reality we've got. And I do feel strongly about it." ER 854 (51).

Plaintiffs' class certification motion included two rounds of briefs, six expert reports, and tens of thousands of pages of documents and deposition testimony. On April 5, 2013, the district court found in a 53-page order that Plaintiffs had satisfied the elements of Rule 23(a) and also shown they could prove class-wide damages. ER 890-942 (87-139). However, the district court expressed frustration that Defendants had failed to complete document production, and refused to schedule the depositions of the architects of the scheme (e.g., George Lucas, Eric Schmidt, Bill Campbell, Bruce Chizen, and Paul Otellini) until after submission of the briefs, so it did not have the benefit of a complete evidentiary record. ER 936 (133). *See also* Jan. 17, 2013 Hr'g Tr., SER 243-246. The court also requested more comprehensive statistical analysis of the question of class-wide impact. ER 933-34 (130-131). Plaintiffs supplied this analysis and also narrowed the class by approximately 40%, limiting it to an identified set of technical employees at

the core of Defendants' conspiracy.

After careful consideration, the district court issued a second, 86-page order certifying the narrower class. ER 804-889 (1-86). The court reviewed all of the evidence from both rounds of briefing and its own prior findings. It also gave extensive consideration to recent Supreme Court and Ninth Circuit authority, including *Walmart v. Dukes*, 131 S. Ct. 2541 (2011), *Amgen Inc. v. Connecticut Retirement Plans and Trust Funds*, 133 S. Ct. 1184 (2013), *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013), and *Leyva v. Medline Industries, Inc.*, 716 F. 3d 510 (9th Cir. 2013). ER 822-827 (19-24). Before certifying the narrowed class, it addressed and rejected every single objection and argument advanced by Defendants.

Unable to challenge the court's actual reasoning, Defendants now mischaracterize the Order. They claim the court "refused to resolve disputed issues about plaintiffs' conduct [damages] regression," but do not identify a single such issue. Pet. 7. There are none. They say the court found that Plaintiffs' evidence "could not generate a common answer" on the question of antitrust impact, when the court plainly found the opposite. *Compare* Pet. 10 *with* ER 827-887 (24-84). They advance novel arguments that they never adequately raised below. Defendants fail to articulate a valid basis for their petition. It should be denied.

II. STANDARD FOR GRANTING A RULE 23(f) PETITION

In *Chamberlan*, the Ninth Circuit identified three highly unusual situations in which interlocutory review of a class certification order may be justified. Defendants invoke only one of them: "the district court's class certification decision is manifestly erroneous." *See* Pet. 1 (quoting *Chamberlan*, 402 F.3d at 959). However, they ignore *Chamberlan*'s further explanation that:

> It is difficult to show that a class certification order is manifestly erroneous unless the district court applies an incorrect Rule 23 standard or ignores a directly controlling case. Class certification decisions rarely will involve legal errors, however, simply because class actions typically involve complex facts that are unlikely to be on all fours with existing precedent.

Id. at 962 (citations omitted). "The error in the district court's decision must be significant; bare assertions of error will not suffice." *Id.* at 959. Given these standards, Rule 23(f) petitions are granted only "sparingly." *Id*.

III. THE DISTRICT COURT DID NOT COMMIT "MANIFEST ERROR"

Defendants have done worse than rely on bare assertions; they rely on false ones.[1] They claim that the district court required Plaintiffs to show this action involves only common questions, not common answers. Pet. 10. The Court, however, found Plaintiffs' common evidence of harm to the class as a

[1] Amicus merely repeat the errors.

whole means that "Plaintiffs' case rises and falls with their common evidence." ER 888 (85). In other words, the trial court concluded the answers in this litigation would be common, not just the questions. Similarly, Defendants imply that the district court found the common issue of whether there was an antitrust violation sufficient for common issues to satisfy predominance by itself, even though proving antitrust impact would give rise to individualized issues. Pet. 11. Untrue. The district court held a second certification hearing precisely to assess common impact and found impact to be an issue common to the class. ER 812; 834-881 (9, 31-78). The fact that Defendants do not even honestly describe the order demonstrates, as further explained below, why they have no meaningful challenge to it.

A. The District Court Properly Applied Rule 23(b)(3)

Defendants first claim the court applied a less rigorous standard to predominance than for commonality by insisting only on common questions, not common answers. Pet. 10-11. To the contrary, Judge Koh applied a *more* stringent—not a *less* stringent—standard in assessing predominance than commonality. She recognized Rule 23(b)(3) requires common issues to *predominate*, ER 823 (20) (citing *Amgen*, 133 S. Ct. at 1191, 1194, 1196), whereas Rule 23(a)(2) requires only a single common issue. ER 818 (15) (citing *Dukes*, 131 S. Ct. at 2250-51, 2256); *see also* ER 899 (96) (April 5,

2013 Class Cert. Order) ("The predominance criterion of Rule 23(b)(3) is 'far more demanding' than satisfying the commonality requirement…'") (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 624 (1997)). After analyzing commonality—and based, *inter alia*, on Defendants' concession of common legal and factual issues, ER 817-818 (14-15)—Judge Koh conducted a rigorous analysis and found that common issues *predominated* not only in the case as a whole but as to *each element* of Plaintiffs' claims. ER 887 (84).

In doing so, Judge Koh found Plaintiffs' claims would give rise not only to common questions but *to common answers*, including with respect to injury and damages. Plaintiffs offered abundant evidence common to the class that Defendants' conduct suppressed the wages of the class *as a whole*, evidence that Judge Koh analyzed with extraordinary rigor. ER 834 -881 (31-78). In conducting that analysis, Judge Koh properly recognized that the issue is not whether Plaintiffs will *win* on common impact—a matter to be resolved at trial—but whether their claims would succeed or fail together. The merits only matter to the extent a failure of common proof leads to individualized proof. The Supreme Court made that clear in *Amgen*, a case that Defendants pretend never issued. ER 823 (20) ("'Rule 23(b)(3) requires a showing that *questions* common to the class predominate, not that those

questions will be answered, on the merits, in favor of the class.'") (quoting *Amgen*, 133 S. Ct. at 1191). Judge Koh found that "Plaintiffs' case rises and falls with their common evidence." ER 888 (85).

That finding relied on abundant documentary and deposition evidence. The court "could not identify a case at the class certification stage with the level of documentary evidence Plaintiffs have presented in the instant case." ER 872 (69). With respect to the antitrust violation, the court found that "Plaintiffs have set forth copious common evidence in the form of Defendants' internal work documents, deposition transcripts, and email exchanges between Defendants' CEOs as well as other directors, officers, and senior managers, all of which support Plaintiffs' allegations that Defendants entered into express agreements not to compete for one another's employees." ER 828 (25).

The court explained that "Plaintiffs marshal substantial evidence, including documentary evidence and expert reports using statistical modeling, economic theory, and data, to demonstrate that common questions will predominate over individual questions in determining the impact of the antitrust violations." ER 834 (31). Plaintiffs provided "significant evidence that cold calling was an important part of Defendants' recruitment practices and contend that the elimination of such recruitment through cold calling

had adverse effects on all Technical Class members." ER 836 (33). Defendants' business records and senior executives confirmed that "throughout the class period, Defendants viewed recruitment, particularly of 'passive candidates'—that is, employees who were not actively looking for a new job—as crucial to their growth and development." ER 836, 836-838 (33, 33-35).

"While Defendants dispute that this absence of cold calling due to their anti-solicitation agreements had any effect on job opportunities or flow of information to the class members, . . . Defendants' own documents created during the alleged conspiracy tell a different story." ER 838 (35). *See also* ER 838-841 (summarizing evidence). "Plaintiffs' evidence supports their claim that these anti-solicitation agreements, enforced by Defendants' top officers, stifled recruitment efforts of Technical Class members." ER 841 (38). The evidence "suggests not only that the anti-solicitation agreements eliminated a key tool of recruitment, cold calling, but also that the impact of this elimination affected the entire Technical Class." ER 842 (39).

The Court also reviewed and relied upon extensive documentary and expert evidence that "shows that Defendants maintained formal compensation structures and made significant efforts to maintain internal

equity within those structures." ER 843, 843-850 (40, 40-47). Defendants attempt to dismiss as "unremarkable" this "evidence that defendants generally paid employees within base-salary ranges and tried to compensate similarly performing employees similarly under 'internal equity' policies." Pet. 13. But this admission describes structural forces at work that commonly impact the Class. ER 850 (47).

According to Defendants, the "undisputed evidence shows that each class member's compensation is determined by highly individualized factors," Pet. 2, and that each Defendant "set each class member's pay on a case-by-case basis," Pet. 5. In fact, the evidence is overwhelmingly to the contrary: "Defendants each employed company-wide compensation structures that included grades and titles, and that high-level management established ranges of salaries for grades and titles, which left little scope for individual variation." ER 860 (57).

Defendants also assert, without evidence, that they did not compete for employees. Pet. 4. But the evidence showed "Defendants viewed each other as competitors for the same employees," ER 850, 850-854 (47, 47-51) (summarizing evidence), and exchanged confidential information about each other's planned company-wide compensation increases. ER 852 (49).

Defendants also misstate Plaintiffs' theory of class-wide impact,

claiming the theory Plaintiffs advance is that information from one recipient of a cold call would spread to others via word-of-mouth, causing a "'ripple' effect" across the Class. Pet. 15; *see also id*. 6-7. In fact, "there is compelling evidence that in the absence of the anti-solicitation agreements, Defendants would have had to make structural preemptive or reactive changes" in response to greater levels of competition. ER 877, 877-881 (74, 74-78) (summarizing evidence). Google did exactly that—increased compensation to all of its employees—in response to Facebook refusing to agree not to solicit Google employees. ER 879-881 (76-78).

The voluminous evidence, including business records and testimony, all lead to the same conclusion: common violation, common impact, and damages to the class as a whole. Such evidence is "likely to be among the most persuasive to a jury as it illustrates and confirms many of the actual dynamics at play within Defendants' firms." ER 869 (66).

IV. THE DISTRICT COURT SCRUTINIZED AND PROPERLY FOUND PERSUASIVE PLAINTIFFS' ECONOMIC AND STATISTICAL EVIDENCE OF IMPACT

Defendants accuse the district court of relying on "meaningless aggregated and averaged statistical analyses," Pet. 12, that it "failed to carefully scrutinize," *id.* at 14, and about which it refused to "resolve evidentiary disputes," *id.* In fact, Judge Koh recognized that "when there is

a battle of the experts on class certification, 'rigorous analysis' requires district courts to determine not only admissibility of the experts' statements, but also the 'persuasiveness of the evidence presented.'" ER (20) (citing *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 982 (9th Cir. 2011)). Defendants do not identify a single issue on which the court failed to make the appropriate findings—no citation to the record follows any of these bald assertions. Instead, they argue that the court *must* not have applied the right standards for the simple reason that they *disagree* with its conclusions. Pet. 14 ("Had the district court taken the requisite 'hard look' at plaintiffs' statistics, it could not have found… [etc.]."). This is the most naked form of sophistry.

The district court spent 20 pages (and significant time at oral argument) carefully scrutinizing all of the economic statistical evidence. ER 854-863 (51-60), ER 872-878 (69-75); Aug. 8, 2013 Hr'g Tr., SER 89-152. On every issue, the district court found for Plaintiffs, specifically concluding that "the **methodological deficiencies** in Defendants' expert reports render[ed] the[ir] criticisms unpersuasive." ER 855 (52) (emphasis added). The court further found that Plaintiffs aggregated data at the right level—job title—because job title overwhelmingly drives compensation in Defendants' workforces. The court therefore properly found that Plaintiffs' economic

and statistical evidence "demonstrate[s] that common questions are likely to predominate over individual questions." ER 855(52).

A. Economic Framework

To analyze the effect of these agreements Plaintiffs engaged Professor Edward E. Leamer, the Chauncey J. Medberry Professor of Management, Professor of Economics and Professor of Statistics at the University of California at Los Angeles. ER 854, n.11 (51). Dr. Leamer first explained the well-accepted economic principle that labor markets do not display perfect competition. *See* ER 856-858 (discussing price discovery). A worker's ability to demand higher compensation depends on, among other things, information; and even a small amount of information, or a small restriction on information, can have a "profound effect" on worker pay. ER 858 (55) (quoting Joseph E. Stiglitz, *Information and the Change in the Paradigm in Economics*, 92 Amer. Econ. Rev. 460, 461 (2002)). Another principle, internal equity, helps explain why any effect of this restriction on information would have been broadly felt across Defendants' workforces. ER 858-860 (55-57). High-tech companies must ensure their employees feel fairly treated. *Id*. That is why, as demonstrated by the record here, *see* supra 1-2, 7-10, Defendants set pay through incremented salary systems that hold employees' compensation together in a semi-rigid structure. *See also* ER

854, 866-868 (51, 63-65) (discussing testimony of Plaintiff expert Prof. Kevin F. Hallock). Defendants' expert, Professor Kevin M. Murphy, did not contest these basic principles, ER 868-869 (65-66), nor do Defendants now.

B. Quantitative Proof of the Operation of these Principles

Dr. Leamer provided quantitative evidence that these principles explain the compensation of Defendants' workers, providing further proof that the impact of the agreements would have been real and broadly felt. Dr. Leamer "first performed an analysis to show that employees who changed [between Defendant] firms received higher compensation than those who stayed, reflecting the economic theory of price discovery at work." ER 858 (55) (bracketed material added). This confirms the proposition, which Defendants concede, that competition for Defendants' workers is not "perfect" and restrictions on information affect worker compensation.

Dr. Leamer also analyzed the factors that determine worker pay, to test Defendants' implausible assertion that worker pay is completely committed to manager discretion, not an administrative pay system. The court relied on the fact that "[a]ccording to Dr. Leamer, approximately 90 percent of the variation in any individual employee's compensation can be explained by common factors 'such as age, number of months in the company, gender, location, title, and employer." ER 861 (58) (quoting ¶ 128

of Oct 1, 2012 Leamer Report, SER 775-776 (373)). Of these, worker compensation is driven "primarily by job title." ER 874-875 (71-72).

Dr. Leamer performed a multiple variable regression to analyze the effect on the class of the anti-solicitation agreements, ER 862 (59), a standard method for proving damages. FEDERAL JUDICIAL CENTER REFERENCE MANUAL ON SCIENTIFIC EVIDENCE (3d ed. 2011) at 305. The court found that in addition to being a valid proof of damages, this regression "show[ed] that the anti-solicitation agreements had a general impact on class members." ER 863 (60). Defendants contend that "when the same model is run defendant by defendant it falls apart, showing overcompensation by various defendants." Pet. 15 (emphasis omitted). However, the court specifically considered and rejected this criticism in its April 5, 2013 Class Certification Order. ER 928 (125). Even Defendants' own expert did not create "truly disaggregated models for each Defendant." *Id.*

Having established that job title "primarily" determines worker compensation, Dr. Leamer then analyzed whether a structure holds together compensation of different titles. He analyzed the correlation of job title compensation to class compensation over time and the correlation of year-by-year changes in job title and class compensation. ER 863-864 (60-61).

> With respect to both, Dr. Leamer found that the "vast majority" of [class] employee job titles (weighted by number of employee years) at each firm correlated positively over time with the compensation of the overall set of [class] employees at that firm.

ER 864 (61) (bracketed material added). He used multiple regression analysis to examine the degree to which overall compensation to the class explains each job title's compensation. ER 864-865 (61-62).

> The regressions indicated that the "vast majority" of employees fall within titles or groups that show: (1) that gains for the titles or groups are shared broadly at the same time and (2) that gains for some are shared with others in different job titles in a subsequent year.

ER 865 (62). Dr. Leamer found these analyses to support his opinion that "all or almost all Defendants' employees would have been impacted by the non-compete agreements," ER 865 (62) (quoting SER 909 (468)); he further "opined that the fact that gains were shared over time strongly indicated that an internal sharing force, rather than only external market forces, drove the structure of class member compensation." ER 865 (62). This structure, in turn, spread the effects of the violation throughout the Class.

C. The Court Considered and Properly Rejected The Criticisms of Defense Expert Dr. Kevin Murphy

Defendants seem to argue that any data analysis that averages individual transactions must be rejected. Defendants are wrong. The Ninth Circuit has held—in yet another controlling decision that they simply choose

to ignore—that "it is a generally accepted principle that aggregated statistical data may be used where it is more probative than subdivided data." *Paige v. California*, 291 F.3d 1141, 1148 (9th Cir. 2002) (citations omitted); *see also In re Graphics Processing Units Antitrust Litig.*, 253 F.R.D. 478, 491 (N.D. Cal. 2008) ("This order agrees that such methods, where plausibly reliable, should be allowed as a means of common proof. To rule otherwise would allow antitrust violators a free pass in many industries."). The district court recognized here "that aggregation may provide 'a [more] robust analysis and yield more reliable and more meaningful statistical results.'" ER 882 (79) (quoting *Ellis v. Costco Wholesale Corp.*, 285 F.R.D. 492, 523 (N.D. Cal. 2012)) (edits in original).[2] As the court found, to assess whether a relationship exists among job titles the data must be aggregated to the job title level. ER 874 (71). Dr. Murphy agrees: "The reason you do the averaging is so that you are left with a more systematic part and the idiosyncratic parts get averaged out." ER 874 (71) (Murphy Dep. 553:18-20).

[2] In *Ellis v. Costco*, this Court remanded with an instruction to weigh the persuasiveness of the aggregate data and make a determination as to whether it amounted to significant proof. 657 F.3d at 982. After the district court granted the plaintiffs' motion for class certification, finding, among other things, that aggregate data could yield more meaningful and robust statistical proof, *Ellis v. Costco*, 285 F.R.D. at 523, this Court denied a subsequent Rule 23(f) petition. SER 718.

Defendants on appeal ignore the steps (explained above) that led Dr. Leamer to run regressions at the job title level. And, of course, the Defendants themselves regularly aggregate and analyze their compensation data at the job title level for business purposes. ER 875 (72). Defendants also monitored and analyzed each other's aggregated compensation data through market surveys in which all of the Defendants participated in various combinations—an additional method of propagating pay suppression. ER 867 (64) (citing ¶ 240 of Hallock Report, SER 1079-80 (636-637)); *see* ER 867:23-27 (64:23-28). Indeed, when determining the competitiveness of their own pay practices, the court found that Defendants "often aggregated their entire compensation budget and compared it to the budgets of other firms, or matched job title compensation within the company to similar titles across multiple companies." ER 875 (72).

Furthermore, "that Defendants differentiated pay is not inconsistent with Dr. Leamer's finding that the Defendants maintained compensation structures that restrained that differentiation." ER 876 (73). Dr. Leamer's analysis shows that job title accounts for the vast *majority* of a worker's pay, not *all* of it. Thus, Defendants' administrative pay systems allowed a limited amount of differentiation while including controls that kept workers' pay together over time, *i.e.*, a "semi-rigid pay structure," with the

overwhelming majority of all employers—97%—paid by design within their jobs' annual, centrally pre-set salary ranges. SER 982, 1002-1006 (541, 561-565) (July 12, 2013 Leamer Report, ¶¶ 31, 68 & figs. 6-9); *see* ER 843-850, 863-872:6-9 (40-47, 60-69:6-9). The court understood that Plaintiffs never argued that the impact of the agreements would have been "lockstep." ER 877 (74). Rather, "by shielding their employees from waves of recruiting, Defendants not only avoided individual raises, they also avoided having to make across-the-board preemptive increases to compensation." ER 877 (74) (internal quotation marks omitted), such as Google did in response to recruiting by Facebook. SER 1071, 1074 (628, 631) (Hallock Report, ¶¶ 205, 213-214); SER 976-980 (535-539) (July 12, 213 Leamer Report, ¶¶ 18-25).

V. THE DISTRICT COURT'S ORDER DID NOT VIOLATE THE RULES ENABLING ACT OR DEFENDANTS' DUE PROCESS RIGHTS

Defendants assert that Judge Koh's Order violates the Rules Enabling Act ("the REA") and the Due Process Clause by abridging their substantive rights. Pet. 17-20. Defendants only ever made this argument in a footnote below; this Court should not consider it as a basis for granting interlocutory review. *See Peterson v. Highland Music*, 140 F.3d 1313, 1321 (9th Cir. 1998) (this Court "appl[ies] a 'general rule' against entertaining arguments

on appeal that were not presented or developed before the district court."); SER 716 (Opp. to Pls.' Mot. for Class Cert. at 25:20-23). Defendants' new argument once again has no substance to it. It boils down to this:

> 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.

Pet. 19. Of course, Judge Koh has not limited their defenses in any way—so this argument is illusory. Rather, Defendants seem to be saying that a class can *never* be certified for damages purposes because there must *always* be individual hearings on damages. In other words, it is Rule 23 itself that must always violate the REA and the Due Process Clause.

Defendants cite no authority for this proposition because legions of cases contradict it. First, there is no requirement that plaintiffs prove impact using evidence individual to each class member—this is just like saying a class cannot be certified for purposes of damages, which *requires* common proof. Second, the possibility that a few class members might not have been injured does not preclude class certification in antitrust cases. *Messner v. Northshore Univ. Healthsystem*, 669 F. 3d 802, 825 (7th Cir. 2012); *Kohen v. Pac Inv. Mgmt. Co.*, 571 F.3d 672, 677 (7th Cir. 2009). Third, once plaintiffs prove a violation and *fact* of damage, "damages '[c]alculations

need not be exact'". ER 881 (78) (quoting *Comcast*, 133 S. Ct. at 1433). It is hornbook law that damages may be proven on an aggregate or average basis in class cases. *See* 2 NEWBERG ON CLASS ACTIONS § 10.05 (3d Ed. 1992) ("aggregate computation of class monetary relief is lawful and proper"); *see*, *e.g.*, *In re Scrap Metal Antitrust Litig.*, 527 F.3d 517, 534 (3d Cir. 2008); *see also* n.2, supra. Defendants raise the red herring of "Trial by Formula," *Dukes*, 131 S. Ct. at 2561, i.e. the practice in some discrimination cases of resolving some questions through representative samples of class members. Defendants seem to interpret this as a ban on math. It is not, and has no bearing on the practice of proving class damages on an aggregate basis.[3]

VI. CONCLUSION

For the foregoing reasons, Defendants' petition should be denied.

[3] The cases on which Defendants rely are inapposite. In *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215 (2d Cir. 2008), the Second Circuit denied class certification because proof of individual reliance on the defendant's allegedly false advertisements about light cigarettes was an essential element of plaintiffs' claims that could not be proven using common evidence. 522 F.3d at 223-25. Nor, though they cite *Carrera v. Bayer Corp.*, 727 F.3d 300 (3d Cir. 2013), do Defendants challenge the ascertainability requirement. *Id.* at 303 ("The sole issue on appeal is whether the class members are ascertainable."). And, unlike in *Dukes*, and despite their reliance on *Lindsey v. Normet*, 405 U.S. 56, 66 (1972) (due process entitles defendants to "present every available defense"), Defendants have not identified *any* purported individualized statutory defense available to them.

Dated: November 18, 2013 By: */s/ Brendan P. Glackin*

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