

*Consumer Track*  
**Consumer Class Actions**

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31<sup>st</sup> Annual ABI Spring Meeting  
Consumer Class Actions

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1. JURISDICTIONAL ISSUES

- a. *Wilborn v. Wells Fargo Bank, N.A. (In re Wilborn)*, 609 F.3d 748, 754 (5<sup>th</sup> Cir. 2010) (“[I]f bankruptcy court jurisdiction is not permitted over a class action of debtors, Rule 7023 is virtually read out of the rules. This would ascribe to Congress the intent to categorically foreclose multi-debtor class actions arising under the Bankruptcy Code without a clear indication of such intent.”)
- b. *Rodriguez v. Countrywide Home Loans, Inc. (In re Rodriguez)*, 432 Bankr. 671, 678 (Bankr. S.D.Tex. 2010)
- c. Nationwide Class?
  - i. *In re Noletto*, 244 B.R. 845 (Bankr. S.D. Ala. 2000) (Yes)
  - ii. *Bank United v. Manley*, 273 B.R. 229 (N.D. Ala. 2001) (Yes)
  - iii. *Sims v. Capital One Fin. Corp. (In re Sims)*, 278 B.R. 457 (Bankr. E.D. Tenn. 2002) (Yes)
  - iv. *Conley v. Sears, Roebuck & Co.*, 222 B.R. 181 (D. Mass. 1998) (Yes)
  - v. *Cano v. GMAC Mortgage Corp. (In re Cano)*, 410 B.R. 506 (Bankr. S.D. Tex. 2009) (Yes, with a compilation of prior decisions holding both ways)
  - vi. *Wells Fargo Bank v. Singleton (In re Singleton)*, 284 B.R. 322 (D.R.I. 2002) (No, discharge and automatic stay litigation is limited to courts “issuing” the order.)
  - vii. *Barrett v. AVCO Financial Servs. Mgmt., Co.*, 292 B.R. 1 (D. Mass. 2003) (No, discharge and automatic stay litigation is limited to courts “issuing” the order.)
  - viii. *Beck v. Gold Key Lease, Inc. (In re Beck)*, 283 B.R. 163 (Bankr. E.D. Pa. 2002) (No, discharge and automatic stay litigation is limited to courts “issuing” the order.)
  - ix. *Williams v. Sears, Roebuck & Co.*, 244 B.R. 858 (S.D. Ga. 2000) (No based upon 28 U.S.C. § 1334(e) (exclusive jurisdiction of property of the estate)
  - x. *Cline v. First Nationwide Mortgage Corp. (In re Cline)*, 282 B.R. 686 (W.D. Wash. 2002) (No based upon policy issues)
  - xi. *Simmons v. Ford Motor Credit Co. (In re Simmons)*, 237 B.R. 672 (Bankr. N.D. Ill. 1999) (No based upon policy issues)

2. REQUIREMENTS FOR CERTIFICATION OF A CLASS - CAN THEY BE SATISFIED?

- a. Rule 23(a) – applicable to all class actions

- i. Numerosity(23(a)(1))- requires that the class be so numerous that joinder of all members is impracticable. There is no rule as to what specific number of class members is required for certification. The proper focus is whether joinder of all members is practicable in light of the size and other relevant factors.
  1. Must generally provide some evidence or a reasonable estimate of the number of class members (70 – 100 is generally sufficient).
  2. Is joinder of all members practicable.
  3. Interest of judicial economy.
  4. Does the class involve small individual claims.
  5. Ease of identification of members.
  
- ii. Commonality(23(a)(2))- requires that there be questions of law or fact common to the class. The threshold of ‘commonality’ is not high.
  1. Requirement is easily met in most cases.
  2. Need only show that there is at least one issue whose resolution will affect all or a significant number of putative class members.
  
- iii. Typicality(23(a)(3)) -requires the representative parties to have claims or defenses that are typical of the claims or defenses of the class.
  1. Test is not demanding.
  2. Typicality is generally satisfied where the representative plaintiffs’ claims arise out of the same event or course of conduct as the other members’ claims and are based on the same legal theory.
  3. Do the class representative’s claims have the same essential characteristics of those of the putative class.
  4. Rational is that a plaintiff with typical claims will pursue his or her own self-interest in the litigation, and in so doing, advance the interests of the class members.
  
- iv. Adequate Representation(23(a)(4)) - requires a finding that the representative parties will fairly and adequately protect the interests of the class.
  1. With respect to the class representatives, they must possess a sufficient level of knowledge and understanding to be capable of controlling and prosecuting the litigation, but need not be legal scholars and may rely upon counsel as any other client would.
  2. Class representative may not have interests antagonistic to the other class members.
  3. Class counsel must be competent to prosecute the class action, sufficiently zealous and free of conflicts with the members of the class.

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4. For the class representative:
    - a. Problem of settling out;
    - b. Must understand the class mechanism and the claims presented;
    - c. No conflict of interest with the class members.
  5. For class counsel:
    - a. Obligation to notify the court of any proposed settlement;
    - b. Must protect against overbroad releases;
    - c. Fees v. recovery – must settle class claims first;
    - d. Include incentive awards for class plaintiffs;
    - e. Adequacy of representation flows to the class v. the class representatives.
- b. Rule 23(b) – Once all the elements of 23(a) have been met, Plaintiffs must satisfy one or more of the three prong’s of 23(b) for certification.
- i. Rule 23(b)(1)(A)
    1. A class may be maintained if the prosecution of separate actions by or against individual members of the class would create the risk of inconsistent or varying adjudications which would thereby create incompatible standards of conduct for the party opposing certification.
    2. Generally applies to lawsuits seeking injunctive or declaratory relief.
    3. Contrary rulings by different courts could create a situation where a party may be ordered to engage in irreconcilable conduct.
    4. Mere fact that some plaintiffs prevail and some lose in separate lawsuits does not justify (b)(1)(A) certification.
    5. A request for money damages is not evidence of a potential irreconcilable conduct.
  - ii. Rule 23(b)(1)(B)
    1. Mandatory “limited fund” certification.
    2. Designed to preserve a limited fund for the entire class against the individual claims of class members, which claims might otherwise exhaust the limited fund and thereby leave subsequent plaintiffs with no remedy.
    3. Does not provide class members with an automatic right to opt-out of the class (discretionary with the court).
    4. Commonly utilized to avoid an unfair preference for the early claimants at the expense of later claimants.

iii. Rule 23(b)(2)

1. A class may be maintained if the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.
2. Subsection (b)(2) class actions are limited to those class actions seeking primarily injunctive or corresponding declaratory relief.
3. Because a (b)(2) class must be homogeneous and cohesive, a class can be certified under subsection (b)(2) only where the defendant has acted in the same way toward all members of the class, or has acted on grounds applicable to all members of the class.
4. Pattern and practice cases.
5. Monetary damages must only be incidental – capable of calculation by objective standards.

iv. Rule 23(b)(3)

1. A class may be maintained if the questions of law or fact common to the class members predominate over any questions affecting only individual members and the class action is superior to other available methods for fairly and efficiently adjudicating the controversy.
  - a. “Predominance” is similar, but more demanding than the “commonality” requirement of 23(a).
  - b. Predominance tests whether proposed classes are sufficiently cohesive to warrant determination by representation and requires the court to assess how the case will be tried by identifying the substantive issues that will control the outcome, assess the issues which will predominate and then determine whether the issues are common to the class.
  - c. The most common factor destroying certification is the necessity for individualized damage determinations, thereby failing the predominance test.
  - d. *See generally Rodriguez v. Countrywide Home Loans, Inc. (In re Rodriguez)*, 432 B.R. 671 (Bankr. S.D.Tex. 2010)

3. CERTIFICATION STANDARDS DO VARY BY DISTRICT – CURRENT DECISIONS (STARTING POINTS)

- a. *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541 (2011)
- b. *Garcia-Rubiera v. Calderon*, 570 F.3d 443 (1<sup>st</sup> Cir. 2009)
- c. *Shahriar v. Smith & Wollensky Restaurant Group, Inc.*, 659 F.3d 234 (2<sup>nd</sup> Cir. 2011)

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- d. *Marcus v. BMW of North America, LLC*, 687 F.3d 583 (3<sup>rd</sup> Cir. 2012)
  - e. *Brown v. Nucor Corp.*, 576 F.3d 149 (4<sup>th</sup> Cir. 2009)
  - f. *M.D. ex rel. v. Perry*, 675 F.3d 832 (5<sup>th</sup> Cir. 2012)
  - g. *Glazer v. Whirlpool Corp. (In re Whirlpool Corp. Front Loading Washer Products Liability Litigation)*, 678 F.3d 409 (6<sup>th</sup> Cir. 2012)
  - h. *Spano v. The Boeing Co.*, 633 F.3d 574 (7<sup>th</sup> Cir. 2011)
  - i. *DeBoer v. Mellon Mortgage Co.*, 64 F.3d 1171 (8<sup>th</sup> Cir. 1995)
  - j. *Evon v. Law Offices Of Sidney Mickell*, 688 F.3d 1015 (9<sup>th</sup> Cir. 2012)
  - k. *D.G. ex rel. Stricklen v. DeVaughn*, 594 F.3d 1188 (10<sup>th</sup> Cir. 2010)
  - l. *Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256 (11<sup>th</sup> Cir. 2009)
4. WHAT DEFENSES/ARGUMENTS ARE AVAILABLE TO THE TARGETED DEFENDANT IN OPPOSING CLASS CERTIFICATION?
- a. Rule 23 Requirements.
    - i. Plaintiffs' claims fail under the predominance and superiority inquiries of Rule 23 because individual issues for each class member, particularly with respect to damages, override class concerns. *Wilborn v. Wells Fargo Bank, N.A. (In re Wilborn)*, 609 F.3d 748 (5<sup>th</sup> Cir. 2010)
    - ii. Plaintiffs' claims fails the Rule 23(b)(2) predominance test "because individual issues for each class member, particularly with respect to damages, override class concerns when we consider how the case may be tried", and fails the Rule 23(b)(3) test because the monetary relief sought does not flow directly/automatically from a determination of liability. *Gilliland v. TSYS (In re Gilliland)*, 474 B.R. 482 (Bankr. N.D. Miss 2012).
  - b. Jurisdiction.
    - i. Nationwide class action cannot be certified for civil contempt claims as only the court where the contempt occurred has jurisdiction to issue a civil contempt award. *In re Death Row Records*, 2012 WL 952292 at \*12 (BAP 9<sup>th</sup> Cir. 2012) (citing Bankruptcy Rule 9014).
  - c. Standing/Conflict of Interest.
    - i. Chapter 7 Trustee had a sufficient stake in the outcome of the proceeding to confer standing and fiduciary duties of Chapter 7 Trustee were not incompatible with being a class representative. *In re Death Row Records*, 2012 WL 952292 at \*13 (BAP 9<sup>th</sup> Cir. 2012).
  - d. Class Representative Individual Defenses.
    - i. Plaintiff's claim is subject to unique defense (waiver, arbitration, consent, 12(b)(6) merit defenses) that destroys the ability to satisfy the typicality

requirement. *Sandlin v. Ameriquest Mortgage Co., Inc. (In re Sandlin)*, 2010 WL 4260030 at \*7 (N.D. Alabama S.D. 2010).

e. Adequacy of Representation.

- i. Adequacy of counsel and class representative is not established. *Sandlin v. Ameriquest Mortgage Co., Inc. (In re Sandlin)*, 2010 WL 4260030 at \*8-\*9 (N.D. Alabama S.D. 2010).
- ii. Alleged wrong action is different for each class claimant, as distinguished from alleged a wrong based upon a general policy. *Mazzei v. The Money Store*, 2012 WL 6622706 (S.D.N.Y.2012).

f. Fail Safe Class.

- i. A fail safe class is one that by definition shields the plaintiff from an adverse decision as the class is defined in terms of the alleged unlawful conduct. Compare *Mazzei v. The Money Store*, 2012 WL 6622706 (S.D.N.Y.2012) (Court modifies class definition to avoid fail safe designation), with *Rodriguez v. Countrywide Home Loans, Inc.*, 695 F.3d 360 (5<sup>th</sup> Cir. 2012) (approving fail safe class).

5. SAMPLE OF CERTIFIED CASES:

- a. *Conley v. Sears, Roebuck & Co.*, 222 B.R. 181(D. Mass. 1998)
- b. *In re Coggin*, 155 B.R. 934 (Bankr. E.D. N.C. 1993)
- c. *In re Noletto*, 280 B.R. 868 (Bankr. S.D. Ala. 2001)
- d. *In re Powe*, 278 B.R. 539 and 280 B.R. 728 (Bankr. S.D. Ala. 2002);
- e. *In re Sheffield*, 281 B.R. 24 (Bankr. S.D. Ala. 2002)
- f. *In re Harris*, 280 B.R. 876 (Bankr. S.D. Ala. 2001)
- g. *Tate v. Nationsbanc Mortgage Corp. (In re Tate)*, 253 B.R. 653, 663 (Bankr. W.D. N.C. 2000)
- h. *Harris v. Washington Mutual Home Loans (In re Harris)*, 297 B.R. 61 (Bankr. N.D. Miss. 2003), *aff'd Harris v. Washington Mut. Home Loans, Inc. (In re Harris)*, 312 B.R. 591 (N.D. Miss 2004)
- i. *In re Montano*, 398 B.R. 47 (Bankr. D.N.M. 2008)
- j. *Rodriguez v. Countrywide Home Loans, Inc. (In re Rodriguez)*, 695 F.3d 360 (5th Cir. 2012) (affirming the certification of the injunctive class)
- k. *Brannan v. Wells Fargo Home Mortg., Inc. (In re Brannan)*, Bankr. No. 02-16647, 2013 WL 85158 (Bankr. S.D. Ala. Jan. 8, 2013) (determining class could be certified for injunctive relief)
- l. *Wilborn v. Wells Fargo Bank (In re Wilborn)*, 609 F.3d 748 (5th Cir. 2010) (holding that bankruptcy court had authority to certify debtors' class action)
- m. *In re Death Row Records, Inc.*, 2012 WL 952292 (B.A.P. 9th Cir. Mar. 21, 2012) (remanding matter to bankruptcy court to issue a certification order solely under Civil Rules 23(a) and (b)(2) and narrowing scope of class action by excluding claims for interest damages and claims for willful violation of automatic stay)

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- n. *Mazzei v. Money Store*, No. 01 Civ. 5694(JGK), 2012 WL 6622706 (S.D.N.Y. Dec. 20, 2012) (certification of class of borrowers was warranted where borrowers were charged late fees after their loans were accelerated and loans were paid off)

### 6. SAMPLE OF RECENT CERTIFICATION DENIED CASES:

- a. *Sandlin v. AmeriquestMortg. Co. (In re Sandlin)*, Bankr. No. 10-00048-TOM-13, 2010 WL 4260030 (Bankr. N.D. Ala. Oct. 21, 2010) (deciding to deny motion for class certification because debtors failed to establish typicality or adequacy of representation)
- b. *In re Motors Liquidation Co.*, 447 B.R. 150 (Bankr. S.D.N.Y. 2011) (disallowing class certification of proofs of claim since individual issues would predominate)
- c. *In re Circuit City Stores, Inc.*, 439 B.R. 652 (E.D. Va. 2010) *aff'd in part on other grounds sub nom. Gentry v. Siegel*, 668 F.3d 83 (4th Cir. 2012) (holding that bankruptcy court's findings that proposed class litigation of claims against debtors for alleged violations of state labor laws would be inferior to individual bankruptcy claims resolution process and would unduly complicate administration of other claims before court against debtors were not clearly erroneous, and therefore denial of motion to apply class certification rule to class proofs of claim was not abuse of discretion)
- d. *In re Blockbuster Inc.*, 441 B.R. 239 (Bankr. S.D.N.Y. 2011) (finding that proposed classes did not satisfy either commonality prerequisite to class certification or provision of certification rule allowing for class certification when common issues predominated)
- e. *In re Gilliland*, 474 B.R. 482 (Bankr. N.D. Miss. 2012) (deciding debtor class could not be certified on theory that credit card company had acted on grounds generally applicable to class)
- f. *Teta v. TWL Corp.*, No. 4:11-cv-282-JRG, 2012 WL 469872 (E.D. Tex. Feb. 14, 2012) (finding that the bankruptcy court's denial of class certification as failing to meet the superior method requirement does not amount to abuse of discretion)

### 7. "REPRESENTATIVE CLAIMS" OR CLASS PROOF OF CLAIMS

- a. Expanded Notice = Expanded Discharge
- b. Majority of courts allow, but see *Unioil v. Elledge (In re Unioil, Inc.)*, 962 F.2d 988 (10<sup>th</sup> Cir. 1992)
- c. Must comply with Rule 23/7023 either pre or post-petition – issue is timing (after an objection is filed?) and who carries the burden of requesting application form the court.
- d. May also need to comply with Rule 2019 if in a chapter 11
- e. *In re American Reserve Corporation*, 840 F.2d 487, 488 (7<sup>th</sup> Cir. 1988) (“Bankruptcy Rule 9014, which applies to ‘a contested matter in a case ... not otherwise governed by these rules’ states that ‘[t]he court may at any stage in a particular matter direct that one or more of the other rules in Part VII shall apply.’ Rule 9014 thus allows bankruptcy judges to apply Rule 7023 — and thereby

- FED.R.CIV.P. 23, the class action rule — to ‘any stage’ in contested matters. Filing a proof of claim is a “stage”.)
- f. *Gentry v. Siegel*, 668 F.3d 83 (4<sup>th</sup> Cir. 2012) (The bankruptcy court retains significant discretion to determine whether and when to apply the requirements of 7023 to the claim process)
  - g. *The Certified Class In The Charter Securities Litigation v. The Charter Company (In re The Charter Company)*, 876 F.2d 866, 873 (Class proof of claims allowed in bankruptcy.)
  - h. *Reid v. White Motor Corporation*, 886 F.2d 1462, 1472 (6<sup>th</sup> Cir. 1989) (While the rules permit the filing of a class proof of claim, compliance with rule 7023 to commence a class action is required.)
  - i. *In re Musicland Holding Corp.*, 362 B.R. 644 (Bankr. S.D. N.Y. 2007) (Detailed explanation of the legal basis and procedural requirements for filing a class proof of claim.)
  - j. *In re Craft*, 321 B.R. 189 (Bankr. N.D. Tex. 2005) (Burden on claimant to seek application of rule 7023 in a timely manner and questions applicability of 2019 to class claims)

8. SPECIAL EFFECTS

- a. Arbitration – Mandatory arbitration clauses may prohibit class action
  - i. Bankruptcy Court may have the authority to deny enforceability of arbitration provisions
  - ii. *Insurance Co. of North America v. NGC Settlement Trust & Asbestos Claims Management Corp. (In re National Gypsum Co.)*, 118 F.3d 1056 (5<sup>th</sup> Cir. 1997)
  - iii. *In re Gandy*, 299 F.3d 489 (5<sup>th</sup> Cir. 2002)
  - iv. Core Proceedings – Discretion To Refuse To Compel Arbitration
  - v. Non-Core Proceedings – No Discretion
- b. Debtor member of a non-bankruptcy class
  - i. Many class actions allow or require an election by potential class plaintiffs
  - ii. Bankruptcy may be filed prior to election deadline
  - iii. Is the right to opt-in/opt-out property of the estate?
  - iv. What if the proposed settlement includes a release of all counterclaims?
  - v. Is the automatic stay implicated?
  - vi. Does 11 U.S.C. § 108 automatically extend the deadline to opt-in/opt-out?
  - vii. What is the effect of confirmation and vesting/non-vesting of property of the estate?
  - viii. *Santangelo v. Fairbanks Capital Corp. (In re Santangelo)*, 325 B.R. 874 (Bankr. M.D. Fla. 2005) (The chapter 13 debtor’s failure to opt-out found to be similar to a failure to file a claim within statute of limitations, and confirmation of the plan vested the claims/right in the debtor and property of the estate was therefore not implicated.)

9. ARTICLES/TREATISES

- a. Corrine Ball & Michelle J. Meises, *Current Trends in Consumer Class Actions in the Bankruptcy Arena*, 56 BUS. LAW 1245 (May 2001)
- b. Elizabeth Warren and Jay Westbrook, *Class Actions for Post-Petition Wrongs: National Relief Against National Creditors*, 22-2 ABIJ (March 2003)
- c. Robert P. Wasson, Article: *Remedying Violations of the Discharge Injunction Under Bankruptcy Code 524, Federal and Non-Bankruptcy Law and State-Law Comports with Congressional Intent, Federalism and Supreme Court Jurisprudence for Identifying the Existence of an Implied Right of Action*, 20 BANKR. DEV. J. 77 (2003)
- d. 1 COLLIER PAMPHLET ED. OVERVIEW 1334, Mathew Bender & Co., Inc., 2006, p. 6-7
- e. Katherine Porter, *Misbehavior and Mistake in Bankruptcy Mortgage Claims*, 87 TEX.L.REV.1 (2008)

**Hypothetical Case Study**

Bankruptcy Class Action Class: All individual Debtors (Chapter 7, 11 or 13) whose bankruptcy case was filed during the two years prior to the filing the bankruptcy class complaint, where: (i) the Debtor was a member of a non-bankruptcy class action; (ii) a class action settlement was approved by the court presiding over the non-bankruptcy class action; (iii) relief from stay was not granted by the Bankruptcy Court presiding over the Debtor's bankruptcy case authorizing the class plaintiff/class defendant in the non-bankruptcy class action to obtain approval of the class action settlement; and (iv) the Debtor [did not timely elect to opt in or to opt out of the class] [did not receive notice of the motion to approve the class action settlement][did not receive notice of the approval of the class action settlement][did not receive notice of the right to opt in or opt out of the class action settlement].

Defendants: Professional Class Representative and Class Action Counsel who settled a class action within the two years prior to the filing of the complaint, where the class action was pending.

Class Action Relief: (1) Injunctive relief prohibiting class plaintiff and counsel from obtaining approval of class action settlements in the future without first obtaining relief from stay from the bankruptcy court presiding over a bankruptcy case for a class member.

(2) Damages equal to the filing fee that should have been paid to file the relief from stay motion payable to the Clerk of the [Particular Jurisdiction]; and, to the extent the Debtor did not make a timely class election, damages equal to the consideration that would have been paid to the Debtor upon election to opt in the class settlement.

Class Action Theory: A Debtor's cause of action against a targeted non-bankruptcy class action defendant is property of the estate pursuant to Section 541. Any action to take possession of, or to control, the cause of action is protected by the automatic stay. Any judicial or enforcement action against the Debtor is protected by the automatic stay. Approval of a non-bankruptcy class action which is binding upon a Debtor that purports to divest the Debtor of its rights against the targeted non-bankruptcy class action defendant violates the automatic stay. Where a Debtor has the right to participate in a non-bankruptcy class action settlement of a claim it owns against a targeted non-bankruptcy class action defendant and does not receive notice of such settlement and thus is deprived of the right to opt in or opt out of said settlement is an improper post-petition transfer under Section 549 and a violation of the automatic stay under Section 362. Furthermore, the wholesale disregard of the rights of the Debtor by the Professional Class Representative and Class Action Counsel is an intentional disregard for the Bankruptcy Code and the Bankruptcy Rules and an assault on the integrity of the bankruptcy process. A Bankruptcy Court's inherent power to prevent a fraud on the Court, coupled with Section 105, provides a statutory basis for a cause of action to lie against such Professional Class Representative and Class Action Counsel and for the Bankruptcy Court to fashion an appropriate remedy.

131 S.Ct. 2541

## Briefs and Other Related Documents

### Related Westlaw Journal Article

Supreme Court of the United States

**WAL-MART** STORES, INC., Petitioner,

v.

DUKES et al.

No. 10-277. | Argued March 29, 2011. | Decided June 20, 2011.

### Synopsis

**Background:** Female employees of retail store chain brought Title VII against employer alleging sex discrimination and seeking injunctive and declaratory relief, back pay, and punitive damages. The United States District Court for the Northern District of California, [Martin J. Jenkins, J., 222 F.R.D. 137](#), granted in part and denied in part plaintiffs' motion for **class** certification, and the Ninth Circuit Court of Appeals, [Pregerson](#), Circuit Judge, [509 F.3d 1168](#), affirmed. On rehearing en banc, the Court of Appeals, [Michael Daly Hawkins](#), Circuit Judge, [603 F.3d 571](#), affirmed in part and remanded in part. Certiorari was granted.

**Holdings:** The Supreme Court, Justice [Scalia](#), held that:

[1] evidence presented by members of putative **class** did not rise to level of significant proof that company operated under general policy of discrimination, as required to satisfy commonality requirement and to permit certification of plaintiff **class**;

[2] certification of plaintiff **class** upon theory that defendant has acted, or refused to act, on grounds that apply generally to **class**, thereby making final injunctive or declaratory relief appropriate with respect to **class** as whole, is not appropriate with respect to claims for monetary relief, at least where monetary relief is not incidental to injunctive or declaratory relief; and

[3] necessity of litigation to resolve employer's statutory defenses to claims for backpay asserted by individual members of putative employee **class** prevented court from treating these backpay claims as "incidental" to claims for declaratory or injunctive relief.

Reversed.

Justice [Ginsburg](#) concurred in part and dissented in part and filed opinion, in which Justices [Breyer](#), [Sotomayor](#), and [Kagan](#) joined.

West Headnotes (17)

### [1] Federal Civil Procedure 🔑 **Class Actions**

**Class action** is exception to the usual rule that litigation is conducted by and on behalf of individual named parties only. [Fed.Rules Civ.Proc.Rule 23](#), 28 U.S.C.A.

68 Cases that cite this headnote

[2] **Federal Civil Procedure** 🔑 Representation of **class**; typicality

In order to justify a departure from usual rule that litigation is conducted by and on behalf of individual named parties only, **class** representative must be part of **class** and possess same interest and suffer same injury as **class** members. [Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.](#)

143 Cases that cite this headnote

[3] **Federal Civil Procedure** 🔑 Impracticability of joining all members of **class**; numerosity

**Federal Civil Procedure** 🔑 Representation of **class**; typicality

**Federal Civil Procedure** 🔑 Common interest in subject matter, questions and relief; damages issues

Numerosity, commonality, typicality, and adequate representation requirements of Federal Rule of Civil Procedure governing **class actions** ensure that the named plaintiffs are appropriate representatives of **class** whose claims they wish to litigate by effectively limiting the **class** claims to those fairly encompassed by named plaintiffs' claims. [Fed.Rules Civ.Proc.Rule 23\(a\), 28 U.S.C.A.](#)

110 Cases that cite this headnote

[4] **Federal Civil Procedure** 🔑 Common interest in subject matter, questions and relief; damages issues

Commonality requirement for **class** certification obligates the named plaintiff to demonstrate that **class** members have suffered the "same injury," not merely that they have all suffered violation of same provision of law; claims must depend upon a common contention, and that common contention must be of such a nature that it is capable of classwide resolution, meaning that determination of its truth or falsity will resolve issue that is central to validity of each one of the claims in one stroke. [Fed.Rules Civ.Proc.Rule 23\(a\)\(2\), 28 U.S.C.A.](#)

448 Cases that cite this headnote

[5] **Federal Civil Procedure** 🔑 Common interest in subject matter, questions and relief; damages issues

What matters to **class** certification is not the raising of common questions, even in droves, but rather the capacity of classwide proceeding to generate common answers apt to drive resolution of litigation. [Fed.Rules Civ.Proc.Rule 23\(a\)\(2\), 28 U.S.C.A.](#)

266 Cases that cite this headnote

[6] **Federal Civil Procedure** 🔑 Evidence; pleadings and supplementary material

Federal Rule of Civil Procedure governing **class actions** does not set forth mere pleading standard; party seeking **class** certification must affirmatively demonstrate his compliance with Rule, that is, he must be prepared to prove that there are in fact sufficiently numerous parties, and that other requirements of the Rule are met. [Fed.Rules Civ.Proc.Rule 23\(a\), 28 U.S.C.A.](#)

168 Cases that cite this headnote

[7] **Federal Civil Procedure** 🔑 Consideration of merits

**Class** determination generally involves considerations that are enmeshed in factual and legal issues comprising plaintiff's cause of **action**. [Fed.Rules Civ.Proc.Rule 23\(a\)](#), 28 U.S.C.A.

[35 Cases that cite this headnote](#)

[8] **Civil Rights** ➔ Practices prohibited or required in general; elements

Crux of court's inquiry in resolving an individual's Title VII claim is reason for particular employment decision. Civil Rights Act of 1964, § 701 et seq., [42 U.S.C.A. § 2000e et seq.](#)

[5 Cases that cite this headnote](#)

[9] **Federal Civil Procedure** ➔ Discrimination and civil rights **actions** in general

Conceptually, there is wide gap between an individual employee's claim that he or she has been denied promotion on discriminatory grounds and employee's otherwise unsupported allegation, in moving for certification of employee **class**, that company has policy of discrimination, a conceptual gap that may be bridged by showing that employer used a biased testing procedure, or by presenting significant proof that employer operated under general policy of discrimination; such proof could conceivably justify a **class** of both applicants and employees if discrimination manifested itself in hiring and promotion practices in same general fashion, such as through entirely subjective decisionmaking processes. Civil Rights Act of 1964, § 701 et seq., [42 U.S.C.A. § 2000e et seq.](#); [Fed.Rules Civ.Proc.Rule 23\(a\)](#), 28 U.S.C.A.

[21 Cases that cite this headnote](#)

[10] **Federal Civil Procedure** ➔ Sex discrimination **actions**

Evidence presented by members of putative **class**, consisting of testimony of sociological expert that employer's corporate culture made it "vulnerable" to gender bias, but without being able to definitively say whether 0.5 percent or 95 percent of employment decisions in company were based on stereotypical thinking, statistical evidence that employer's policy of according discretion to local supervisors over pay and promotion matters had resulted in an overall, sex-based disparity among employees at company's 3,400 stores, and anecdotal evidence of allegedly discriminatory employment decisions did not rise to level of significant proof that company operated under general policy of discrimination, as required to satisfy commonality requirement and to permit certification of plaintiff **class**, especially given that company's announced policy was to forbid sex discrimination, and that company imposed penalties for denial of equal employment opportunities. Civil Rights Act of 1964, § 701 et seq., [42 U.S.C.A. § 2000e et seq.](#); [Fed.Rules Civ.Proc.Rule 23\(a\)\(2\)](#), 28 U.S.C.A.

[35 Cases that cite this headnote](#)

[11] **Civil Rights** ➔ Disparate impact

**Federal Civil Procedure** ➔ Discrimination and civil rights **actions** in general

In appropriate cases, giving discretion to lower-level supervisors can be basis of Title VII liability under disparate-impact theory, since employer's undisciplined system of subjective decisionmaking can have precisely the same effects as system pervaded by impermissible intentional discrimination; however, recognition that this type of Title VII claim "can" exist does not lead to conclusion that every employee in company using such a system of discretion has such a claim in common, for purposes of certifying employee **class**. Civil Rights Act of 1964, § 701 et seq., [42 U.S.C.A. § 2000e et seq.](#); [Fed.Rules Civ.Proc.Rule 23\(a\)](#), 28 U.S.C.A.

[10 Cases that cite this headnote](#)

**[12] Declaratory Judgment** 🔑 Representative or **class actions****Federal Civil Procedure** 🔑 Common interest in subject matter, questions and relief; damages issues

Certification of plaintiff **class** upon theory that defendant has acted, or refused to act, on grounds that apply generally to **class**, thereby making final injunctive or declaratory relief appropriate with respect to **class** as whole, is not appropriate with respect to claims for monetary relief, at least where monetary relief is not incidental to injunctive or declaratory relief. [Fed.Rules Civ.Proc.Rule 23\(b\)\(2\)](#), 28 U.S.C.A.

112 Cases that cite this headnote

**[13] Declaratory Judgment** 🔑 Representative or **class actions****Federal Civil Procedure** 🔑 Common interest in subject matter, questions and relief; damages issues

Certification of plaintiff **class** upon theory that defendant has acted, or refused to act, on grounds that apply generally to **class**, thereby making final injunctive or declaratory relief appropriate with respect to **class** as whole, is appropriate only when single injunction or declaratory judgment would provide relief to each member of **class**; certification is not authorized when each individual **class** member would be entitled to different injunction or declaratory judgment against defendant, or when each **class** member would be entitled to individualized award of monetary damages. [Fed.Rules Civ.Proc.Rule 23\(b\)\(2\)](#), 28 U.S.C.A.

212 Cases that cite this headnote

**[14] Declaratory Judgment** 🔑 Representative or **class actions****Federal Civil Procedure** 🔑 Discrimination and civil rights **actions in general**

Civil rights cases against parties charged with unlawful, **class**-based discrimination are prime examples of circumstances under which certification of plaintiff **class** may be warranted on ground that defendant has acted, or refused to act, on grounds that apply generally to **class**, thereby making final injunctive or declaratory relief appropriate with respect to **class** as whole. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.; [Fed.Rules Civ.Proc.Rule 23\(b\)\(2\)](#), 28 U.S.C.A.

26 Cases that cite this headnote

**[15] Declaratory Judgment** 🔑 Representative or **class actions****Federal Civil Procedure** 🔑 Sex discrimination **actions**

Even assuming that “incidental” monetary relief can be awarded to **class** certified upon theory that defendant has acted, or refused to act, on grounds generally applicable to **class**, thereby making final injunctive or declaratory relief appropriate with respect to **class** as whole, necessity of litigation to resolve employer's statutory defenses to claims for backpay asserted by individual members of putative employee **class**, who were allegedly victims of employer's, or potential employer's, gender-based discrimination, prevented court from treating these backpay claims as “incidental” to claims for declaratory or injunctive relief. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.; [Fed.Rules Civ.Proc.Rule 23\(b\)\(2\)](#), 28 U.S.C.A.

34 Cases that cite this headnote

**[16] Civil Rights** 🔑 Effect of prima facie case; shifting burden**Civil Rights** 🔑 Relief

When plaintiff in employment discrimination case seeks individual relief such as reinstatement or backpay after establishing pattern or practice of discrimination, district court must usually conduct additional proceedings to

determine scope of individual relief, and at that phase, burden of proof will shift to employer, but it will have right to raise any individual affirmative defenses that it may have and to demonstrate that individual employee was denied employment opportunity for lawful reasons. Civil Rights Act of 1964, § 701 et seq., [42 U.S.C.A. § 2000e et seq.](#)

[10 Cases that cite this headnote](#)

**[17] Federal Civil Procedure** 🔑 **Sex discrimination actions**

Because the Rules Enabling Act forbade interpretation of Federal Rule of Civil Procedure that governs **class actions** so as to abridge, enlarge or modify any substantive right, employee **class** could not be certified in employment discrimination **action** on premise that employer would not be entitled to litigate its statutory defenses to **class** members' claims for backpay. Civil Rights Act of 1964, § 701 et seq., [42 U.S.C.A. § 2000e et seq.](#); [28 U.S.C.A. § 2072\(b\)](#); [Fed.Rules Civ.Proc.Rule 23](#), [28 U.S.C.A.](#)

[19 Cases that cite this headnote](#)

**\*2544 Syllabus\***

Respondents, current or former employees of petitioner **Wal-Mart**, sought judgment against the company for injunctive and declaratory relief, punitive damages, and backpay, on behalf of themselves and a nationwide **class** of some 1.5 million female employees, because of **Wal-Mart's** alleged discrimination against women in violation of Title VII of the Civil Rights Act of 1964. They claim that local managers exercise their discretion over pay and promotions disproportionately in favor of men, which has an unlawful disparate impact on female employees; and that **Wal-Mart's** refusal to cabin its managers' authority amounts to disparate treatment. The District Court certified the **class**, finding that respondents satisfied [Federal Rule of Civil Procedure 23\(a\)](#), and [Rule 23\(b\)\(2\)](#)'s requirement of showing that “the party opposing the **class** has acted or refused to act on grounds that apply generally to the **class**, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the **class** as a whole.” The Ninth Circuit substantially affirmed, concluding, *inter alia*, that respondents met [Rule 23\(a\)\(2\)](#)'s commonality requirement and that their backpay claims could be certified as part of a (b)(2) **class** because those claims did not predominate over the declaratory and injunctive relief requests. It also ruled that the **class action** could be manageably tried without depriving **Wal-Mart** of its right to present its statutory defenses if the District Court selected a random set of claims for valuation and then extrapolated the validity and value of the untested claims from the sample set.

*Held* :

1. The certification of the plaintiff **class** was not consistent with [Rule 23\(a\)](#). Pp. 2550 – 2557.

**\*2545** (a) [Rule 23\(a\)\(2\)](#) requires a party seeking **class** certification to prove that the **class** has common “questions of law or fact.” Their claims must depend upon a common contention of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke. Here, proof of commonality necessarily overlaps with respondents' merits contention that **Wal-Mart** engages in a pattern or practice of discrimination. The crux of a Title VII inquiry is “the reason for a particular employment decision,” [Cooper v. Federal Reserve Bank of Richmond](#), [467 U.S. 867](#), [876](#), [104 S.Ct. 2794](#), [81 L.Ed.2d 718](#), and respondents wish to sue for millions of employment decisions at once. Without some glue holding together the alleged reasons for those decisions, it will be impossible to say that examination of all the **class** members' claims will produce a common answer to the crucial discrimination question. Pp. 2550 – 2553.

(b) *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 102 S.Ct. 2364, 72 L.Ed.2d 740, describes the proper approach to commonality. On the facts of this case, the conceptual gap between an individual's discrimination claim and “the existence of a **class** of persons who have suffered the same injury,” *id.*, at 157–158, 102 S.Ct. 2364, must be bridged by “[s]ignificant proof that an employer operated under a general policy of discrimination,” *id.*, at 159, n. 15, 102 S.Ct. 2364. Such proof is absent here. **Wal-Mart's** announced policy forbids sex discrimination, and the company has penalties for denials of equal opportunity. Respondents' only evidence of a general discrimination policy was a sociologist's analysis asserting that **Wal-Mart's** corporate culture made it vulnerable to gender bias. But because he could not estimate what percent of **Wal-Mart** employment decisions might be determined by stereotypical thinking, his testimony was worlds away from “significant proof” that **Wal-Mart** “operated under a general policy of discrimination.” Pp. 2553 – 2554.

(c) The only corporate policy that the plaintiffs' evidence convincingly establishes is **Wal-Mart's** “policy” of giving local supervisors discretion over employment matters. While such a policy could be the basis of a Title VII disparate-impact claim, recognizing that a claim “can” exist does not mean that every employee in a company with that policy has a common claim. In a company of **Wal-Mart's** size and geographical scope, it is unlikely that all managers would exercise their discretion in a common way without some common direction. Respondents' attempt to show such direction by means of statistical and anecdotal evidence falls well short. Pp. 2554 – 2557.

2. Respondents' backpay claims were improperly certified under [Rule 23\(b\)\(2\)](#). Pp. 2557 – 2561.

(a) Claims for monetary relief may not be certified under [Rule 23\(b\)\(2\)](#), at least where the monetary relief is not incidental to the requested injunctive or declaratory relief. It is unnecessary to decide whether monetary claims can ever be certified under the Rule because, at a minimum, claims for individualized relief, like backpay, are excluded. [Rule 23\(b\)\(2\)](#) applies only when a single, indivisible remedy would provide relief to each **class** member. The Rule's history and structure indicate that individualized monetary claims belong instead in [Rule 23\(b\)\(3\)](#), with its procedural protections of predominance, superiority, mandatory notice, and the right to opt out. Pp. 2557 – 2559.

(b) Respondents nonetheless argue that their backpay claims were appropriately \*2546 certified under [Rule 23\(b\)\(2\)](#) because those claims do not “predominate” over their injunctive and declaratory relief requests. That interpretation has no basis in the Rule's text and does obvious violence to the Rule's structural features. The mere “predominance” of a proper (b)(2) injunctive claim does nothing to justify eliminating [Rule 23\(b\)\(3\)](#)'s procedural protections, and creates incentives for **class** representatives to place at risk potentially valid monetary relief claims. Moreover, a district court would have to reevaluate the roster of **class** members continuously to excise those who leave their employment and become ineligible for classwide injunctive or declaratory relief. By contrast, in a properly certified (b)(3) **class action** for backpay, it would be irrelevant whether the plaintiffs are still employed at **Wal-Mart**. It follows that backpay claims should not be certified under [Rule 23\(b\)\(2\)](#). Pp. 2559 – 2561.

(c) It is unnecessary to decide whether there are any forms of “incidental” monetary relief that are consistent with the above interpretation of [Rule 23\(b\)\(2\)](#) and the Due Process Clause because respondents' backpay claims are not incidental to their requested injunction. **Wal-Mart** is entitled to individualized determinations of each employee's eligibility for backpay. Once a plaintiff establishes a pattern or practice of discrimination, a district court must usually conduct “additional proceedings ... to determine the scope of individual relief.” *Teamsters v. United States*, 431 U.S. 324, 361, 97 S.Ct. 1843, 52 L.Ed.2d 396. The company can then raise individual affirmative defenses and demonstrate that its **action** was lawful. *Id.*, at 362, 97 S.Ct. 1843. The Ninth Circuit erred in trying to replace such proceedings with Trial by Formula. Because [Rule 23](#) cannot be interpreted to “abridge, enlarge or modify any substantive right,” 28 U.S.C. § 2072(b), a **class** cannot be certified on the premise that **Wal-Mart** will not be entitled to litigate its statutory defenses to individual claims. Pp. 2561.

603 F.3d 571, reversed.

SCALIA, J., delivered the opinion of the Court, in which ROBERTS, C.J., and KENNEDY, THOMAS, and ALITO, JJ., joined, and in which GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined as to Parts I and III. Ginsburg, J., filed an opinion concurring in part and dissenting in part, in which BREYER, SOTOMAYOR, and KAGAN, JJ., joined.

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#### Opinion

Justice SCALIA delivered the opinion of the Court.

We are presented with one of the most expansive **class actions** ever. The District Court and the Court of Appeals approved the certification of a **class** comprising about one and a half million plaintiffs, current and former female employees of petitioner **Wal-Mart** who allege that the discretion exercised by their local supervisors over pay and promotion matters violates Title VII by discriminating against women. In addition to injunctive and declaratory relief, the plaintiffs seek an award of backpay. We consider whether the certification of the plaintiff **class** was consistent with **Federal Rules of Civil Procedure 23(a) and (b)(2)**.

## I

### A

Petitioner **Wal-Mart** is the Nation's largest private employer. It operates four types of retail stores throughout the country: Discount Stores, Supercenters, Neighborhood Markets, and Sam's Clubs. Those stores are divided into seven nationwide divisions, which in turn comprise 41 regions of 80 to 85 stores apiece. Each store has between 40 and 53 separate departments and 80 to 500 staff positions. In all, **Wal-Mart** operates approximately 3,400 stores and employs more than one million people.

Pay and promotion decisions at **Wal-Mart** are generally committed to local managers' broad discretion, which is exercised "in a largely subjective manner." 222 F.R.D. 137, 145 (N.D.Cal.2004). Local store managers may increase the wages of hourly employees (within limits) with only limited corporate oversight. As for salaried employees, such as store managers and their deputies, higher corporate authorities have discretion to set their pay within preestablished ranges.

Promotions work in a similar fashion. **Wal-Mart** permits store managers to apply their own subjective criteria when selecting candidates as "support managers," which is the first step on the path to management. Admission to **Wal-Mart's** management training program, however, does require that a candidate meet certain objective criteria, including an above-average performance rating, at least one year's tenure in the applicant's current position, and a willingness to relocate. But except

for those requirements, regional and district managers have discretion to use their own judgment when selecting candidates for management training. Promotion to higher office—*e.g.*, assistant manager, co-manager, or store manager—is similarly at the discretion of the employee's superiors after prescribed objective factors are satisfied.

## B

The named plaintiffs in this lawsuit, representing the 1.5 million members of the certified **class**, are three current or former **Wal-Mart** employees who allege that the company discriminated against them on the basis of their sex by denying them equal pay or promotions, in violation of Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. § 2000e-1 *et seq.*<sup>1</sup>

Betty Dukes began working at a Pittsburgh, California, **Wal-Mart** in 1994. She started as a cashier, but later sought and \*2548 received a promotion to customer service manager. After a series of disciplinary violations, however, Dukes was demoted back to cashier and then to greeter. Dukes concedes she violated company policy, but contends that the disciplinary **actions** were in fact retaliation for invoking internal complaint procedures and that male employees have not been disciplined for similar infractions. Dukes also claims two male greeters in the Pittsburgh store are paid more than she is.

Christine Kwapnoski has worked at Sam's Club stores in Missouri and California for most of her adult life. She has held a number of positions, including a supervisory position. She claims that a male manager yelled at her frequently and screamed at female employees, but not at men. The manager in question "told her to 'doll up,' to wear some makeup, and to dress a little better." App. 1003a.

The final named plaintiff, Edith Arana, worked at a **Wal-Mart** store in Duarte, California, from 1995 to 2001. In 2000, she approached the store manager on more than one occasion about management training, but was brushed off. Arana concluded she was being denied opportunity for advancement because of her sex. She initiated internal complaint procedures, whereupon she was told to apply directly to the district manager if she thought her store manager was being unfair. Arana, however, decided against that and never applied for management training again. In 2001, she was fired for failure to comply with **Wal-Mart's** timekeeping policy.

These plaintiffs, respondents here, do not allege that **Wal-Mart** has any express corporate policy against the advancement of women. Rather, they claim that their local managers' discretion over pay and promotions is exercised disproportionately in favor of men, leading to an unlawful disparate impact on female employees, see 42 U.S.C. § 2000e-2(k). And, respondents say, because **Wal-Mart** is aware of this effect, its refusal to cabin its managers' authority amounts to disparate treatment, see § 2000e-2(a). Their complaint seeks injunctive and declaratory relief, punitive damages, and backpay. It does not ask for compensatory damages.

Importantly for our purposes, respondents claim that the discrimination to which they have been subjected is common to *all* **Wal-Mart's** female employees. The basic theory of their case is that a strong and uniform "corporate culture" permits bias against women to infect, perhaps subconsciously, the discretionary decisionmaking of each one of **Wal-Mart's** thousands of managers—thereby making every woman at the company the victim of one common discriminatory practice. Respondents therefore wish to litigate the Title VII claims of all female employees at **Wal-Mart's** stores in a nationwide **class action**.

## C

**Class** certification is governed by Federal Rule of Civil Procedure 23. Under Rule 23(a), the party seeking certification must demonstrate, first, 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**” (paragraph breaks added).

Second, the proposed **class** must satisfy at least one of the three requirements listed in [Rule 23\(b\)](#). Respondents rely on [Rule 23\(b\)\(2\)](#), which applies when “the party opposing the **class** has acted or refused to \*2549 act on grounds that apply generally to the **class**, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the **class** as a whole.”<sup>2</sup>

Invoking these provisions, respondents moved the District Court to certify a plaintiff **class** consisting of “ [a]ll women employed at any **Wal-Mart** domestic retail store at any time since December 26, 1998, who have been or may be subjected to **Wal-Mart's** challenged pay and management track promotions policies and practices.” [222 F.R.D., at 141–142](#) (quoting Plaintiff ‘s Motion for **Class** Certification in case No. 3:01–cv–02252–CRB (ND Cal.), Doc. 99, p. 37). As evidence that there were indeed “questions of law or fact common to” all the women of **Wal-Mart**, as [Rule 23\(a\)\(2\)](#) requires, respondents relied chiefly on three forms of proof: statistical evidence about pay and promotion disparities between men and women at the company, anecdotal reports of discrimination from about 120 of **Wal-Mart's** female employees, and the testimony of a sociologist, Dr. William Bielby, who conducted a “social framework analysis” of **Wal-Mart's** “culture” and personnel practices, and concluded that the company was “vulnerable” to gender discrimination. [603 F.3d 571, 601 \(C.A.9 2010\)](#) (en banc).

**Wal-Mart** unsuccessfully moved to strike much of this evidence. It also offered its own countervailing statistical and other proof in an effort to defeat [Rule 23\(a\)](#)'s requirements of commonality, typicality, and adequate representation. **Wal-Mart** further contended that respondents' monetary claims for backpay could not be certified under [Rule 23\(b\)\(2\)](#), first because that Rule refers only to injunctive and declaratory relief, and second because the backpay claims could not be manageably tried as a **class** without depriving **Wal-Mart** of its right to present certain statutory defenses. With one limitation not relevant here, the District Court granted respondents' motion and certified their proposed **class**.<sup>3</sup>

## D

A divided en banc Court of Appeals substantially affirmed the District Court's certification order. [603 F.3d 571](#). The majority concluded that respondents' evidence of commonality was sufficient to “raise the common question whether **Wal-Mart's** female employees nationwide were subjected to a single set of corporate policies (not merely a number of independent discriminatory acts) that may have worked to unlawfully discriminate against them in violation of Title VII.” *Id.*, at 612 (emphasis deleted). It also agreed with the District Court that the named plaintiffs' claims were sufficiently typical of the **class** \*2550 as a whole to satisfy [Rule 23\(a\)\(3\)](#), and that they could serve as adequate **class** representatives, see [Rule 23\(a\)\(4\)](#). *Id.*, at 614–615. With respect to the [Rule 23\(b\)\(2\)](#) question, the Ninth Circuit held that respondents' backpay claims could be certified as part of a (b) (2) **class** because they did not “predominat[e]” over the requests for declaratory and injunctive relief, meaning they were not “superior in strength, influence, or authority” to the nonmonetary claims. *Id.*, at 616 (internal quotation marks omitted).<sup>4</sup>

Finally, the Court of Appeals determined that the **action** could be manageably tried as a **class action** because the District Court could adopt the approach the Ninth Circuit approved in *Hilao v. Estate of Marcos*, [103 F.3d 767, 782–787](#) (1996). There compensatory damages for some 9,541 **class** members were calculated by selecting 137 claims at random, referring those claims to a special master for valuation, and then extrapolating the validity and value of the untested claims from the sample set. See [603 F.3d, at 625–626](#). The Court of Appeals “s[aw] no reason why a similar procedure to that used in *Hilao* could not be employed in this case.” *Id.*, at 627. It would allow **Wal-Mart** “to present individual defenses in the randomly selected ‘sample

cases,' thus revealing the approximate percentage of **class** members whose unequal pay or nonpromotion was due to something other than gender discrimination." *Ibid.*, n. 56 (emphasis deleted).

We granted certiorari. 562 U.S. —, 131 S.Ct. 795, 178 L.Ed.2d 530 (2010).

## II

[1] [2] [3] The **class action** is "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Califano v. Yamasaki*, 442 U.S. 682, 700–701, 99 S.Ct. 2545, 61 L.Ed.2d 176 (1979). In order to justify a departure from that rule, "a **class** representative must be part of the **class** and 'possess the same interest and suffer the same injury' as the **class** members." *East Tex. Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395, 403, 97 S.Ct. 1891, 52 L.Ed.2d 453 (1977) (quoting *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 216, 94 S.Ct. 2925, 41 L.Ed.2d 706 (1974)). Rule 23(a) ensures that the named plaintiffs are appropriate representatives of the **class** whose claims they wish to litigate. The Rule's four requirements—numerosity, commonality, typicality, and adequate representation—"effectively 'limit the **class** claims to those fairly encompassed by the named plaintiff's claims.'" *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 156, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982) (quoting *General Telephone Co. of Northwest v. EEOC*, 446 U.S. 318, 330, 100 S.Ct. 1698, 64 L.Ed.2d 319 (1980)).

## A

[4] [5] The crux of this case is commonality—the rule requiring a plaintiff to show that "there are questions of law or fact \*2551 common to the **class**." Rule 23(a)(2).<sup>5</sup> That language is easy to misread, since "[a]ny competently crafted **class** complaint literally raises common 'questions.'" Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U.L.Rev. 97, 131–132 (2009). For example: Do all of us plaintiffs indeed work for **Wal-Mart**? Do our managers have discretion over pay? Is that an unlawful employment practice? What remedies should we get? Reciting these questions is not sufficient to obtain **class** certification. Commonality requires the plaintiff to demonstrate that the **class** members "have suffered the same injury," *Falcon, supra*, at 157, 102 S.Ct. 2364. This does not mean merely that they have all suffered a violation of the same provision of law. Title VII, for example, can be violated in many ways—by intentional discrimination, or by hiring and promotion criteria that result in disparate impact, and by the use of these practices on the part of many different superiors in a single company. Quite obviously, the mere claim by employees of the same company that they have suffered a Title VII injury, or even a disparate-impact Title VII injury, gives no cause to believe that all their claims can productively be litigated at once. Their claims must depend upon a common contention—for example, the assertion of discriminatory bias on the part of the same supervisor. That common contention, moreover, must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.

"What matters to **class** certification ... is not the raising of common 'questions'—even in droves—but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation. Dissimilarities within the proposed **class** are what have the potential to impede the generation of common answers." Nagareda, *supra*, at 132.

[6] [7] Rule 23 does not set forth a mere pleading standard. A party seeking **class** certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc. We recognized in *Falcon* that "sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question," 457 U.S., at 160, 102 S.Ct. 2364, and that certification is proper only if "the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied," *id.*, at 161, 102 S.Ct. 2364; see *id.*, at 160, 102 S.Ct. 2364 ("[A]ctual, not presumed, conformance with Rule 23(a) remains ... indispensable"). Frequently that "rigorous analysis" will entail some overlap with the merits of the plaintiff's underlying claim. That cannot be helped. "[T]he \*2552 **class** determination generally involves considerations that are enmeshed in the factual

and legal issues comprising the plaintiff's cause of **action.**' ” *Falcon, supra*, at 160, 102 S.Ct. 2364 (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469, 98 S.Ct. 2454, 57 L.Ed.2d 351 (1978)); some internal quotation marks omitted).<sup>6</sup> Nor is there anything unusual about that consequence: The necessity of touching aspects of the merits in order to resolve preliminary matters, e.g., jurisdiction and venue, is a familiar feature of litigation. See *Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672, 676–677 (C.A.7 2001) (Easterbrook, J.).

[8] In this case, proof of commonality necessarily overlaps with respondents' merits contention that **Wal-Mart** engages in a *pattern or practice* of discrimination.<sup>7</sup> That is so because, in resolving an individual's Title VII claim, the crux of the inquiry is “the reason for a particular employment decision,” *Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867, 876, 104 S.Ct. 2794, 81 L.Ed.2d 718 (1984). Here respondents wish to sue about literally millions of employment decisions at once. Without some glue holding the alleged *reasons* for all those decisions together, it will be impossible to say that examination of all the **class** members' claims for relief will produce a common answer to the crucial question *why was I disfavored*.

## B

[9] This Court's opinion in *Falcon* describes how the commonality issue must be \*2553 approached. There an employee who claimed that he was deliberately denied a promotion on account of race obtained certification of a **class** comprising all employees wrongfully denied promotions and all applicants wrongfully denied jobs. 457 U.S., at 152, 102 S.Ct. 2364. We rejected that composite **class** for lack of commonality and typicality, explaining:

“Conceptually, there is a wide gap between (a) an individual's claim that he has been denied a promotion [or higher pay] on discriminatory grounds, and his otherwise unsupported allegation that the company has a policy of discrimination, and (b) the existence of a **class** of persons who have suffered the same injury as that individual, such that the individual's claim and the **class** claim will share common questions of law or fact and that the individual's claim will be typical of the **class** claims.” *Id.*, at 157–158, 102 S.Ct. 2364.

*Falcon* suggested two ways in which that conceptual gap might be bridged. First, if the employer “used a biased testing procedure to evaluate both applicants for employment and incumbent employees, a **class action** on behalf of every applicant or employee who might have been prejudiced by the test clearly would satisfy the commonality and typicality requirements of Rule 23(a).” *Id.*, at 159, n. 15, 102 S.Ct. 2364. Second, “[s]ignificant proof that an employer operated under a general policy of discrimination conceivably could justify a **class** of both applicants and employees if the discrimination manifested itself in hiring and promotion practices in the same general fashion, such as through entirely subjective decisionmaking processes.” *Ibid.* We think that statement precisely describes respondents' burden in this case. The first manner of bridging the gap obviously has no application here; **Wal-Mart** has no testing procedure or other companywide evaluation method that can be charged with bias. The whole point of permitting discretionary decisionmaking is to avoid evaluating employees under a common standard.

[10] The second manner of bridging the gap requires “significant proof” that **Wal-Mart** “operated under a general policy of discrimination.” That is entirely absent here. **Wal-Mart's** announced policy forbids sex discrimination, see App. 1567a–1596a, and as the District Court recognized the company imposes penalties for denials of equal employment opportunity, 222 F.R.D., at 154. The only evidence of a “general policy of discrimination” respondents produced was the testimony of Dr. William Bielby, their sociological expert. Relying on “social framework” analysis, Bielby testified that **Wal-Mart** has a “strong corporate culture,” that makes it “ ‘vulnerable’ ” to “gender bias.” *Id.*, at 152. He could not, however, “determine with any specificity how regularly stereotypes play a meaningful role in employment decisions at **Wal-Mart**. At his deposition ... Dr. Bielby conceded that he could not calculate whether 0.5 percent or 95 percent of the employment decisions at **Wal-Mart** might be determined by stereotyped thinking.” 222 F.R.D. 189, 192 (N.D.Cal.2004). The parties dispute whether Bielby's testimony even met the standards for the admission of expert testimony under Federal Rule of Civil Procedure 702 and our *Daubert* case, see *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).<sup>8</sup> The District Court concluded \*2554 that *Daubert* did not apply to expert testimony at the certification stage of **class-action** proceedings. 222

F.R.D., at 191. We doubt that is so, but even if properly considered, Bielby's testimony does nothing to advance respondents' case. "[W]hether 0.5 percent or 95 percent of the employment decisions at **Wal-Mart** might be determined by stereotyped thinking" is the essential question on which respondents' theory of commonality depends. If Bielby admittedly has no answer to that question, we can safely disregard what he has to say. It is worlds away from "significant proof" that **Wal-Mart** "operated under a general policy of discrimination."

## C

The only corporate policy that the plaintiffs' evidence convincingly establishes is **Wal-Mart's** "policy" of *allowing discretion* by local supervisors over employment matters. On its face, of course, that is just the opposite of a uniform employment practice that would provide the commonality needed for a **class action**; it is a policy *against having* uniform employment practices. It is also a very common and presumptively reasonable way of doing business—one that we have said "should itself raise no inference of discriminatory conduct," *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 990, 108 S.Ct. 2777, 101 L.Ed.2d 827 (1988).

[11] To be sure, we have recognized that, "in appropriate cases," giving discretion to lower-level supervisors can be the basis of Title VII liability under a disparate-impact theory—since "an employer's undisciplined system of subjective decisionmaking [can have] precisely the same effects as a system pervaded by impermissible intentional discrimination." *Id.*, at 990–991, 108 S.Ct. 2777. But the recognition that this type of Title VII claim "can" exist does not lead to the conclusion that every employee in a company using a system of discretion has such a claim in common. To the contrary, left to their own devices most managers in any corporation—and surely most managers in a corporation that forbids sex discrimination—would select sex-neutral, performance-based criteria for hiring and promotion that produce no **actionable** disparity at all. Others may choose to reward various attributes that produce disparate impact—such as scores on general aptitude tests or educational achievements, see *Griggs v. Duke Power Co.*, 401 U.S. 424, 431–432, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971). And still other managers may be guilty of intentional discrimination that produces a sex-based disparity. In such a company, demonstrating the invalidity of one manager's use of discretion will do nothing to demonstrate the invalidity of another's. A party seeking to certify a nationwide **class** will be unable to show that all the employees' Title VII claims will in fact depend on the answers to common questions.

Respondents have not identified a common mode of exercising discretion that **\*2555** pervades the entire company—aside from their reliance on Dr. Bielby's social frameworks analysis that we have rejected. In a company of **Wal-Mart's** size and geographical scope, it is quite unbelievable that all managers would exercise their discretion in a common way without some common direction. Respondents attempt to make that showing by means of statistical and anecdotal evidence, but their evidence falls well short.

The statistical evidence consists primarily of regression analyses performed by Dr. Richard Drogin, a statistician, and Dr. Marc Bendick, a labor economist. Drogin conducted his analysis region-by-region, comparing the number of women promoted into management positions with the percentage of women in the available pool of hourly workers. After considering regional and national data, Drogin concluded that "there are statistically significant disparities between men and women at **Wal-Mart** ... [and] these disparities ... can be explained only by gender discrimination." 603 F.3d, at 604 (internal quotation marks omitted). Bendick compared work-force data from **Wal-Mart** and competitive retailers and concluded that **Wal-Mart** "promotes a lower percentage of women than its competitors." *Ibid.*

Even if they are taken at face value, these studies are insufficient to establish that respondents' theory can be proved on a classwide basis. In *Falcon*, we held that one named plaintiff's experience of discrimination was insufficient to infer that "discriminatory treatment is typical of [the employer's employment] practices." 457 U.S., at 158, 102 S.Ct. 2364. A similar failure of inference arises here. As Judge Ikuta observed in her dissent, "[i]nformation about disparities at the regional and national level does not establish the existence of disparities at individual stores, let alone raise the inference that a company-wide policy of discrimination is implemented by discretionary decisions at the store and district level." 603 F.3d, at 637. A

regional pay disparity, for example, may be attributable to only a small set of **Wal-Mart** stores, and cannot by itself establish the uniform, store-by-store disparity upon which the plaintiffs' theory of commonality depends.

There is another, more fundamental, respect in which respondents' statistical proof fails. Even if it established (as it does not) a pay or promotion pattern that differs from the nationwide figures or the regional figures in *all* of **Wal-Mart's** 3,400 stores, that would still not demonstrate that commonality of issue exists. Some managers will claim that the availability of women, or qualified women, or interested women, in their stores' area does not mirror the national or regional statistics. And almost all of them will claim to have been applying some sex-neutral, performance-based criteria—whose nature and effects will differ from store to store. In the landmark case of ours which held that giving discretion to lower-level supervisors can be the basis of Title VII liability under a disparate-impact theory, the plurality opinion *conditioned* that holding on the corollary that merely proving that the discretionary system has produced a racial or sexual disparity *is not enough*. “[T]he plaintiff must begin by identifying the specific employment practice that is challenged.” *Watson*, 487 U.S., at 994, 108 S.Ct. 2777; accord, *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 656, 109 S.Ct. 2115, 104 L.Ed.2d 733 (1989) (approving that statement), superseded by statute on other grounds, 42 U.S.C. § 2000e–2(k). That is all the more necessary when a **class** of plaintiffs is sought to be certified. Other than the bare existence of delegated discretion, respondents have identified no “specific employment practice”—much less one that ties all their 1.5 million claims \*2556 together. Merely showing that **Wal-Mart's** policy of discretion has produced an overall sex-based disparity does not suffice.

Respondents' anecdotal evidence suffers from the same defects, and in addition is too weak to raise any inference that all the individual, discretionary personnel decisions are discriminatory. In *Teamsters v. United States*, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977), in addition to substantial statistical evidence of company-wide discrimination, the Government (as plaintiff) produced about 40 specific accounts of racial discrimination from particular individuals. See *id.*, at 338, 97 S.Ct. 1843. That number was significant because the company involved had only 6,472 employees, of whom 571 were minorities, *id.*, at 337, 97 S.Ct. 1843, and the **class** itself consisted of around 334 persons, *United States v. T.I.M.E.-D.C., Inc.*, 517 F.2d 299, 308 (C.A.5 1975), overruled on other grounds, *Teamsters*, *supra*. The 40 anecdotes thus represented roughly one account for every eight members of the **class**. Moreover, the Court of Appeals noted that the anecdotes came from individuals “spread throughout” the company who “for the most part” worked at the company's operational centers that employed the largest numbers of the **class** members. 517 F.2d, at 315, and n. 30. Here, by contrast, respondents filed some 120 affidavits reporting experiences of discrimination—about 1 for every 12,500 **class** members—relating to only some 235 out of **Wal-Mart's** 3,400 stores. 603 F.3d, at 634 (Ikuta, J., dissenting). More than half of these reports are concentrated in only six States (Alabama, California, Florida, Missouri, Texas, and Wisconsin); half of all States have only one or two anecdotes; and 14 States have no anecdotes about **Wal-Mart's** operations at all. *Id.*, at 634–635, and n. 10. Even if every single one of these accounts is true, that would not demonstrate that the entire company “operate [s] under a general policy of discrimination,” *Falcon*, *supra*, at 159, n. 15, 102 S.Ct. 2364, which is what respondents must show to certify a companywide **class**.<sup>9</sup>

The dissent misunderstands the nature of the foregoing analysis. It criticizes our focus on the dissimilarities between the putative **class** members on the ground that we have “blend[ed]” Rule 23(a)(2)'s commonality requirement with Rule 23(b)(3)'s inquiry into whether common questions “predominate” over individual ones. See *post*, at 2550 – 2552 (GINSBURG, J., concurring in part and dissenting in part). That is not so. We quite agree that for purposes of Rule 23(a)(2) “ ‘[e]ven a single [common] question’ ” will do, *post*, at 2566, n. 9 (quoting Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 Colum. L.Rev. 149, 176, n. 110 (2003)). We consider dissimilarities not in order to determine (as Rule 23(b)(3) requires) whether common questions *predominate*, but in order to determine (as Rule 23(a)(2) requires) whether there *is* “[e]ven a single [common] question.” And there is not here. Because respondents provide no convincing proof of a companywide discriminatory pay and promotion policy, we have concluded that they have \*2557 not established the existence of any common question.<sup>10</sup>

In sum, we agree with Chief Judge Kozinski that the members of the **class**:

“held a multitude of different jobs, at different levels of **Wal-Mart's** hierarchy, for variable lengths of time, in 3,400 stores, sprinkled across 50 states, with a kaleidoscope of supervisors (male and female), subject to a variety of regional policies

that all differed .... Some thrived while others did poorly. They have little in common but their sex and this lawsuit.” 603 F.3d, at 652 (dissenting opinion).

### III

[12] We also conclude that respondents' claims for backpay were improperly certified under Federal Rule of Civil Procedure 23(b)(2). Our opinion in *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 121, 114 S.Ct. 1359, 128 L.Ed.2d 33 (1994) (*per curiam*) expressed serious doubt about whether claims for monetary relief may be certified under that provision. We now hold that they may not, at least where (as here) the monetary relief is not incidental to the injunctive or declaratory relief.

### A

[13] Rule 23(b)(2) allows class treatment when “the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.” One possible reading of this provision is that it applies *only* to requests for such injunctive or declaratory relief and does not authorize the class certification of monetary claims at all. We need not reach that broader question in this case, because we think that, at a minimum, claims for individualized relief (like the backpay at issue here) do not satisfy the Rule. The key to the (b)(2) class is “the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them.” Nagareda, 84 N.Y.U.L.Rev., at 132. In other words, Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class. It does not authorize class certification when each individual class member would be entitled to a different injunction or declaratory judgment against the defendant. Similarly, it does not authorize class certification when each class member would be entitled to an individualized award of monetary damages.

[14] That interpretation accords with the history of the Rule. Because Rule 23 “stems from equity practice” that predated its codification, *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 613, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997), in determining its meaning we have previously looked to the historical models on which the Rule was based, *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 841–845, 119 S.Ct. 2295, 144 L.Ed.2d 715 (1999). As we observed in *Amchem*, “[c]ivil rights cases against parties charged with unlawful, class-based discrimination are prime examples” of what (b)(2) is meant to capture. \*2558 521 U.S., at 614, 117 S.Ct. 2231. In particular, the Rule reflects a series of decisions involving challenges to racial segregation—conduct that was remedied by a single classwide order. In none of the cases cited by the Advisory Committee as examples of (b)(2)'s antecedents did the plaintiffs combine any claim for individualized relief with their classwide injunction. See Advisory Committee's Note, 39 F.R.D. 69, 102 (1966) (citing cases); e.g., *Potts v. Flax*, 313 F.2d 284, 289, n. 5 (C.A.5 1963); *Brunson v. Board of Trustees of Univ. of School Dist. No. 1, Clarendon Cty.*, 311 F.2d 107, 109 (C.A.4 1962) (*per curiam*); *Frasier v. Board of Trustees of N.C.*, 134 F.Supp. 589, 593 (NC 1955) (three-judge court), *aff'd*, 350 U.S. 979, 76 S.Ct. 467, 100 L.Ed. 848 (1956).

Permitting the combination of individualized and classwide relief in a (b)(2) class is also inconsistent with the structure of Rule 23(b). Classes certified under (b)(1) and (b)(2) share the most traditional justifications for class treatment—that individual adjudications would be impossible or unworkable, as in a (b)(1) class,<sup>11</sup> or that the relief sought must perforce affect the entire class at once, as in a (b)(2) class. For that reason these are also mandatory classes: The Rule provides no opportunity for (b)(1) or (b)(2) class members to opt out, and does not even oblige the District Court to afford them notice of the action. Rule 23(b)(3), by contrast, is an “adventuresome innovation” of the 1966 amendments, *Amchem*, 521 U.S., at 614, 117 S.Ct. 2231 (internal quotation marks omitted), framed for situations “in which ‘class-action treatment is not as clearly called for’,” *id.*, at 615, 117 S.Ct. 2231 (quoting Advisory Committee's Notes, 28 U.S.C.App., p. 697 (1994 ed.)). It allows class certification in a much wider set of circumstances but with greater procedural protections. Its only prerequisites are 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.” Rule 23(b)(3). And unlike (b)(1)

and (b)(2) **classes**, the (b)(3) **class** is not mandatory; **class** members are entitled to receive “the best notice that is practicable under the circumstances” and to withdraw from the **class** at their option. See [Rule 23\(c\)\(2\)\(B\)](#).

Given that structure, we think it clear that individualized monetary claims belong in [Rule 23\(b\)\(3\)](#). The procedural protections attending the (b)(3) **class**—predominance, superiority, mandatory notice, and the right to opt out—are missing from (b)(2) not because the Rule considers them unnecessary, but because it considers them unnecessary *to a (b)(2) class*. When a **class** seeks an indivisible injunction benefitting all its members at once, there is no reason to undertake a case-specific inquiry into whether **class** issues predominate or whether **class action** is a superior method of adjudicating the dispute. Predominance and superiority are self-evident. But with respect to each **class** member's individualized claim for money, that is not so—which \*2559 is precisely why (b)(3) requires the judge to make findings about predominance and superiority before allowing the **class**. Similarly, (b)(2) does not require that **class** members be given notice and opt-out rights, presumably because it is thought (rightly or wrongly) that notice has no purpose when the **class** is mandatory, and that depriving people of their right to sue in this manner complies with the Due Process Clause. In the context of a **class action** predominantly for money damages we have held that absence of notice and opt-out violates due process. See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985). While we have never held that to be so where the monetary claims do not predominate, the serious possibility that it may be so provides an additional reason not to read [Rule 23\(b\)\(2\)](#) to include the monetary claims here.

## B

Against that conclusion, respondents argue that their claims for backpay were appropriately certified as part of a **class** under [Rule 23\(b\)\(2\)](#) because those claims do not “predominate” over their requests for injunctive and declaratory relief. They rely upon the Advisory Committee's statement that [Rule 23\(b\)\(2\)](#) “does not extend to cases in which the appropriate final relief relates *exclusively or predominantly* to money damages.” 39 F.R.D., at 102 (emphasis added). The negative implication, they argue, is that it *does* extend to cases in which the appropriate final relief relates only partially and nonpredominantly to money damages. Of course it is the Rule itself, not the Advisory Committee's description of it, that governs. And a mere negative inference does not in our view suffice to establish a disposition that has no basis in the Rule's text, and that does obvious violence to the Rule's structural features. The mere “predominance” of a proper (b)(2) injunctive claim does nothing to justify elimination of [Rule 23\(b\)\(3\)](#)'s procedural protections: It neither establishes the superiority of **class** adjudication over *individual* adjudication nor cures the notice and opt-out problems. We fail to see why the Rule should be read to nullify these protections whenever a plaintiff **class**, at its option, combines its monetary claims with a request—even a “predominating request”—for an injunction.

Respondents' predominance test, moreover, creates perverse incentives for **class** representatives to place at risk potentially valid claims for monetary relief. In this case, for example, the named plaintiffs declined to include employees' claims for compensatory damages in their complaint. That strategy of including only backpay claims made it more likely that monetary relief would not “predominate.” But it also created the possibility (if the predominance test were correct) that individual **class** members' compensatory-damages claims would be *precluded* by litigation they had no power to hold themselves apart from. If it were determined, for example, that a particular **class** member is not entitled to backpay because her denial of increased pay or a promotion was *not* the product of discrimination, that employee might be collaterally estopped from independently seeking compensatory damages based on that same denial. That possibility underscores the need for plaintiffs with individual monetary claims to decide *for themselves* whether to tie their fates to the **class** representatives' or go it alone—a choice [Rule 23\(b\)\(2\)](#) does not ensure that they have.

The predominance test would also require the District Court to reevaluate the roster of **class** members continually. The Ninth Circuit recognized the necessity for this when it concluded that those plaintiffs \*2560 no longer employed by **Wal-Mart** lack standing to seek injunctive or declaratory relief against its employment practices. The Court of Appeals' response to that difficulty, however, was not to eliminate *all* former employees from the certified **class**, but to eliminate only those who had left the company's employ by the date the complaint was filed. That solution has no logical connection to the problem, since those who have left their **Wal-Mart** jobs *since* the complaint was filed have no more need for prospective relief than those

who left beforehand. As a consequence, even though the validity of a (b)(2) **class** depends on whether “final injunctive relief or corresponding declaratory relief is appropriate respecting the **class as a whole**,” [Rule 23\(b\)\(2\)](#) (emphasis added), about half the members of the **class** approved by the Ninth Circuit have no claim for injunctive or declaratory relief at all. Of course, the alternative (and logical) solution of excising plaintiffs from the **class** as they leave their employment may have struck the Court of Appeals as wasteful of the District Court’s time. Which indeed it is, since if a backpay **action** were properly certified for **class** treatment under *(b)(3)*, the ability to litigate a plaintiff’s backpay claim as part of the **class** would not turn on the irrelevant question whether she is still employed at **Wal-Mart**. What follows from this, however, is not that some arbitrary limitation on **class** membership should be imposed but that the backpay claims should not be certified under [Rule 23\(b\)\(2\)](#) at all.

Finally, respondents argue that their backpay claims are appropriate for a (b)(2) **class action** because a backpay award is equitable in nature. The latter may be true, but it is irrelevant. The Rule does not speak of “equitable” remedies generally but of injunctions and declaratory judgments. As Title VII itself makes pellucidly clear, backpay is neither. See [42 U.S.C. § 2000e–5\(g\)\(2\)\(B\)\(i\)](#) and (ii) (distinguishing between declaratory and injunctive relief and the payment of “backpay,” see [§ 2000e–5\(g\)\(2\)\(A\)](#)).

## C

[15] In *Allison v. Citgo Petroleum Corp.*, [151 F.3d 402, 415 \(C.A.5 1998\)](#), the Fifth Circuit held that a (b)(2) **class** would permit the certification of monetary relief that is “incidental to requested injunctive or declaratory relief,” which it defined as “damages that flow directly from liability to the **class as a whole** on the claims forming the basis of the injunctive or declaratory relief.” In that court’s view, such “incidental damage should not require additional hearings to resolve the disparate merits of each individual’s case; it should neither introduce new substantial legal or factual issues, nor entail complex individualized determinations.” *Ibid.* We need not decide in this case whether there are any forms of “incidental” monetary relief that are consistent with the interpretation of [Rule 23\(b\)\(2\)](#) we have announced and that comply with the Due Process Clause. Respondents do not argue that they can satisfy this standard, and in any event they cannot.

Contrary to the Ninth Circuit’s view, **Wal-Mart** is entitled to individualized determinations of each employee’s eligibility for backpay. Title VII includes a detailed remedial scheme. If a plaintiff prevails in showing that an employer has discriminated against him in violation of the statute, the court “may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative **action** as may be appropriate, [including] reinstatement or hiring of employees, with or without backpay ... or any other equitable relief as the court deems appropriate.” [§ 2000e–5\(g\)\(1\)](#). But if the employer can show that it took an adverse employment **action** against an employee for any \*2561 reason other than discrimination, the court cannot order the “hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any backpay.” [§ 2000e–5\(g\)\(2\)\(A\)](#).

[16] We have established a procedure for trying pattern-or-practice cases that gives effect to these statutory requirements. When the plaintiff seeks individual relief such as reinstatement or backpay after establishing a pattern or practice of discrimination, “a district court must usually conduct additional proceedings ... to determine the scope of individual relief.” *Teamsters*, [431 U.S., at 361, 97 S.Ct. 1843](#). At this phase, the burden of proof will shift to the company, but it will have the right to raise any individual affirmative defenses it may have, and to “demonstrate that the individual applicant was denied an employment opportunity for lawful reasons.” *Id.*, [at 362, 97 S.Ct. 1843](#).

[17] The Court of Appeals believed that it was possible to replace such proceedings with Trial by Formula. A sample set of the **class** members would be selected, as to whom liability for sex discrimination and the backpay owing as a result would be determined in depositions supervised by a master. The percentage of claims determined to be valid would then be applied to the entire remaining **class**, and the number of (presumptively) valid claims thus derived would be multiplied by the average backpay award in the sample set to arrive at the entire **class** recovery—without further individualized proceedings. [603 F.3d, at 625–627](#). We disapprove that novel project. Because the Rules Enabling Act forbids interpreting [Rule 23](#) to “abridge, enlarge or

modify any substantive right,” 28 U.S.C. § 2072(b); see *Ortiz*, 527 U.S., at 845, 119 S.Ct. 2295, a **class** cannot be certified on the premise that **Wal-Mart** will not be entitled to litigate its statutory defenses to individual claims. And because the necessity of that litigation will prevent backpay from being “incidental” to the classwide injunction, respondents’ **class** could not be certified even assuming, *arguendo*, that “incidental” monetary relief can be awarded to a 23(b)(2) **class**.

\* \* \*

The judgment of the Court of Appeals is

*Reversed.*

Justice GINSBURG, with whom Justice BREYER, Justice SOTOMAYOR, and Justice KAGAN join, concurring in part and dissenting in part.

The **class** in this case, I agree with the Court, should not have been certified under Federal Rule of Civil Procedure 23(b)(2). The plaintiffs, alleging discrimination in violation of Title VII, 42 U.S.C. § 2000e *et seq.*, seek monetary relief that is not merely incidental to any injunctive or declaratory relief that might be available. See *ante*, at 2557 – 2561. A putative **class** of this type may be certifiable under Rule 23(b)(3), if the plaintiffs show that common **class** questions “predominate” over issues affecting individuals—*e.g.*, qualification for, and the amount of, backpay or compensatory damages—and that a **class action** is “superior” to other modes of adjudication.

Whether the **class** the plaintiffs describe meets the specific requirements of Rule 23(b)(3) is not before the Court, and I would reserve that matter for consideration and decision on remand.<sup>1</sup> The Court, \*2562 however, disqualifies the **class** at the starting gate, holding that the plaintiffs cannot cross the “commonality” line set by Rule 23(a)(2). In so ruling, the Court imports into the Rule 23(a) determination concerns properly addressed in a Rule 23(b)(3) assessment.

I

A

Rule 23(a)(2) establishes a preliminary requirement for maintaining a **class action**: “[T]here are questions of law or fact common to the **class**.”<sup>2</sup> The Rule “does not require that all questions of law or fact raised in the litigation be common,” 1 H. Newberg & A. Conte, *Newberg on Class Actions* § 3.10, pp. 3–48 to 3–49 (3d ed.1992); indeed, “[e]ven a single question of law or fact common to the members of the **class** will satisfy the commonality requirement,” Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 Colum. L.Rev. 149, 176, n. 110 (2003). See Advisory Committee’s 1937 Notes on Fed. Rule Civ. Proc. 23, 28 U.S.C.App., p. 138 (citing with approval cases in which “there was only a question of law or fact common to” the **class** members).

A “question” is ordinarily understood to be “[a] subject or point open to controversy.” American Heritage Dictionary 1483 (3d ed.1992). See also Black’s Law Dictionary 1366 (9th ed.2009) (defining “question of fact” as “[a] disputed issue to be resolved ... [at] trial” and “question of law” as “[a]n issue to be decided by the judge”). Thus, a “question” “common to the **class**” must be a dispute, either of fact or of law, the resolution of which will advance the determination of the **class** members’ claims.<sup>3</sup>

B

The District Court, recognizing that “one significant issue common to the **class** may be sufficient to warrant certification,” 222 F.R.D. 137, 145 (N.D.Cal.2004), found that the plaintiffs easily met that test. Absent an error of law or an abuse of discretion, an appellate tribunal has no warrant to upset the District Court's finding of commonality. See *Califano v. Yamasaki*, 442 U.S. 682, 703, 99 S.Ct. 2545, 61 L.Ed.2d 176 (1979) (“[M]ost issues arising under Rule 23 ... [are] committed in the first instance to the discretion of the district court.”).

The District Court certified a **class** of “[a]ll women employed at any **Wal-Mart** domestic retail store at any time since December 26, 1998.” 222 F.R.D., at 141–143 (internal quotation marks omitted). The named plaintiffs, led by Betty Dukes, propose to litigate, on behalf of the **class**, allegations that **Wal-Mart** discriminates on the basis of gender in pay and promotions. \*2563 They allege that the company “[r]eli[es] on gender stereotypes in making employment decisions such as ... promotion[s][and] pay.” App. 55a. **Wal-Mart** permits those prejudices to infect personnel decisions, the plaintiffs contend, by leaving pay and promotions in the hands of “a nearly all male managerial workforce” using “arbitrary and subjective criteria.” *Ibid.* Further alleged barriers to the advancement of female employees include the company's requirement, “as a condition of promotion to management jobs, that employees be willing to relocate.” *Id.*, at 56a. Absent instruction otherwise, there is a risk that managers will act on the familiar assumption that women, because of their services to husband and children, are less mobile than men. See Dept. of Labor, Federal Glass Ceiling Commission, Good for Business: Making Full Use of the Nation's Human Capital 151 (1995).

Women fill 70 percent of the hourly jobs in the retailer's stores but make up only “33 percent of management employees.” 222 F.R.D., at 146. “[T]he higher one looks in the organization the lower the percentage of women.” *Id.*, at 155. The plaintiffs' “largely uncontested descriptive statistics” also show that women working in the company's stores “are paid less than men in every region” and “that the salary gap widens over time even for men and women hired into the same jobs at the same time.” *Ibid.*; cf. *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 643, 127 S.Ct. 2162, 167 L.Ed.2d 982 (2007) (GINSBURG, J., dissenting).

The District Court identified “systems for ... promoting in-store employees” that were “sufficiently similar across regions and stores” to conclude that “the manner in which these systems affect the **class** raises issues that are common to all **class** members.” 222 F.R.D., at 149. The selection of employees for promotion to in-store management “is fairly characterized as a ‘tap on the shoulder’ process,” in which managers have discretion about whose shoulders to tap. *Id.*, at 148. Vacancies are not regularly posted; from among those employees satisfying minimum qualifications, managers choose whom to promote on the basis of their own subjective impressions. *Ibid.*

**Wal-Mart's** compensation policies also operate uniformly across stores, the District Court found. The retailer leaves open a \$2 band for every position's hourly pay rate. **Wal-Mart** provides no standards or criteria for setting wages within that band, and thus does nothing to counter unconscious bias on the part of supervisors. See *id.*, at 146–147.

**Wal-Mart's** supervisors do not make their discretionary decisions in a vacuum. The District Court reviewed means **Wal-Mart** used to maintain a “carefully constructed ... corporate culture,” such as frequent meetings to reinforce the common way of thinking, regular transfers of managers between stores to ensure uniformity throughout the company, monitoring of stores “on a close and constant basis,” and “**Wal-Mart** TV,” “broadcas[t] ... into all stores.” *Id.*, at 151–153 (internal quotation marks omitted).

The plaintiffs' evidence, including **class** members' tales of their own experiences,<sup>4</sup> suggests that gender bias suffused **Wal-Mart's** company culture. Among illustrations, \*2564 senior management often refer to female associates as “little Janie Qs.” Plaintiffs' Motion for **Class** Certification in No. 3:01–cv–02252–CRB (ND Cal.), Doc. 99, p. 13 (internal quotation marks omitted). One manager told an employee that “[m]en are here to make a career and women aren't.” 222 F.R.D., at 166 (internal quotation marks omitted). A committee of female **Wal-Mart** executives concluded that “[s]tereotypes limit the opportunities offered to women.” Plaintiffs' Motion for **Class** Certification in No. 3:01–cv–02252–CRB (ND Cal.), Doc. 99, at 16 (internal quotation marks omitted).

Finally, the plaintiffs presented an expert's appraisal to show that the pay and promotions disparities at **Wal-Mart** “can be explained only by gender discrimination and not by ... neutral variables.” 222 F.R.D., at 155. Using regression analyses, their expert, Richard Drogin, controlled for factors including, *inter alia*, job performance, length of time with the company, and the store where an employee worked. *Id.*, at 159.<sup>5</sup> The results, the District Court found, were sufficient to raise an “inference of discrimination.” *Id.*, at 155–160.

## C

The District Court's identification of a common question, whether **Wal-Mart's** pay and promotions policies gave rise to unlawful discrimination, was hardly infirm. The practice of delegating to supervisors large discretion to make personnel decisions, uncontrolled by formal standards, has long been known to have the potential to produce disparate effects. Managers, like all humankind, may be prey to biases of which they are unaware.<sup>6</sup> The risk of discrimination is heightened when those managers are predominantly of one sex, and are steeped in a corporate culture that perpetuates gender stereotypes.

The plaintiffs' allegations resemble those in one of the prototypical cases in this area, *Leisner v. New York Tel. Co.*, 358 F.Supp. 359, 364–365 (S.D.N.Y.1973). In deciding on promotions, supervisors in that case were to start with objective measures; but ultimately, they were to “look at the individual as a total individual.” *Id.*, at 365 (internal quotation marks omitted). The final question they were to ask and answer: “Is this person going to be successful in our business?” *Ibid.* (internal quotation marks omitted). It is hardly surprising that for many managers, the ideal candidate was someone with characteristics similar to their own.

We have held that “discretionary employment practices” can give rise to Title \*2565 VII claims, not only when such practices are motivated by discriminatory intent but also when they produce discriminatory results. See *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 988, 991, 108 S.Ct. 2777, 101 L.Ed.2d 827 (1988). But see *ante*, at 2555 (“[P]roving that [a] discretionary system has produced a ... disparity is not enough.”). In *Watson*, as here, an employer had given its managers large authority over promotions. An employee sued the bank under Title VII, alleging that the “discretionary promotion system” caused a discriminatory effect based on race. 487 U.S., at 984, 108 S.Ct. 2777 (internal quotation marks omitted). Four different supervisors had declined, on separate occasions, to promote the employee. *Id.*, at 982, 108 S.Ct. 2777. Their reasons were subjective and unknown. The employer, we noted “had not developed precise and formal criteria for evaluating candidates”; “[i]t relied instead on the subjective judgment of supervisors.” *Ibid.*

Aware of “the problem of subconscious stereotypes and prejudices,” we held that the employer's “undisciplined system of subjective decisionmaking” was an “employment practic[e]” that “may be analyzed under the disparate impact approach.” *Id.*, at 990–991, 108 S.Ct. 2777. See also *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 657, 109 S.Ct. 2115, 104 L.Ed.2d 733 (1989) (recognizing “the use of ‘subjective decision making’ ” as an “employment practic[e]” subject to disparate-impact attack).

The plaintiffs' allegations state claims of gender discrimination in the form of biased decisionmaking in both pay and promotions. The evidence reviewed by the District Court adequately demonstrated that resolving those claims would necessitate examination of particular policies and practices alleged to affect, adversely and globally, women employed at **Wal-Mart's** stores. Rule 23(a)(2), setting a necessary but not a sufficient criterion for **class-action** certification, demands nothing further.

## II

## A

The Court gives no credence to the key dispute common to the **class**: whether **Wal-Mart's** discretionary pay and promotion policies are discriminatory. See *ante*, at 2551 (“Reciting” questions like “Is [giving managers discretion over pay] an unlawful employment practice?” “is not sufficient to obtain **class** certification.”). “What matters,” the Court asserts, “is not the raising of common ‘questions,’” but whether there are “[d]issimilarities within the proposed **class**” that “have the potential to impede the generation of common answers.” *Ante*, at 2551 (quoting Nagareda, **Class Certification in the Age of Aggregate Proof**, 84 *N.Y.U.L.Rev.* 97, 132 (2009); some internal quotation marks omitted).

The Court blends **Rule 23(a)(2)**'s threshold criterion with the more demanding criteria of **Rule 23(b)(3)**, and thereby elevates the (a)(2) inquiry so that it is no longer “easily satisfied,” 5 J. Moore et al., *Moore's Federal Practice* § 23.23[2], p. 23–72 (3d ed.2011).<sup>7</sup> **Rule 23(b)(3)** certification \*2566 requires, in addition to the four 23(a) findings, determinations that “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 ... adjudicating the controversy.”<sup>8</sup>

The Court's emphasis on differences between **class** members mimics the **Rule 23(b)(3)** inquiry into whether common questions “predominate” over individual issues. And by asking whether the individual differences “impede” common adjudication, *ante*, at 2551 – 2552 (internal quotation marks omitted), the Court duplicates 23(b)(3)'s question whether “a **class action** is superior” to other modes of adjudication. Indeed, Professor Nagareda, whose “dissimilarities” inquiry the Court endorses, developed his position in the context of **Rule 23(b)(3)**. See 84 *N.Y.U.L.Rev.*, at 131 (**Rule 23(b)(3)** requires “some decisive degree of similarity across the proposed **class**” because it “speaks of common ‘questions’ that ‘predominate’ over individual ones”).<sup>9</sup> “The **Rule 23(b)(3)** predominance inquiry” is meant to “tes[t] whether proposed **classes** are sufficiently cohesive to warrant adjudication by representation.” *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 623, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997). If courts must conduct a “dissimilarities” analysis at the **Rule 23(a)(2)** stage, no mission remains for **Rule 23(b)(3)**.

Because **Rule 23(a)** is also a prerequisite for **Rule 23(b)(1)** and **Rule 23(b)(2)** **classes**, the Court's “dissimilarities” position is far reaching. Individual differences should not bar a **Rule 23(b)(1)** or **Rule 23(b)(2)** **class**, so long as the **Rule 23(a)** threshold is met. See *Amchem Products*, 521 U.S., at 623, n. 19, 117 S.Ct. 2231 (**Rule 23(b)(1)(B)** “does not have a predominance requirement”); *Yamasaki*, 442 U.S., at 701, 99 S.Ct. 2545 (**Rule 23(b)(2)** **action** in which the Court noted that “[i]t is unlikely that differences in the factual background of each claim will affect the outcome of the legal issue”). For example, in *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976), a **Rule 23(b)(2)** **class** of African–American truckdrivers complained that the defendant had \*2567 discriminatorily refused to hire black applicants. We recognized that the “qualification[s] and performance” of individual **class** members might vary. *Id.*, at 772, 96 S.Ct. 1251 (internal quotation marks omitted). “Generalizations concerning such individually applicable evidence,” we cautioned, “cannot serve as a justification for the denial of [injunctive] relief to the entire **class**.” *Ibid*.

## B

The “dissimilarities” approach leads the Court to train its attention on what distinguishes individual **class** members, rather than on what unites them. Given the lack of standards for pay and promotions, the majority says, “demonstrating the invalidity of one manager's use of discretion will do nothing to demonstrate the invalidity of another's.” *Ante*, at 2554.

**Wal-Mart's** delegation of discretion over pay and promotions is a policy uniform throughout all stores. The very nature of discretion is that people will exercise it in various ways. A system of delegated discretion, *Watson* held, is a practice **actionable** under Title VII when it produces discriminatory outcomes. 487 U.S., at 990–991, 108 S.Ct. 2777; see *supra*, at 2564 – 2565. A finding that **Wal-Mart's** pay and promotions practices in fact violate the law would be the first step in the usual order of

proof for plaintiffs seeking individual remedies for company-wide discrimination. *Teamsters v. United States*, 431 U.S. 324, 359, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977); see *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 415–423, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975). That each individual employee's unique circumstances will ultimately determine whether she is entitled to backpay or damages, § 2000e–5(g)(2)(A) (barring backpay if a plaintiff “was refused ... advancement ... for any reason other than discrimination”), should not factor into the Rule 23(a)(2) determination.

\* \* \*

The Court errs in importing a “dissimilarities” notion suited to Rule 23(b)(3) into the Rule 23(a) commonality inquiry. I therefore cannot join Part II of the Court's opinion.

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### Footnotes

- \* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.
- 1 The complaint included seven named plaintiffs, but only three remain part of the certified **class** as narrowed by the Court of Appeals.
- 2 Rule 23(b)(1) allows a **class** to be maintained where “prosecuting separate **actions** by or against individual **class** members would create a risk of” either “(A) inconsistent or varying adjudications,” or “(B) adjudications ... that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impeded their ability to protect their interests.” Rule 23(b)(3) states that a **class** may be maintained where “questions of law or fact common to **class** members predominate over any questions affecting only individual members,” and a **class action** would be “superior to other available methods for fairly and efficiently adjudicating the controversy.” The applicability of these provisions to the plaintiff **class** is not before us.
- 3 The District Court excluded backpay claims based on promotion opportunities that had not been publicly posted, for the reason that no applicant data could exist for such positions. 222 F.R.D. 137, 182 (N.D.Cal.2004). It also decided to afford **class** members notice of the **action** and the right to opt-out of the **class** with respect to respondents' punitive-damages claim. *Id.*, at 173.
- 4 To enable that result, the Court of Appeals trimmed the (b)(2) **class** in two ways: First, it remanded that part of the certification order which included respondents' punitive-damages claim in the (b)(2) **class**, so that the District Court might consider whether that might cause the monetary relief to predominate. 603 F.3d, at 621. Second, it accepted in part Wal-Mart's argument that since **class** members whom it no longer employed had no standing to seek injunctive or declaratory relief, as to them monetary claims must predominate. It excluded from the certified **class** “those putative **class** members who were no longer Wal-Mart employees at the time Plaintiffs' complaint was filed,” *id.*, at 623 (emphasis added).
- 5 We have previously stated in this context that “[t]he commonality and typicality requirements of Rule 23(a) tend to merge. Both serve as guideposts for determining whether under the particular circumstances maintenance of a **class action** is economical and whether the named plaintiff's claim and the **class** claims are so interrelated that the interests of the **class** members will be fairly and adequately protected in their absence. Those requirements therefore also tend to merge with the adequacy-of-representation requirement, although the latter requirement also raises concerns about the competency of **class** counsel and conflicts of interest.” *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 157–158, n. 13, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982). In light of our disposition of the commonality question, however, it is unnecessary to resolve whether respondents have satisfied the typicality and adequate-representation requirements of Rule 23(a).
- 6 A statement in one of our prior cases, *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974), is sometimes mistakenly cited to the contrary: “We find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a **class**

**action.**” But in that case, the judge had conducted a preliminary inquiry into the merits of a suit, not in order to determine the propriety of certification under [Rules 23\(a\) and \(b\)](#) (he had already done that, see *id.*, at 165, 94 S.Ct. 2140), but in order to shift the cost of notice required by [Rule 23\(c\)\(2\)](#) from the plaintiff to the defendants. To the extent the quoted statement goes beyond the permissibility of a merits inquiry for any other pretrial purpose, it is the purest dictum and is contradicted by our other cases.

Perhaps the most common example of considering a merits question at the [Rule 23](#) stage arises in **class-action** suits for securities fraud. [Rule 23\(b\)\(3\)](#)'s requirement that “questions of law or fact common to **class** members predominate over any questions affecting only individual members” would often be an insuperable barrier to **class** certification, since each of the individual investors would have to prove reliance on the alleged misrepresentation. But the problem dissipates if the plaintiffs can establish the applicability of the so-called “fraud on the market” presumption, which says that all traders who purchase stock in an efficient market are presumed to have relied on the accuracy of a company's public statements. To invoke this presumption, the plaintiffs seeking [23\(b\)\(3\)](#) certification must prove that their shares were traded on an efficient market, *Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. —, —, 131 S.Ct. 2179, 2185, 180 L.Ed.2d 24, 2011 WL 2175208 (2011) (slip op., at 5), an issue they will surely have to prove *again* at trial in order to make out their case on the merits.

- 7 In a pattern-or-practice case, the plaintiff tries to “establish by a preponderance of the evidence that ... discrimination was the company's standard operating procedure[,] the regular rather than the unusual practice.” *Teamsters v. United States*, 431 U.S. 324, 358, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977); see also *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 772, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976). If he succeeds, that showing will support a rebuttable inference that all **class** members were victims of the discriminatory practice, and will justify “an award of prospective relief,” such as “an injunctive order against the continuation of the discriminatory practice.” *Teamsters, supra*, at 361, 97 S.Ct. 1843.
- 8 Bielby's conclusions in this case have elicited criticism from the very scholars on whose conclusions he relies for his social-framework analysis. See Monahan, Walker, & Mitchell, [Contextual Evidence of Gender Discrimination: The Ascendancy of “Social Frameworks,”](#) 94 *Va. L.Rev.* 1715, 1747 (2008) (“[Bielby's] research into conditions and behavior at **Wal-Mart** did not meet the standards expected of social scientific research into stereotyping and discrimination”); *id.*, at 1745, 1747 (“[A] social framework necessarily contains only general statements about reliable patterns of relations among variables ... and goes no further .... Dr. Bielby claimed to present a social framework, but he testified about social facts specific to **Wal-Mart**”); *id.*, at 1747–1748 (“Dr. Bielby's report provides no verifiable method for measuring and testing any of the variables that were crucial to his conclusions and reflects nothing more than Dr. Bielby's ‘expert judgment’ about how general stereotyping research applied to all managers across all of **Wal-Mart's** stores nationwide for the multi-year **class** period”).
- 9 The dissent says that we have adopted “a rule that a discrimination claim, if accompanied by anecdotes, must supply them in numbers proportionate to the size of the **class**.” *Post*, at 2563, n. 4 (GINSBURG, J., concurring in part and dissenting in part). That is not quite accurate. A discrimination claimant is free to supply as few anecdotes as he wishes. But when the claim is that a company operates under a general policy of discrimination, a few anecdotes selected from literally millions of employment decisions prove nothing at all.
- 10 For this reason, there is no force to the dissent's attempt to distinguish *Falcon* on the ground that in that case there were “‘no common questions of law or fact’ between the claims of the lead plaintiff and the applicant **class**” *post*, at 2565 – 2566, n. 7 (quoting *Falcon*, 457 U.S., at 162, 102 S.Ct. 2364 (BURGER, C.J., concurring in part and dissenting in part)). Here also there is nothing to unite all of the plaintiffs' claims, since (contrary to the dissent's contention, *post*, at 2565 – 2566, n. 7), the same employment practices do not “touch and concern all members of the **class**.”
- 11 [Rule 23\(b\)\(1\)](#) applies where separate **actions** by or against individual **class** members would create a risk of “establish[ing] incompatible standards of conduct for the party opposing the **class**,” [Rule 23\(b\)\(1\)\(A\)](#), such as “where the party is obliged by law to treat the members of the **class** alike,” *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 614, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997), or where individual adjudications “as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests,” [Rule 23\(b\)\(1\)\(B\)](#), such as in “‘limited fund’ cases, ... in which numerous persons make claims against a fund insufficient to satisfy all claims,” *Amchem, supra*, at 614, 117 S.Ct. 2231.
- 1 The plaintiffs requested [Rule 23\(b\)\(3\)](#) certification as an alternative, should their request for (b)(2) certification fail. Plaintiffs' Motion for **Class** Certification in No. 3:01–cv–02252–CRB (ND Cal.), Doc. 99, p. 47.
- 2 [Rule 23\(a\)](#) lists three other threshold requirements for **class-action** certification: “(1) the **class** is so numerous that joinder of all members is impracticable”; “(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**.” The numerosity requirement is clearly met and **Wal-Mart** does not contend otherwise. As the Court does not reach the typicality and adequacy requirements, *ante*, at 2551, n. 5, I will not discuss them either, but will simply record my agreement with the District Court's resolution of those issues.
- 3 The Court suggests [Rule 23\(a\)\(2\)](#) must mean more than it says. See *ante*, at 2550 – 2552. If the word “questions” were taken literally, the majority asserts, plaintiffs could pass the [Rule 23\(a\)\(2\)](#) bar by “[r]eciting ... questions” like “Do all of us plaintiffs indeed work

- for **Wal-Mart?**” *Ante*, at 2551. Sensibly read, however, the word “questions” means disputed issues, not any utterance crafted in the grammatical form of a question.
- 4 The majority purports to derive from *Teamsters v. United States*, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977), a rule that a discrimination claim, if accompanied by anecdotes, must supply them in numbers proportionate to the size of the **class**. *Ante*, at 17–18. *Teamsters*, the Court acknowledges, see *ante*, at 2556, n. 9, instructs that statistical evidence alone may suffice, 431 U.S., at 339, 97 S.Ct. 1843; that decision can hardly be said to establish a numerical floor before anecdotal evidence can be taken into account.
- 5 The Court asserts that Drogin showed only average differences at the “regional and national level” between male and female employees. *Ante*, at 2555 (internal quotation marks omitted). In fact, his regression analyses showed there were disparities *within* stores. The majority’s contention to the contrary reflects only an arcane disagreement about statistical method—which the District Court resolved in the plaintiffs’ favor. 222 F.R.D. 137, 157 (N.D.Cal.2004). Appellate review is no occasion to disturb a trial court’s handling of factual disputes of this order.
- 6 An example vividly illustrates how subjective decisionmaking can be a vehicle for discrimination. Performing in symphony orchestras was long a male preserve. Goldin and Rouse, *Orchestrating Impartiality: The Impact of “Blind” Auditions on Female Musicians*, 90 Am. Econ. Rev. 715, 715–716 (2000). In the 1970’s orchestras began hiring musicians through auditions open to all comers. *Id.*, at 716. Reviewers were to judge applicants solely on their musical abilities, yet subconscious bias led some reviewers to disfavor women. Orchestras that permitted reviewers to see the applicants hired far fewer female musicians than orchestras that conducted blind auditions, in which candidates played behind opaque screens. *Id.*, at 738.
- 7 The Court places considerable weight on *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982). *Ante*, at 2553. That case has little relevance to the question before the Court today. The lead plaintiff in *Falcon* alleged discrimination evidenced by the company’s failure to promote him and other Mexican–American employees and failure to hire Mexican–American applicants. There were “no common questions of law or fact” between the claims of the lead plaintiff and the applicant **class**. 457 U.S., at 162, 102 S.Ct. 2364 (Burger, C. J., concurring in part and dissenting in part) (emphasis added). The plaintiff–employee alleged that the defendant–employer had discriminated against him intentionally. The applicant **class** claims, by contrast, were “advanced under the ‘adverse impact’ theory,” *ibid.*, appropriate for facially neutral practices. “[T]he only commonality [wa]s that respondent is a Mexican–American and he seeks to represent a **class** of Mexican–Americans.” *Ibid.* Here the same practices touch and concern all members of the **class**.
- 8 “A **class action** may be maintained if Rule 23(a) is satisfied and if:
- “(1) prosecuting separate **actions** by or against individual **class** members would create a risk of ... inconsistent or varying adjudications ... [or] adjudications with respect to individual **class** members that, as a practical matter, would be dispositive of the interests of the other members ...;
  - “(2) the party opposing the **class** has acted or refused to act on grounds that apply generally to the **class**, so that final injunctive relief ... is appropriate respecting the **class** as a whole; or
  - “(3) 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. Rule Civ. Proc. 23(b)* (paragraph breaks added).
- 9 Cf. *supra*, at 2545 (**Rule 23(a)** commonality prerequisite satisfied by “[e]ven a single question ... common to the members of the **class**” (quoting Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 Colum. L.Rev. 149, 176, n. 110 (2003)).

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

United States Court of Appeals  
Fifth Circuit

**FILED**

March 29, 2013

Lyle W. Cayce  
Clerk

\_\_\_\_\_  
No. 12-40271  
\_\_\_\_\_

In the Matter of: TWL CORPORATION,

Debtor

\_\_\_\_\_  
FRANK TETA,

Appellant

v.

MICHELLE CHOW,

Appellee

\_\_\_\_\_  
Appeal from the United States District Court  
for the Eastern District of Texas  
\_\_\_\_\_

Before KING, SOUTHWICK, and GRAVES, Circuit Judges.

KING, Circuit Judge:

TWL Corporation and its primary subsidiary, TWL Knowledge Group, Inc., filed for bankruptcy in 2008. Appellant Frank Teta, a former TWL employee, commenced a class action adversary proceeding within TWL's bankruptcy suit, alleging violations of the Worker Adjustment and Retraining Notification Act, 29 U.S.C. §§ 2101–2109. The bankruptcy court denied Teta's related motion for class certification and dismissed the adversary proceeding. The district court affirmed. Because the reasons for the bankruptcy court's order

No. 12-40271

are unclear, we VACATE the orders below and REMAND to the district court to remand to the bankruptcy court for reconsideration in light of this opinion.

### I. FACTUAL AND PROCEDURAL BACKGROUND

Prior to filing for bankruptcy, TWL Corporation and its primary subsidiary, TWL Knowledge Group, Inc. (collectively “TWL”), were in the business of providing workplace learning, training, and certification programs. Appellant Frank Teta served as a vice president of TWL. On September 8, 2008, TWL allegedly laid off the majority of its workforce, including Teta. On October 19, 2008, TWL filed a voluntary petition for bankruptcy under Chapter 11.<sup>1</sup> The bar date for filing proofs of claim against TWL was February 19, 2009.

On November 4, 2008, Teta filed within TWL’s bankruptcy case a complaint against TWL, thereby initiating the adversary proceeding underlying this appeal. In that complaint, Teta—who claims to be acting on behalf of himself and other terminated employees—alleges that TWL violated the Worker Adjustment and Retraining Notification Act (“WARN Act”), 29 U.S.C. §§ 2101–2109, by failing to give its employees sixty days written notice of their termination.<sup>2</sup> Teta seeks to recover for himself and the class sixty days of wages and benefits under the Act. He asserts that such claims are entitled to be paid as administrative claims under 11 U.S.C. § 503(b)(1)(A) or, alternatively, as priority unsecured claims under § 507(a)(4) and (5). TWL moved to dismiss Teta’s adversary complaint on February 9, 2009.

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<sup>1</sup> Although each entity filed its own petition, the bankruptcy court has jointly administered the cases. For the sake of convenience, we therefore refer to the cases and their associated duplicative filings and rulings in the singular.

<sup>2</sup> “The WARN Act prohibits employers from ordering a ‘plant closing or mass layoff until the end of a 60-day period after the employer serves written notice’ of the closing or layoff to its employees.” *Hollowell v. Orleans Reg’l Hosp. LLC*, 217 F.3d 379, 382 (5th Cir. 2000) (quoting 29 U.S.C. § 2102(a)). Employers who violate the Act’s notice provision are required to provide “back pay for each day of violation.” 29 U.S.C. § 2104(a)(1)(A).

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In addition to the aforementioned adversary complaint, Teta also filed, on February 18, 2009, a class proof of claim against TWL on behalf of all former TWL employees. The same day, Teta filed a motion seeking class certification<sup>3</sup> and an order naming Teta as the lead plaintiff.<sup>4</sup> On March 23, 2009, the bankruptcy court granted a motion filed by Teta to stay consideration of the class proof of claim until the court ruled on TWL's motion to dismiss the adversary proceeding. At the parties' request, the court abated the adversary proceeding until October 6, 2009. The hearing on the motion to dismiss and the request for class certification subsequently was continued several times because the parties informed the court that they did not wish to proceed with the adversary proceeding until the size of the estate was determined.

In the meantime, because TWL's reorganization efforts were unsuccessful, the court converted the bankruptcy case to Chapter 7 and appointed Appellee Michelle Chow ("Trustee") as trustee of the estate. The last day to file proofs of claim in the converted case was December 10, 2010. Creditors ultimately filed 86 claims against the estate of TWL Corporation, and 107 claims against TWL Knowledge Group, Inc. According to the bankruptcy court's estimation, only 34 of those claims were filed by individuals, of which, fewer than 20 appeared to relate to unpaid wages, salaries, or commissions.

On March 23, 2011, the bankruptcy court denied Teta's motion for class certification and granted the Trustee's motion to dismiss the adversary proceeding.<sup>5</sup> The district court affirmed the bankruptcy court's order *in toto* on February 13, 2012. Teta now appeals.

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<sup>3</sup> It is unclear whether Teta's motion was filed in his adversary proceeding, his class claim, or both. The court's order clearly is directed, however, to his adversary proceeding.

<sup>4</sup> Also on February 18, 2009, Teta filed an individual proof of claim for \$5,472.77 in unreimbursed expenses and 401k plan contributions.

<sup>5</sup> After her appointment, the Trustee assumed administration of the case.

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## II. STANDARD OF REVIEW

We apply the same standard of review to the bankruptcy court's decision as applied by the district court. *In re Amco Ins.*, 444 F.3d 690, 694 (5th Cir. 2006). We thus review class certification decisions for abuse of discretion. *In re Wilborn*, 609 F.3d 748, 752 (5th Cir. 2010). A bankruptcy court abuses its discretion when it applies an improper legal standard or rests its decision on findings of fact that are clearly erroneous. *In re Babcock & Wilcox Co.*, 526 F.3d 824, 826 (5th Cir. 2008). Whether the lower court applied the correct legal standard in reaching its decision on class certification is a legal question that we review de novo. *Allison v. Citgo Petrol. Corp.*, 151 F.3d 402, 408 (5th Cir. 1998).<sup>6</sup>

## III. ANALYSIS

At the outset, we underscore the limited scope of this appeal. In particular, while Teta filed a class proof of claim against TWL, that matter is not currently before us, and we expressly decline to address the merits of that claim. Rather, this appeal concerns only the bankruptcy court's order denying Teta's class certification motion in his adversary proceeding, and its related dismissal of that proceeding. Teta submits that the bankruptcy court abused its discretion by applying an improper legal standard to the class certification question. To fully appreciate Teta's objections, a brief discussion of the bankruptcy court's order, and the federal bankruptcy rules implicated by it, is warranted.

### A. The Bankruptcy Court's Order

In denying class certification, the bankruptcy court held that Teta did not satisfy Rule 23's numerosity and superiority requirements. With respect to numerosity, the court observed that "[e]ven if all 130 members of the putative class elected to pursue WARN Act claims—which seems unlikely given their lack

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<sup>6</sup> We do not discuss with particularity our standard of review for the bankruptcy court's dismissal of Teta's adversary proceeding. As we explain in Part III.D, the bankruptcy court did not clearly articulate its rationale for dismissing Teta's adversary proceeding.

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of participation in the claims allowance process to date—that number certainly would be manageable.” This conclusion was informed by the court’s finding that, although each putative plaintiff could have asserted WARN Act claims “simply by filling out a proof of claim form,” none had done so. Because the bar date for filing proofs of claim already had passed on two occasions, the court explained that “class certification would negate the bar date by permitting those who missed the deadline to interpose claims into [the] case without establishing . . . excusable neglect.” Moreover, the court expressed that “the expense of allowing [the] adversary proceeding to go forward so that Teta can offer certain creditors a third bite at the proverbial apple is a factor that weighs against class certification.” This fact seemed especially weighty to the court, given its conclusion that “[e]ven without considering Teta’s WARN Act claims,” TWL’s estate was “insufficient to pay all of [its] creditors in full.” Thus, the court held that “under the facts of this case, Teta has failed to establish the numerosity required to prosecute a class claim.”

As for superiority, the court explained that it was unconvinced “that a class action would be a ‘superior method’ of adjudication as required by Rule 23(b)(3).” The court stated that the “Bankruptcy Code already concentrates any WARN Act claims in [the bankruptcy court] by requiring former employees to seek allowance of such claims in order to share in any distribution from [TWL’s estate].” Accordingly, the court concluded that “it would be a waste of [TWL’s] limited assets to move forward with [the] adversary proceeding when Teta is the only individual who has asserted a timely WARN Act claim, and the claims process can more expeditiously move Teta’s claims down a parallel track.”

Aside from these general references to the parallel proofs of claim process, the bankruptcy court did not offer an explanation for its decision to grant the Trustee’s motion to dismiss Teta’s adversary proceeding.

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## B. Applicable Bankruptcy Rules

The court issued its order against the backdrop of the procedural rules governing a bankruptcy case. Those rules provide that once a debtor files a bankruptcy petition, a creditor may file a “proof of claim” to establish a claim against the debtor. Fed. R. Bankr. P. 3002. If objected to, the proof of claim becomes a “contested matter.” Fed. R. Bankr. P. 9014 advisory committee’s note (“Whenever there is an actual dispute, other than an adversary proceeding, . . . the litigation to resolve that dispute is a contested matter.”). An “adversary proceeding,” on the other hand, is a *lawsuit* filed within the bankruptcy case. See Fed. R. Bankr. P. 7001; see also 10 Collier on Bankruptcy ¶ 7001.01 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2010) (“Adversary proceedings are separate lawsuits within the context of a particular bankruptcy case and have all the attributes of a lawsuit . . .”). Adversary proceedings are initiated with the filing of a complaint. Fed. R. Bankr. P. 7003; Fed. R. Civ. P. 3.

Pursuant to Rule 7023—which falls within Part VII of the Federal Bankruptcy Rules—Rule 23 of the Federal Rules of Civil Procedure “applies in adversary proceedings.”<sup>7</sup> Fed. R. Bankr. P. 7023. Thus, “[i]n an appropriate situation, class adversary proceedings may be commenced in a bankruptcy case provided that the requirements of the various subdivisions of Rule 23 are satisfied.” 10 Collier on Bankruptcy ¶ 7023.01; see also *In re Wilborn*, 609 F.3d at 754 (“[C]lass action proceedings are expressly allowed in the Federal Bankruptcy Rules, which provide that the requirements for class actions under Federal Rule of Civil Procedure 23 apply in adversary proceedings.”).

Rule 23 does not necessarily apply, however, to a class proof of claim. First, our circuit has not addressed whether a *class* proof of claim even is

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<sup>7</sup> “Part VII of the Federal Rules of Bankruptcy Procedure applies to litigated matters that arise during the pendency of a bankruptcy case and that are denoted adversary proceedings.” 10 Collier on Bankruptcy ¶ 7000 (footnote omitted).

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permissible. Second, Rule 9014, which governs contested matters, provides that only certain procedural rules automatically apply when an objection is lodged to a proof of claim. *See* Fed. R. Bankr. P. 9014. Rule 7023 is not designated as one of these automatically applicable rules, but Rule 9014 does state that “[t]he court *may* at any stage in a particular matter direct that one or more of the other rules in Part VII shall apply.” Fed. R. Bankr. P. 9014 (emphasis added).

Given this discretion, Rule 23’s operation in contested matters involves a two-step process. 10 Collier on Bankruptcy ¶ 7023.01. “First, the court must exercise its discretion [under Rule 9014] as to whether to apply Rule 23 to the contested proceeding.” *Id.* Second, if the court decides to apply Rule 23, it then must determine whether the Rule’s requirements for class certification have been satisfied. *Id.* In considering whether to apply Rule 23 in the first instance:

the court will consider a variety of factors relating to the bankruptcy case. These include: (1) whether the class was certified pre-petition, (2) whether the members of the putative class received notice of the bar date, and (3) whether class certification will adversely affect the administration of the case, especially if the proposed litigation would cause undue delay.

*Id.* The court also may consider the benefits and costs of class litigation to the estate. *In re Computer Learning Ctrs., Inc.*, 344 B.R. 79, 86 (Bankr. E.D. Va. 2006).

There is thus a distinction between Rule 23’s operation in an adversary proceeding and its operation in the claims process. In an adversary proceeding, Rule 23 is automatically applicable: “there is no need to seek its application as is required in the claims allowance process.” *Id.* at 92 n.17. In contrast, although Rule 23 perhaps may be applicable within the proofs of claim process, under Rule 9014, the bankruptcy court has discretion whether to authorize its application to a proof of claim.

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### **C. Class Certification**

With this foundation in mind, we turn to Teta's challenge to the bankruptcy court's denial of class certification. In essence, Teta contends that instead of simply analyzing the class certification issue under Rule 23, the bankruptcy court improperly "based its decision to deny certification on a body of discretionary determinations under Rule 9014, none of which have any bearing on class certification in adversary proceedings."

We agree with Teta that the bankruptcy court appears at times to have erroneously conflated rules applicable in an adversary proceeding with those applicable in a contested matter. Nevertheless, under de novo review, we reject Teta's ultimate contention that it is impermissible for a bankruptcy court addressing a class certification motion under Rule 23 to consider, among other relevant matters, factors related to the bankruptcy case. As we will discuss, however, in this instance, although the bankruptcy court adopted the proper legal standard in assessing Rule 23's superiority requirement, it failed to explain with sufficient particularity its rationale for denying class certification. Accordingly, we must remand for the court to enter the specific findings of fact and conclusions of law necessary to support the order it issues on remand. *See Westwego Citizens for Better Gov't v. City of Westwego*, 872 F.2d 1201, 1204 (5th Cir. 1989).

#### **1. Rule 23's Requirements**

Rule 23 states that class actions may be maintained if:

(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.

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Fed. R. Civ. P. 23(a). Additionally, the suit must fit into one of the three categories set forth in Rule 23(b)—one of which, as relevant here, requires that the court “find[] 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). “By its terms [Rule 23] creates a categorical rule entitling a plaintiff whose suit meets the specified criteria to pursue his claim as a class action.” *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1437 (2010); *see also id.* at 1438 (rejecting defendant’s assertion that a court has discretion whether to certify a class where the Rule’s requirements are met).

In this case, the bankruptcy court concluded that Teta failed to satisfy the numerosity and superiority prongs of Rule 23. Because “a plaintiff’s request for class certification must fail if any one of Rule 23’s requirements is not met,” we address these requirements in turn. *Vizena v. Union Pac. R.R. Co.*, 360 F.3d 496, 503 n.1 (5th Cir. 2004) (per curiam).

## 2. Numerosity

Under Rule 23(a)(1), a class action is proper where “the class is so numerous that joinder of all members is impracticable.” Fed. R. Civ. P. 23(a)(1). On this score, Teta argues that we previously have held that a putative class of 100 to 150 members “is within the range that generally satisfies the numerosity requirement.” *Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 624 (5th Cir. 1999). Teta neglects, however, that we also explained in *Mullen* that “the number of members in a proposed class is not determinative of whether joinder is impracticable.” *Id.*

Indeed, leading commentators note that “there is no definite standard as to what size class satisfies Rule 23(a)(1).” 7A Charles Alan Wright et al., *Federal Practice and Procedure* § 1762 (3d ed. 2005) (collecting cases in which

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numerosity was satisfied with as few as 25 putative class members, but not satisfied with as many as 350, and explaining that this inconsistency “graphically demonstrates that caution should be exercised in relying on a case as a precedent simply because it involves a class of a particular size”). For this reason, we have counseled that “courts must not focus on sheer numbers alone.” *Pederson v. La. State Univ.*, 213 F.3d 858, 868 n.11 (5th Cir. 2000). Rather, assessing numerosity also entails consideration of “the geographical dispersion of the class, the ease with which class members may be identified, the nature of the action, and the size of each plaintiff’s claim.” *Zeidman v. J. Ray McDermott & Co.*, 651 F.2d 1030, 1038 (5th Cir. Unit A July 1981); *see also* William B. Rubenstein, 1 Newberg on Class Actions § 3:12 (5th ed. 2012) (explaining that courts also consider “judicial economy arising from the avoidance of a multiplicity of actions”); *accord Robidoux v. Celani*, 987 F.2d 931, 936 (2d Cir. 1993).

Here, the bankruptcy court recognized that the putative class contained 130 members. Nonetheless, for the reasons set forth in Part III.A, it found this number insufficient to satisfy Rule 23’s numerosity requirement. Like Teta, we question whether some of the considerations cited by the court have any bearing on whether Teta satisfied Rule 23’s numerosity requirement.<sup>8</sup> We do note, however, that, given *Zeidman*’s direction that a court addressing a class certification motion must consider the “nature of the action” at issue, 651 F.2d at 1038, we cannot accept his more general argument that bankruptcy-related factors have no role to play in a bankruptcy court’s consideration of a class certification motion.

Here, for instance, the bankruptcy court expressly noted that “[e]ven if all 130 members of the putative class elected to pursue WARN Act claims—which

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<sup>8</sup> Nevertheless, as we explain *infra*, certain of these factors may influence a court’s superiority inquiry.

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seems unlikely given their lack of participation in the claims allowance process to date—that number certainly would be manageable.” While the putative members’ lack of participation in the claims process does not appear to be relevant to Rule 23’s numerosity analysis for reasons that will be discussed *infra*, the court’s reference to the size of the class certainly is. Outside the bankruptcy context, a putative class with only 130 members already might present a close question as to numerosity, depending on the particular circumstances of the case. *See Jaynes v. United States*, 69 Fed. Cl. 450, 454–55 (Fed. Cl. 2006) (finding that a class with as many as 258 putative members failed to satisfy numerosity because the class members all had worked in the same area and easily could be identified and located). Within the bankruptcy context, because “[i]t is not unusual for large numbers of claims to be filed, objected to and allowed or disallowed,” even larger putative classes may not be so numerous as to make joinder impracticable. *In re Woodmoor Corp.*, 4 B.R. 186, 189 (Bankr. D.Colo. 1980) (concluding that Rule 23’s numerosity requirement was not satisfied where putative class consisted of approximately 900 members, because their proofs of claims, which were then pending before the court, could “be conveniently and expeditiously managed by following normal bankruptcy procedures”); *see also In re First Magnus Fin. Corp.*, 403 B.R. 659, 663–64 (D. Ariz. 2009) (affirming the dismissal of a WARN Act adversary proceeding with a putative class of over 5,000 members because “the normal bankruptcy claims procedure was adequate to handle the claims”).

As Teta correctly points out, however, it is not possible on the record before us to determine to what extent the court’s numerosity ruling was influenced by these permissible factors, and to what extent it may have been influenced by factors that are irrelevant to whether joinder was impracticable. Thus, because we are unable to affirm the orders below on the bankruptcy court’s numerosity analysis, we turn to its consideration of Rule 23’s superiority requirement.

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### 3. Superiority

Under Rule 23(b)(3), a court must find “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).

The matters pertinent to these findings include:

(A) the class members’ interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action.

*Id.* “[T]his list is not meant to be exhaustive and the court has discretion to consider whatever other factors it deems relevant to the determination.”<sup>9</sup> 7AA Charles Alan Wright et al., *Federal Practice and Procedure* § 1777 (3d ed. 2005).

Here, for the reasons explained in Part III.A, the court held that it was unconvinced that “a class action would be a ‘superior’ method of adjudication as required by Rule 23(b)(3).” Again, Teta complains that the court’s order evidences that the court erred by considering discretionary bankruptcy-related factors relevant under Rule 9014, but not relevant under Rule 7023 or, by incorporation, Rule 23. In advancing this argument, however, Teta unduly limits the factors a bankruptcy court must consider when analyzing Rule 23’s

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<sup>9</sup>Thus, to the extent Judge Graves implies that we endorse anything other than a “pure Rule 23 analysis,” we reject that notion. To the contrary, we merely hold that bankruptcy-related factors are relevant *as part of* a bankruptcy court’s Rule 23 analysis. We therefore similarly reject, as other courts have, Judge Graves’s suggestion that Rule 23(b)(3)(A)–(D) exhaustively lists the considerations pertinent to a court’s superiority analysis. *See, e.g., Esplin v. Hirschi*, 402 F.2d 94, 98 n.7 (10th Cir. 1968), *cert. denied*, 394 U.S. 928 (1969) (explaining that a court assessing the predominance and superiority requirements “is directed to weigh four *non-exhaustive* factors” (emphasis added)); *see also* Fed. R. Civ. P. 23(b)(3) advisory committee’s note to 1966 amendment (“Factors (A)–(D) are listed, *non-exhaustively*, as pertinent to the [predominance and superiority] findings.” (emphasis added)).

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superiority requirement.

In requiring a court to find “that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy,” Fed. R. Civ. P. 23(b)(3), Rule 23 necessarily suggests a comparative process, *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1023 (9th Cir. 1998). This plain reading of the Rule is reinforced by an associated advisory committee’s note, which states that the court “ought to assess the relative advantages of alternative procedures for handling the total controversy.” Fed. R. Civ. P. 23(b)(3) advisory committee’s note to 1966 amendment. “As is the case with Rule 23(b)(3) generally, the superiority analysis is fact-specific and will vary depending on the circumstances of any given case.” *Robertson v. Monsanto Co.*, 287 F. App’x 354, 361 (5th Cir. 2008) (per curiam) (unpublished).

Within a bankruptcy case, a leading authority suggests that the superiority inquiry assumes added import: “Comparison should be made with respect to the requirements of treating the action as a class suit with the advantages and disadvantages that could result from prosecution of the claims by other means, especially in the bankruptcy context.” 10 Collier on Bankruptcy ¶ 7023.03[3]. For this reason, it is notable that certain bankruptcy-related factors—including “whether class certification will adversely affect the administration of the case”—are “relevant to, and have been considered in the determination of, whether the requirements of Rule 23 have been met.” *Id.* ¶ 7023.01. In *Computer Learning Centers*, for example, the court concluded that, in that case, a class action was not superior “to the ordinary operation of [the related] bankruptcy case.” 344 B.R. at 92 (addressing a class proof of claim).

In our view, a bankruptcy court *should* consider the cost to the debtor’s estate of a class adversary proceeding simply because the expense of adjudicating the controversy via a class action depletes the debtor’s assets, which in turn diminishes the funding available to creditors, including, possibly,

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the very claimants pursuing the class action.<sup>10</sup> Such a consideration is particularly relevant in a case such as this, a Chapter 7 bankruptcy with insufficient assets to pay existing creditors. As a corollary, we also conclude that a bankruptcy court *should* consider the availability and ease of the proof of claim process when determining whether a class adversary proceeding is a superior method for fairly and efficiently adjudicating a controversy.<sup>11</sup> A court's consideration of bankruptcy-related factors not only generally serves to inform its assessment of the comparative merits of one adjudication method over another, but in a case like this—where a comparable class proof of claim has been filed—assessing these factors also is perfectly in keeping with Rule 23's requirement that the court consider “the extent and nature of any litigation concerning the controversy already begun by or against class members.” Fed. R. Civ. P. 23(b)(3)(B). As the court here explained, it may well be the case in the bankruptcy context that “the claims process can more expeditiously move [a claimant's] claims down a parallel track.”

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<sup>10</sup> We note, however, that it would be error for a bankruptcy court to neglect other important factors related to the superiority inquiry by placing too much emphasis on the cost to the estate of the class proceeding.

<sup>11</sup> On this score, the Trustee emphasizes the simple and inexpensive nature of the claims process. The claims form is a mere three pages in length, including instructions. *See* Official Bankruptcy Form B-10, Proof of Claim. Moreover, aside from postage, there is no fee incurred to file a proof of claim. *See* 28 U.S.C. § 1930. In contrast, counsel's fee in a class adversary proceeding is derived from the class members' recovery. Thus, although Judge Graves is correct that counsel's fee does not deplete the bankrupt's estate, it nevertheless reduces a claimant's ultimate recovery. Counsel's fee is therefore an expense that the bankruptcy court properly may consider in analyzing Rule 23's superiority requirement, because filing a proof of claim (class or otherwise) may be a more efficient and cost-effective method for a claimant to collect on a claim. *See First Magnus* 403 B.R. at 663–64 (affirming the dismissal of a WARN Act adversary proceeding because “the adversarial process was duplicative of the normal bankruptcy claims procedure” and “the normal bankruptcy claims procedure was adequate to handle the claims”).

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Our conclusion that a bankruptcy court assessing Rule 23's superiority prong may take into account certain bankruptcy-related factors is not to say, of course, that a class adversary proceeding never can be superior. As will be clear from the following discussion, the facts presented in each particular situation must be assessed on a case-by-case basis to determine whether the requirements of Rule 23 have been met. We simply say that, here, the bankruptcy court adopted the correct legal standard in assessing Rule 23's superiority prong.

#### **4. Application of the Proper Legal Standard**

Having determined that the bankruptcy court did not improperly consider bankruptcy-related factors in assessing Rule 23's superiority prong, we must now resolve whether, in this case, it abused its discretion in denying class certification. We begin with the premise that "superiority analysis requires an understanding of the relevant claims, defenses, facts, and substantive law presented in the case." *Maldonado v. Ochsner Clinic Found.*, 493 F.3d 521, 525 (5th Cir. 2007) (internal quotation marks omitted). As noted, this class adversary proceeding concerns a claim pressed under the WARN Act. To prove a WARN Act claim, a plaintiff must demonstrate that: (1) the defendant was "an employer"; (2) the defendant ordered a "plant closing" or "mass layoff"; (3) the defendant failed to give to the plaintiff sixty days notice of the closing or layoff; and (4) the plaintiff is an "aggrieved" or "affected" employee.<sup>12</sup> 29 U.S.C. §§ 2102, 2104. If a plaintiff establishes these requirements, the employer may avoid liability by proving that it qualifies for the Act's "faltering company" exemption, or that the closing or layoff resulted from "unforeseen business circumstances" or a "natural disaster." *See* 20 C.F.R. § 639.9.

Here, the bankruptcy court generally acknowledged these elements of, and defenses to, a WARN Act claim. However, it entered no findings or conclusions

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<sup>12</sup> "Employer," "plant closing," "mass layoff," and "affected employee" are all terms defined by the Act. 29 U.S.C. § 2101.

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as to the relative complexity, in this case, of adjudicating the claims. There is no indication in the court's order, for instance, of whether the Trustee has or intends to assert any defenses, and, if so, whether those defenses are colorable. This is significant because if defenses are to be asserted, the need for attorneys both to assert the claims and to defend against them becomes greater and, in spite of the associated costs, may be important to the ability of the claimants to recover and of the debtor to defend.<sup>13</sup> On the other hand, if the Trustee does not intend to assert any defenses, it may be the case that resolution of the claims would be relatively uncomplicated and inexpensive.<sup>14</sup> Nevertheless, we simply have no insight into these and related matters, as the only explanation the court provided for its superiority holding was the conclusory declaration that "it would be a waste of [TWL's] limited assets to move forward with [the] adversary proceeding when Teta is the only individual who has asserted a timely WARN Act claim, and the claims process can more expeditiously move Teta's claims down a parallel track."

With just this conclusory statement to rely on, "we are unable to determine . . . the thought processes of the court below." *Velasquez v. City of Abilene*, 725 F.2d 1017, 1021 (5th Cir. 1984). "When because of absence of findings of fact or conclusions of law, an appellate court cannot determine whether the record supports the [lower] court decision, it should remand the action for entry of findings of fact and conclusions of law." *Vizena*, 360 F.3d at 503 (quoting

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<sup>13</sup> With this in mind, we underscore that we agree with Judge Graves that the Trustee's litigation costs may deplete the estate, and we thus conclude that a bankruptcy court properly may consider the effect of those costs when assessing Rule 23's superiority prong.

<sup>14</sup> Although Judge Graves correctly observes that the Trustee has filed an objection to Teta's class proof of claim, as we already have explained, that claim currently is not before us, and we express no view as to its merits. We note, however, that contrary to Judge Graves's suggestion, the fact that the Trustee has objected to Teta's class proof of claim sheds no light on the complexities that may be introduced into this adversary proceeding were the Trustee to assert an affirmative defense to the underlying WARN Act claim.

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*Complaint of Ithaca Corp.*, 582 F.2d 3, 4 (5th Cir. 1978)). Accordingly, we must vacate the orders below and remand for entry of these necessary findings and conclusions.

### **5. The Pending Class Proof of Claim**

Although, as noted, we are unable on this record to affirm the bankruptcy court's order, Teta advances an additional argument urging us to reverse that is not necessarily dependent on the absent findings and conclusions. Specifically, Teta implies that by declining to reverse the court's denial of class certification in the adversary proceeding, we effectively foreclose any right the putative class members may have to recover under the WARN Act. In reaching this conclusion, Teta speculates that because the bankruptcy court denied class certification in the adversary proceeding, we may infer that it will do so again on remand, and that it will do the same in connection with the class proof of claim. Teta posits that denial of class certification in connection with the proof of claim is especially likely given the broader discretion the court has under Bankruptcy Rule 9014 to deny class certification in contested matters.

While Teta's arguments are not facially without force, we ultimately do not share his concern. First, with this opinion, we vacate the bankruptcy court's denial of class certification in the adversary proceeding. While we offer no view as to how the bankruptcy court should resolve that matter on remand, we cannot assume—as adoption of Teta's argument would require—that it necessarily will once again deny class certification in the adversary proceeding. Moreover, although we likewise take no position on the propriety of Teta's class proof of claim, we nevertheless are unwilling to conclude that the court necessarily will prevent that claim from moving forward. The bankruptcy court has yet to rule on that matter, and it would be improper for us to speculate about what the court *might* do in relation thereto.

Further, even assuming that the bankruptcy court again denies

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certification in the adversary proceeding, and also finds the class proof of claim impermissible, the rights of putative class members associated with that proof of claim seemingly would be protected by the reasoning underlying *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983). There, the Supreme Court explained that “[t]he filing of a class action tolls the statute of limitations ‘as to all asserted members of the class.’” *Id.* at 350 (quoting *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 554 (1974)). Applying this reasoning in the bankruptcy context, a sister circuit has explained that if a “bankruptcy court denies [a class certification] motion, it should then establish a reasonable time within which the individual putative class members are allowed to file individual proofs of claim.” *Gentry v. Siegel*, 668 F.3d 83, 91 (4th Cir. 2012); *see also In re Am. Reserve Corp.*, 840 F.2d 487, 493 (7th Cir. 1988) (“If the bankruptcy judge denies the request to certify a class, then each creditor must file an individual proof of claim . . .”).

“Stated otherwise, by recognizing class actions, the Bankruptcy Rules also recognize that putative class representatives can keep the class action process alive until the court decides the issue.” *Gentry*, 668 F.3d at 90; *see also Sheftelman v. Standard Metals Corp.*, 839 F.2d 1383, 1387 (10th Cir. 1987) (per curiam) (leaving unresolved “the class action claims issue,” but requiring instead that notice be given to the putative class members, and that a new bar date be established to allow them to file individual proofs of claim); *In re Entergy New Orleans, Inc.*, 353 B.R. 474, 483–84 (Bankr. E.D. La. 2006) (discussing the complicated issues surrounding notice when a class proof of claim is denied after the bar date has passed, and when “most if not all of the putative class members are likely unaware that they have a potential claim,” but eventually resolving the case on other grounds). Thus, although the bankruptcy court appears repeatedly to fault the putative class members for not filing individual claims, Teta’s class proof of claim—which was filed well prior to the bar date—was filed on their behalf, and therefore appears to preserve their claims pending

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resolution of the class certification issue.<sup>15</sup>

However, because Teta's class proof of claim currently is not before us, we need not resolve these matters. We raise them merely to explain our rationale for rejecting Teta's contention that, by declining to reverse the orders below, we effectively foreclose any right the putative class members may have to recovery. As is evident, to the extent the putative class members have viable WARN Act claims, they also appear to have multiple avenues by which they may press those claims. We leave to the bankruptcy court, in the first instance, the determination of how those claims should be addressed.

#### **D. Dismissal of the Adversary Proceeding**

As explained, the bankruptcy court also granted the Trustee's motion to dismiss Teta's adversary proceeding. Unfortunately, the court's findings and conclusions as to why it did so are even more bare than those associated with its treatment of Teta's class certification motion. In fact, the only line the court's ten-page order that even peripherally addresses the court's dismissal states: "Similar to *In re First Magnus Financial Corp.*, . . . the [c]ourt believes it would be a waste of [TWL's] limited assets to move forward with this adversary proceeding when Teta is the only individual who has asserted a timely WARN Act claim, and the claims process can more expeditiously move Teta's claims down a parallel track."

Although the bankruptcy court's order does not indicate on what basis the Trustee sought dismissal of Teta's adversary proceeding, the record is clear that the related motion was filed pursuant to Federal Rule of Civil Procedure 12(b)(6)

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<sup>15</sup> Judge Graves similarly contends that "[n]o former employee other than Teta filed a WARN Act proof of claim, indicating that the interest of putative class members in individually controlling the case would be low." Again, this neglects that Teta's class proof of claim obviated the need for other individuals to file their own claims at this point in the litigation.

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for failure to state a claim.<sup>16</sup> Nevertheless, nothing in the court's order offers insight into why it agreed that Teta's adversary complaint failed to state a claim for relief, or why dismissal otherwise was proper. *Cf. In re Dewey & LeBoeuf LLP*, No. 12-12321 (MG), 2013 WL 556163, at \*4 (Bankr. S.D.N.Y. Feb. 13, 2013) (explaining that an adversary complaint seeking class WARN Act claims stated a claim for relief because "it assert[ed] that the Debtor terminated Plaintiff and other employees in the month before the bankruptcy filing, and it allege[d] that Debtor failed to comply with the WARN Acts' notice requirements").

Moreover, the bankruptcy court's citation to *First Magnus* is less helpful than might at first might be apparent. In *First Magnus*, the court dismissed the adversary complaint pursuant to Rule 41(b) rather than Rule 12(b)(6). 403 B.R. at 663; *see also* Fed. R. Civ. P. 41(b) ("If the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it."). There is thus no evidence to indicate that the *First Magnus* court believed the complaint there did not state a claim for relief, nor is there evidence here to suggest that Teta failed to prosecute his claim, or failed to comply with applicable rules or court orders.

Thus, we again are left without adequate findings of fact and conclusions of law by which we may determine whether the record supports the bankruptcy court's dismissal of Teta's adversary complaint. We therefore are compelled to vacate the orders below insofar as those orders granted the Trustee's motion to dismiss Teta's adversary proceeding. *See Vizena*, 360 F.3d at 503.

#### IV. CONCLUSION

Because the reasons for the bankruptcy court's order are unclear, we VACATE *in toto* the orders below and REMAND to the district court to remand to the bankruptcy court for reconsideration in light of this opinion. We express

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<sup>16</sup> Federal Rule of Civil Procedure 12(b)(6) is made applicable to adversary proceedings by Bankruptcy Rule 7012(b). *See* Fed. R. Bankr. P. 7012(b).

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no view as to the outcome the bankruptcy court should reach on remand in reconsidering Teta's motion for class certification and the Trustee's motion to dismiss the adversary proceeding.

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JAMES E. GRAVES, JR., Circuit Judge, concurring in the judgment only:

I would reverse the district court's affirmance of the bankruptcy court's denial of class certification and dismissal of this class adversary proceeding. Nevertheless, I concur in the judgment insofar as it requires the bankruptcy court to reconsider its holding.

In its Federal Rule of Civil Procedure 23 “numerosity” and “superiority” analyses,<sup>1</sup> the bankruptcy court erred as a matter of law in applying bankruptcy-related factors such as the expense to the estate in litigating a class adversary proceeding.<sup>2</sup> There is a distinction between: (a) the necessity of the district court's strict adherence to Rule 23's “specified criteria”<sup>3</sup> in class *adversary proceedings*; and (b) the district court's discretionary ability to consider other factors under Federal Rule of Bankruptcy Procedure 9014 in contested matters, which include *proofs of claim*. The Eleventh Circuit has explained this distinction in simple terms: “Rule 23 may be invoked in two circumstances: in

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<sup>1</sup> As relevant to this case, Rule 23 states that class actions may be maintained if: “the class is so numerous that joinder of all members is impracticable,” Fed. R. Civ. P. 23(a)(1) (numerosity), and “a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.” Fed. R. Civ. P. 23(b)(3) (superiority). The following enumerated factors are to be considered in the “superiority” analysis:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action. Fed. R. Civ. P. 23(b)(3).

<sup>2</sup> Of course, in determining whether to certify a class adversary proceeding, it is impossible to avoid considering some factors related to the bankruptcy—Teta filed this adversary proceeding in the midst of TWL's Chapter 7 bankruptcy proceeding. Therefore, I use the term “bankruptcy-related factors” to specifically reference factors unrelated to those four factors enumerated in Rule 23(b)(3)(A)-(D), as well as factors that are not applicable under Rule 23(a)(1).

<sup>3</sup> *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1437 (2010) (Scalia, J.) (“By its terms [Rule 23] creates a categorical rule entitling a plaintiff whose suit meets the specified criteria to pursue his claim as a class action.”).

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an adversary proceeding and in a contested matter. Pursuant to the terms of Bankruptcy Rule 7023, Rule 23 applies in any adversary proceeding. Also, under Bankruptcy Rule 9014, the bankruptcy judge may at his discretion apply Bankruptcy Rule 7023, and by extension Rule 23, in a contested matter.” *In re Charter Co.*, 876 F.2d 866, 873 (11th Cir. 1989).

Indeed, the Supreme Court has held that Rule 23 “says that if the prescribed preconditions [i.e. Rule 23’s specified criteria] are satisfied ‘a class action *may be maintained*’ (emphasis added)—not ‘a class action *may be permitted*.’” *Shady Grove Orthopedic Assocs.*, 130 S. Ct. at 1438 (2010). The Court continued, “[c]ourts do not maintain actions; litigants do. The discretion suggested by Rule 23’s ‘may’ is discretion residing in the plaintiff: He may bring his claim in a class action if he wishes.” *Id.* Here, even the Trustee appears to have acknowledged that the bankruptcy court lacks discretion to consider criteria unrelated to the enumerated Rule 23 factors in its class certification determination of this adversary proceeding:

Court: “In making the determination about whether or not to certify a class, are you saying that’s not a *pure* Rule 23 analysis in a bankruptcy proceeding?”

Trustee: “In a lawsuit [i.e. bankruptcy adversary proceeding], it is a *pure* Rule 23 analysis.”

Oral Argument at 31:50.

As Judge King correctly recognizes, we are called to adjudicate the denial of class certification in the WARN Act adversary proceeding, not the WARN Act class proof of claim. Therefore, it is undisputed that this requires a pure Rule 23 analysis. Considering bankruptcy-related factors such as the expense to the estate in litigating a class adversary proceeding is a departure from a pure Rule 23 analysis because those factors fall outside of Rule 23’s “specified criteria” of, *inter alia*, the four factors enumerated in Rule 23(b)(3)(A)-(D). The bankruptcy court thus erred as a matter of law.

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## I.

Following a pure Rule 23 analysis, I would reverse the bankruptcy court's denial of class certification. Because Judge King bases her holding on the Rule 23(b)(3) "superiority" analysis, I focus on that.<sup>4</sup>

Judge King's opinion explicitly addresses only one of the four enumerated Rule 23(b)(3) "superiority" factors: "the extent and nature of any litigation concerning the controversy already commenced by or against members of the class." Fed. R. Civ. P. 23(b)(3)(B). This factor supports class certification. The related WARN Act class proof of claim was simply filed as a precautionary measure, and bankruptcy courts have held that the class adversary proceeding is a preferable way to adjudicate WARN Act claims, as opposed to the proof of claim process. *See, e.g., In re Taylor Bean & Whitaker Mortg. Corp.*, 2010 WL 4025873, \*3 (Bankr. M.D. Fla. Sept. 27, 2010) (unpublished) ("resolving the WARN Act claims collectively through a class action adversary proceeding will be more efficient than handling them in a piece-meal fashion through the claims process."); *In re First NLC Fin. Servs., LLC*, 410 B.R. 726, 730 (Bankr. S.D. Fla.

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<sup>4</sup> The Rule 23(a) "numerosity" analysis also favors class certification of this adversary proceeding. Judge King is correct that courts "must not focus on sheer numbers alone" in determining whether joinder is impracticable. *Pederson v. Louisiana State Univ.*, 213 F.3d 858, 868 (5th Cir. 2000) (citations omitted). Nevertheless, we have ruled that a class of "100 to 150 members [] is within the range that generally satisfies the numerosity requirement." *Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 624 (5th Cir. 1999) (citation omitted). Moreover, the putative class here contains 130 plaintiffs, and bankruptcy and district courts—including at least one court in our circuit—have certified WARN Act classes of between 50 to 160 putative plaintiffs. *See, e.g., Grimmer v. Lord Day & Lord*, 1996 WL 139649, \*11-12 (S.D.N.Y. 1996) (unpublished) (certifying WARN class of 92); *Finnan v. L.F. Rothschild & Co., Inc.*, 726 F. Supp. 460, 465 (S.D.N.Y. 1989) (certifying WARN class of 127); *In re CQMS Razer (U.S.), LLC*, Ch. 7 Case No. 11-13291, Adv. Pro. No. 12-01003 (Bankr. W.D. La. Oct. 2, 2012) (certifying class of approximately 160 and approving WARN Act settlement); *In re Spring Ford Indus., Inc.*, 2004 WL 231010, \*6 (Bankr. E.D. Pa. Jan. 20, 2004) (unpublished) (holding that "alleged class size of 150 to 270 terminated employees clearly meets the greater-than-forty requirement of [the Third] [C]ircuit."); *In re Kaiser Group Int'l, Inc.*, 278 B.R. 58, 64 (Bankr. D. Del. 2002) (certifying WARN class of 47). This putative class fits well within that range.

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2008) (“if the class is certified, the Court finds that as between an adversary proceeding and the claims process, an adversary proceeding has the potential to provide a less protracted and more efficient litigation framework.”).

Lending further weight for class certification under this factor, the Bankruptcy Court for the Southern District of Texas has held that the “greatest indication that a class action [adversary proceeding] would be superior to other available methods of adjudication” is a “negative value suit.” *In re Wilborn*, 404 B.R. 841, 868 (Bankr. S.D. Tex. 2009) (citations omitted), *vacated on other grounds*, 609 F.3d 748 (5th Cir. 2010)<sup>5</sup>; *see also In re Charter Co.*, 876 F.2d at 871 (“[T]he effort and cost of investigating and initiating a claim may be greater than many claimants’ individual stake in the outcome, discouraging the prosecution of these claims absent a class action filing procedure.”); Collier on Bankruptcy ¶ 7023.03(3) (Alan N. Resnick & Henry J. Sommer eds., 16th ed.) (“It could be economically impossible for each class member to proceed on an individual basis.”). Since this is clearly a “negative value suit”—the cost to each worker to litigate his or her own WARN Act proof of claim would almost certainly outweigh the value of the claim<sup>6</sup>—it only makes sense to pursue the claims as a class in an adversary proceeding.

Additionally, the Bankruptcy Court for the Southern District of Florida has explained why the class adversary proceeding is more efficient and fairer to putative WARN Act class members than the proof of claim process: “resolution of the WARN Act claims will be expedited and handled more efficiently in a class adversary proceeding because [it] will also require the Trustee to state any objections to claims that she may have more promptly than would be required

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<sup>5</sup> “A negative value suit is a case in which the costs of enforcement in an individual action would exceed the expected individual recovery.” *Id.* (quotations omitted).

<sup>6</sup> Teta asserts that each individual claim would be minimal—“60 days wages is all, it’s a couple of thousand dollars for most people.” Oral Argument at 8:12.

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in the normal claims objection process.” *In re First NLC Fin. Services, LLC*, 410 B.R. at 730. Even in a *class* proof of claim, which Judge King concedes may not even be available in this circuit, the trustee would still be able to delay consideration of the class proof of claim to the detriment of the putative WARN Act creditors,<sup>7</sup> while a class adversary proceeding would require the trustee to consider the claim earlier.

Each of the other three enumerated Rule 23(b)(3) “superiority” factors also supports class certification of the adversary proceeding. The first factor, “the interest of members of the class in individually controlling the prosecution or defense of separate actions,” Fed. R. Civ. P. 23(b)(3)(A), favors class certification. No former employee other than Teta filed a WARN Act proof of claim, indicating that the interest of putative class members in individually controlling the case would be low. The second factor, discussed above, falls in favor of class certification. As for the third factor, “the desirability or undesirability of concentrating the litigation of the claims in the particular forum,” Fed. R. Civ. P. 23(b)(3)(C), no one disputes the propriety of concentrating the litigation of the claims in the bankruptcy court. And the fourth factor, “the difficulties likely to be encountered in the management of a class action,” Fed. R. Civ. P. 23(b)(3)(D), supports class certification because, as further discussed below, WARN Act claims are especially well-suited for class treatment. *Gomez v. Am. Garment Finishers Corp.*, 200 F.R.D. 579, 584-85 (W.D. Tex. 2000) (holding that there is no manageability problem related to the class in a WARN Act claim); *see also Finnian v. L.F. Rothschild & Co., Inc.*, 726 F. Supp. 460, 465 (S.D.N.Y. 1989) (“The WARN Act seems particularly amenable to class litigation.”).

## II.

Assuming *arguendo* that it is proper to consider the bankruptcy-related

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<sup>7</sup> As discussed below, however, the Trustee here has already objected to the WARN Act class proof of claim for the very reason that a class proof of claim is not allowed in this circuit.

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factors stated by Judge King in determining whether Rule 23(b)(3)'s "superiority" requirement is satisfied, those factors also weigh in favor of granting class certification of this adversary proceeding. Among the bankruptcy-related factors Judge King deems appropriate for consideration are: (1) the cost to the debtor's estate of a class adversary proceeding, and (2) class counsel's fee in a class adversary proceeding.

With respect to the cost to the debtor's estate, courts have recognized that treating WARN Act claims as a class adversary proceeding actually is the *best* way to preserve the estate's assets. In granting class certification of a WARN Act adversary proceeding, the Bankruptcy Court for the Northern District of Alabama wrote "it is in the best interests of the putative class members, judicial economy, and *even [the debtor's estate]* to an extent to adjudicate these matters in one single action." *In re Bill Heard Enters., Inc.*, 400 B.R. 795, 803 (Bankr. N.D. Ala. 2009) (emphasis added). The court continued, "principles of judicial economy and preservation of the bankruptcy estate require this Court to select one of the adversary proceedings to resolve the WARN Act claims rather than allowing each of the actions involving the same claims to proceed." *Id.* at 804 (citing *In re Protected Vehicles, Inc.*, 397 B.R. 339, 346 (Bankr. S.C. 2008)). Indeed, the expense of litigating multiple proofs of claim, not to mention the costs the Trustee has already incurred in fighting these relatively low-value WARN Act claims, appear to present more of a risk of unnecessarily depleting the estate's assets than anything else.

There is no need to remand the case for the bankruptcy court to enter its findings of fact and conclusions of law on the relative complexity of adjudicating the claims, including "whether the Trustee has or intends to assert any defenses." The Trustee has *already* complicated the WARN Act class proof of claim, as demonstrated by the following three defenses she has asserted to the class proof of claim: (1) "class claims are not allowed in bankruptcy," *In re TWL*

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*Corp.*, Ch. 7 Case No. 08-42773, Brief in Support of Trustee's Objection to Teta's WARN Act Class Proof of Claim 3, Bankr. E.D. Tex. ECF No. 401; (2) even if class claims were allowed, Teta did not timely file for class treatment of the WARN Act claim, *id.* at 5-6; and (3) even if class claims were allowed, the WARN Act class claim should be disallowed for the very same reasons the bankruptcy court denied class certification of this adversary proceeding (numerosity and superiority), *id.* at 6-11. These defenses are material to the class certification analysis in this WARN Act adversary proceeding because they attest to the superiority of the class adversary proceeding over the proof of claims process.<sup>8</sup>

The Trustee's defenses will require attorneys to litigate the issues, especially since Judge King's opinion acknowledges that the class proof of claim may not even be an option. Workers cannot be expected to proceed *pro se* in the claims process and Teta's counsel, which has litigated roughly 100 WARN Act cases, states that individually-filed WARN Act claims are simply unheard of. Appellant's Reply Br. at 6; Oral Argument at 14:50. Indeed, as this case has demonstrated with only one individual WARN Act proof of claim filed, the average worker that has just lost his or her job does not read a bankruptcy court's notice to creditors and decide to file a WARN Act proof of claim. If he or she can decipher the language of the notice, she would then need to: (1) be familiar with the WARN Act, which is nowhere referenced in the notice; (2) know that she has a potential WARN Act claim and navigate the proof of claim form; and (3) be prepared to litigate the claim when her former employer's estate contests it. This may be a reasonable expectation of commercial creditors, but for an ordinary worker owed a few thousand dollars in back wages, it is a formidable task.

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<sup>8</sup> Moreover, the Trustee's first defense—that the class proof of claim is not even an option for Teta—lends further support to adjudicating the WARN Act claims as a class adversary proceeding, which the Trustee concedes is permissible.

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With respect to class counsel's fee in an adversary proceeding, the fee does not deplete the assets in the bankruptcy estate. The class counsel's fee derives from any funds awarded to class members, and is not awarded in addition to the damages that the estate pays to the class members. If anything, then, the only fees depleting the estate's assets are those charged by the Trustee and her attorneys.

### III.

Class WARN Act filings in bankruptcy are not new, and while some courts have opted to adjudicate them through the bankruptcy claims process, just as many or more have found the class adversary proceeding a superior adjudication structure for the reasons articulated above. *See* 2 Employee and Union Member Guide to Labor Law § 10:14 (Labor and Employment Law Committee, National Lawyers Guild 2012) (surveying courts' recent treatment of WARN Act class filings; "WARN Act claims are very often handled by bankruptcy courts in adversary proceedings, though some courts have dismissed adversary proceedings in favor of adjudication through the bankruptcy claim allowance/disallowance process.").

I would reverse the denial of class certification and dismissal of the adversary proceeding because, under a pure Rule 23 analysis or even applying bankruptcy-related factors, joinder would be impracticable and the class adversary proceeding would be the superior way to handle the putative plaintiffs' WARN Act claims. Nevertheless, I concur in the judgment insofar as it requires the bankruptcy court to reconsider its denial of class certification.

2013 WL 1222646

Only the Westlaw citation is currently available.  
Supreme Court of the United States

**COMCAST** CORPORATION, et al., Petitioners

v.

Caroline BEHREND et al.

No. 11–864. | Argued Nov. 5, 2012. | Decided March 27, 2013.

### Synopsis

**Background:** Customers brought antitrust class action against cable television company, alleging that company obtained monopoly via transactions with competitors for allocation of regional cable markets and that company engaged in conduct excluding and preventing competition. The United States District Court for the Eastern District of Pennsylvania, John R. Padova, J., [264 F.R.D. 150](#), certified class, and company appealed. The United States Court of Appeals for the Third Circuit, Aldisert, Circuit Judge, [655 F.3d 182](#), affirmed. Certiorari was granted.

**[Holding:]** The Supreme Court, Justice [Scalia](#), held that regression model developed by plaintiffs' expert could not be accepted as evidence that damages were susceptible of measurement across entire class, as required for certification of class on theory that questions of law or fact common to class members predominated over any questions affecting only individual members.

Reversed.

Justices [Ginsburg](#) and [Breyer](#) dissented and filed opinion, in which Justices [Sotomayor](#) and [Kagan](#) joined.

West Headnotes (9)

[1] **Federal Civil Procedure** 🔑 [Class Actions](#)

Class action is exception to usual rule that litigation is conducted by and on behalf of individual named parties only. [Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.](#)

[2] **Federal Civil Procedure** 🔑 [Evidence; Pleadings and Supplementary Material](#)

Party seeking to maintain class action must affirmatively demonstrate his compliance with Federal Rule of Civil Procedure governing class litigation. [Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.](#)

[3] **Federal Civil Procedure** 🔑 [Factors, Grounds, Objections, and Considerations in General](#)

**Federal Civil Procedure** 🔑 [Evidence; Pleadings and Supplementary Material](#)

Federal Rule of Civil Procedure governing class litigation does not set forth mere pleading standard; rather, party seeking to maintain class action must not only be prepared to prove that there are in fact sufficiently numerous parties, common questions of law or fact, typicality of claims or defenses, and adequacy of representation, as required by first

subsection of the Rule, but must also satisfy through evidentiary proof at least one provision of second subsection. [Fed.Rules Civ.Proc.Rule 23\(a, b\)](#), 28 U.S.C.A.

[4] **Federal Civil Procedure** 🔑 [Consideration of Merits](#)

Analysis as to whether requirements for class certification are met will frequently entail overlap with merits of plaintiff's underlying claim, since class determination generally involves considerations that are enmeshed in factual and legal issues comprising plaintiff's cause of action. [Fed.Rules Civ.Proc.Rule 23](#), 28 U.S.C.A.

[5] **Federal Civil Procedure** 🔑 [Common Interest in Subject Matter, Questions and Relief; Damages Issues](#)

Provision of Federal Rule of Civil Procedure authorizing certification of class when, inter alia, questions of law or fact common to class members predominated over any questions affecting only individual members is an adventuresome innovation, that is designed for situations in which class-action treatment is not as clearly called for. [Fed.Rules Civ.Proc.Rule 23\(b\)\(3\)](#), 28 U.S.C.A.

[1 Cases that cite this headnote](#)

[6] **Federal Civil Procedure** 🔑 [Common Interest in Subject Matter, Questions and Relief; Damages Issues](#)

**Federal Civil Procedure** 🔑 [Evidence; Pleadings and Supplementary Material](#)

**Federal Civil Procedure** 🔑 [Consideration of Merits](#)

In deciding whether damages were capable of measurement on classwide basis, as required for certification of class upon theory that questions of law or fact common to class members predominated over any questions affecting only individual members, lower court should not have refused to entertain arguments against damages model designed by plaintiffs' expert simply because those arguments would also be pertinent to the merits determination. [Fed.Rules Civ.Proc.Rule 23\(b\)\(3\)](#), 28 U.S.C.A.

[7] **Federal Civil Procedure** 🔑 [Evidence; Pleadings and Supplementary Material](#)

**Federal Civil Procedure** 🔑 [Antitrust Plaintiffs](#)

Regression model that attempted to calculate what competitive price would have been for cable television services in relevant market if market contained none of the four anticompetitive impacts that plaintiffs attributed to cable television provider's conduct, on assumption that claims based on each of these anticompetitive impacts would be accepted for class certification, and with no attempt to measure the damages attributable to each such impact, could not, in case in which district court accepted only one antitrust impact as capable of classwide proof, be accepted as evidence that damages as result of this impact were susceptible of measurement across entire class, as required for certification of class on theory that questions of law or fact common to class members predominated over any questions affecting only individual members. [Fed.Rules Civ.Proc.Rule 23\(b\)\(3\)](#), 28 U.S.C.A.

[1 Cases that cite this headnote](#)

[8] **Federal Civil Procedure** 🔑 [Common Interest in Subject Matter, Questions and Relief; Damages Issues](#)

**Federal Civil Procedure** 🔑 [Evidence; Pleadings and Supplementary Material](#)

Model purporting to serve as evidence of damages in class action must measure only those damages attributable to plaintiffs' theory of liability; if model does not even attempt to do that, it cannot possibly establish that damages are susceptible of measurement across entire class, as required for certification of class on theory that questions of law

or fact common to class members predominated over any questions affecting only individual members. [Fed.Rules Civ.Proc.Rule 23\(b\)\(3\)](#), 28 U.S.C.A.

[3 Cases that cite this headnote](#)

[9] **Federal Civil Procedure** 🔑 **Antitrust Plaintiffs**

While damages calculations did not need to be exact in order to support determination that damages from defendant's alleged anticompetitive activity were susceptible of measurement across entire class, as required for certification of antitrust class on theory that questions of law or fact common to class members predominated over any questions affecting only individual members, any model supporting plaintiffs' damages case had to be consistent with its liability case, particularly with respect to alleged anticompetitive effect of violation, and district court, in deciding whether to certify class, had to conduct rigorous analysis to determine whether that was so. [Fed.Rules Civ.Proc.Rule 23\(b\)\(3\)](#), 28 U.S.C.A.

[3 Cases that cite this headnote](#)

*Syllabus* \*

\*1 Petitioners, **Comcast** Corporation and its subsidiaries, allegedly “cluster” their cable television operations within a particular region by swapping their systems outside the region for competitor systems inside the region. Respondents, named plaintiffs in this class-action antitrust suit, claim that they and other **Comcast** subscribers in the Philadelphia “cluster” are harmed because **Comcast's** strategy lessens competition and leads to supra-competitive prices. They sought class certification under [Federal Rule of Civil Procedure 23\(b\)\(3\)](#), which requires that “questions of law or fact common to class members predominate over any questions affecting only individual members.” The District Court required them to show (1) that the “antitrust impact” of the violation could be proved at trial through evidence common to the class and (2) that the damages were measurable on a classwide basis through a “common methodology.” The court accepted only one of respondents' four proposed theories of antitrust impact: that **Comcast's** actions lessened competition from “overbuilders,” *i.e.*, companies that build competing networks in areas where an incumbent cable company already operates. It then certified the class, finding that the damages from overbuilder deterrence could be calculated on a classwide basis, even though respondents' expert acknowledged that his regression model did not isolate damages resulting from any one of respondents' theories. In affirming, the Third Circuit refused to consider petitioners' argument that the model failed to attribute damages to overbuilder deterrence because doing so would require reaching the merits of respondents' claims at the class certification stage.

*Held* : Respondents' class action was improperly certified under [Rule 23\(b\)\(3\)](#). Pp. — — —.

(a) A party seeking to maintain a class action must be prepared to show that [Rule 23\(a\)](#)'s numerosity, commonality, typicality, and adequacy-of-representation requirements have been met, *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. —, —, 131 S.Ct. 2541, 180 L.Ed.2d 374, and must satisfy through evidentiary proof at least one of [Rule 23\(b\)](#)'s provisions. The same analytical principles govern certification under both [Rule 23\(a\)](#) and [Rule 23\(b\)](#). Courts may have to “ ‘probe behind the pleadings before coming to rest on the certification question,’ and [a] certification is proper only if ‘the trial court is satisfied, after a rigorous analysis, that [[Rule 23](#)]'s prerequisites ... have been satisfied.’ ” *Ibid.* The analysis will frequently “overlap with the merits of the plaintiff's underlying claim” because a “ ‘class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action.’ ” *Ibid.* Pp. — — —.

(b) The Third Circuit ran afoul of this Court's precedents when it refused to entertain arguments against respondents' damages model that bore on the propriety of class certification simply because they would also be pertinent to the merits determination.

If they prevail, respondents would be entitled only to damages resulting from reduced overbuilder competition. A model that does not attempt to measure only those damages attributable to that theory cannot establish that damages are susceptible of measurement across the entire class for Rule 23(b)(3) purposes. The lower courts' contrary reasoning flatly contradicts this Court's cases, which require a determination that Rule 23 is satisfied, even when that requires inquiry into the merits of the claim. *Wal-Mart, supra*, at —, and n. 6, 131 S.Ct. 2541. Pp. — — —.

(c) Under the proper standard for evaluating certification, respondents' model falls far short of establishing that damages can be measured classwide. The figure respondents' expert used was calculated assuming the validity of all four theories of antitrust impact initially advanced by respondents. Because the model cannot bridge the differences between supra-competitive prices in general and supra-competitive prices attributable to overbuilder deterrence, Rule 23(b)(3) cannot authorize treating subscribers in the Philadelphia cluster as members of a single class. Pp. — — —.

\*2 655 F.3d 182, reversed.

SCALIA, J., delivered the opinion of the Court, in which ROBERTS, C.J., and KENNEDY, THOMAS, and ALITO, JJ., joined. GINSBURG and BREYER, JJ., filed a dissenting opinion, in which SOTOMAYOR and KAGAN, JJ., joined.

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#### Opinion

Justice SCALIA delivered the opinion of the Court.

The District Court and the Court of Appeals approved certification of a class of more than 2 million current and former Comcast subscribers who seek damages for alleged violations of the federal antitrust laws. We consider whether certification was appropriate under Federal Rule of Civil Procedure 23(b)(3).

#### I

Comcast Corporation and its subsidiaries, petitioners here, provide cable-television services to residential and commercial customers. From 1998 to 2007, petitioners engaged in a series of transactions that the parties have described as “clustering,” a strategy of concentrating operations within a particular region. The region at issue here, which the parties have referred to as the Philadelphia “cluster” or the Philadelphia “Designated Market Area” (DMA), includes 16 counties located in Pennsylvania, Delaware, and New Jersey.<sup>1</sup> Petitioners pursued their clustering strategy by acquiring competitor cable providers in the region and swapping their own systems outside the region for competitor systems located in the region. For instance, in 2001, petitioners obtained Adelphia Communications' cable systems in the Philadelphia DMA, along with its 464,000 subscribers; in exchange, petitioners sold to Adelphia their systems in Palm Beach, Florida, and Los Angeles, California. As a result of nine clustering

transactions, petitioners' share of subscribers in the region allegedly increased from 23.9 percent in 1998 to 69.5 percent in 2007. See 264 F.R.D. 150, 156, n. 8, 160 (E.D.Pa.2010).

The named plaintiffs, respondents here, are subscribers to Comcast's cable-television services. They filed a class-action antitrust suit against petitioners, claiming that petitioners entered into unlawful swap agreements, in violation of § 1 of the Sherman Act, and monopolized or attempted to monopolize services in the cluster, in violation of § 2. Ch. 647, 26 Stat. 209, as amended, 15 U.S.C. §§ 1, 2. Petitioners' clustering scheme, respondents contended, harmed subscribers in the Philadelphia cluster by eliminating competition and holding prices for cable services above competitive levels.

\*3 Respondents sought to certify a class under Federal Rule of Civil Procedure 23(b)(3). That provision permits certification only if “the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members.” The District Court held, and it is uncontested here, that to meet the predominance requirement respondents had to show (1) that the existence of individual injury resulting from the alleged antitrust violation (referred to as “antitrust impact”) was “capable of proof at trial through evidence that [was] common to the class rather than individual to its members”; and (2) that the damages resulting from that injury were measurable “on a class-wide basis” through use of a “common methodology.” 264 F.R.D., at 154.<sup>2</sup>

Respondents proposed four theories of antitrust impact: First, Comcast's clustering made it profitable for Comcast to withhold local sports programming from its competitors, resulting in decreased market penetration by direct broadcast satellite providers. Second, Comcast's activities reduced the level of competition from “overbuilders,” companies that build competing cable networks in areas where an incumbent cable company already operates. Third, Comcast reduced the level of “benchmark” competition on which cable customers rely to compare prices. Fourth, clustering increased Comcast's bargaining power relative to content providers. Each of these forms of impact, respondents alleged, increased cable subscription rates throughout the Philadelphia DMA.

The District Court accepted the overbuilder theory of antitrust impact as capable of classwide proof and rejected the rest. *Id.*, at 165, 174, 178, 181. Accordingly, in its certification order, the District Court limited respondents' “proof of antitrust impact” to “the theory that Comcast engaged in anticompetitive clustering conduct, the effect of which was to deter the entry of overbuilders in the Philadelphia DMA.” App. to Pet. for Cert. 192a–193a.<sup>3</sup>

The District Court further found that the damages resulting from overbuilder-deterrence impact could be calculated on a classwide basis. To establish such damages, respondents had relied solely on the testimony of Dr. James McClave. Dr. McClave designed a regression model comparing actual cable prices in the Philadelphia DMA with hypothetical prices that would have prevailed but for petitioners' allegedly anticompetitive activities. The model calculated damages of \$875,576,662 for the entire class. App. 1388a (sealed). As Dr. McClave acknowledged, however, the model did not isolate damages resulting from any one theory of antitrust impact. *Id.*, at 189a–190a. The District Court nevertheless certified the class.

A divided panel of the Court of Appeals affirmed. On appeal, petitioners contended the class was improperly certified because the model, among other shortcomings, failed to attribute damages resulting from overbuilder deterrence, the only theory of injury remaining in the case. The court refused to consider the argument because, in its view, such an “attac[k] on the merits of the methodology [had] no place in the class certification inquiry.” 655 F.3d 182, 207 (C.A.3 2011). The court emphasized that, “[a]t the class certification stage,” respondents were not required to “tie each theory of antitrust impact to an exact calculation of damages.” *Id.*, at 206. According to the court, it had “not reached the stage of determining on the merits whether the methodology is a just and reasonable inference or speculative.” *Ibid.* Rather, the court said, respondents must “assure us that if they can prove antitrust impact, the resulting damages are capable of measurement and will not require labyrinthine individual calculations.” *Ibid.* In the court's view, that burden was met because respondents' model calculated “supra-competitive prices regardless of the type of anticompetitive conduct.” *Id.*, at 205.

\*4 We granted certiorari. 567 U.S. —, 133 S.Ct. 24, 183 L.Ed.2d 673 (2012).<sup>4</sup>

## II

[1] [2] [3] The class action is “an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.” *Califano v. Yamasaki*, 442 U.S. 682, 700–701, 99 S.Ct. 2545, 61 L.Ed.2d 176 (1979). To come within the exception, a party seeking to maintain a class action “must affirmatively demonstrate his compliance” with Rule 23. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. —, —, 131 S.Ct. 2541, 2551–2552, 180 L.Ed.2d 374 (2011). The Rule “does not set forth a mere pleading standard.” *Ibid.* Rather, a party must not only “be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact,” typicality of claims or defenses, and adequacy of representation, as required by Rule 23(a). *Ibid.* The party must also satisfy through evidentiary proof at least one of the provisions of Rule 23(b). The provision at issue here is Rule 23(b)(3), which requires a court to find that “the questions of law or fact common to class members predominate over any questions affecting only individual members.”

[4] Repeatedly, we have emphasized that it “ ‘may be necessary for the court to probe behind the pleadings before coming to rest on the certification question,’ and that certification is proper only if ‘the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied.’ ” *Ibid.* (quoting *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 160–161, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982)). Such an analysis will frequently entail “overlap with the merits of the plaintiff’s underlying claim.” 564 U.S., at —, 131 S.Ct., at 2551. That is so because the “ ‘class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff’s cause of action.’ ” *Ibid.* (quoting *Falcon, supra*, at 160, 102 S.Ct. 2364).

[5] The same analytical principles govern Rule 23(b). If anything, Rule 23(b)(3)’s predominance criterion is even more demanding than Rule 23(a). *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 623–624, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997). Rule 23(b)(3), as an “ ‘adventuresome innovation,’ ” is designed for situations “ ‘in which “class-action treatment is not as clearly called for.” ’ ” *Wal-Mart, supra*, at —, 131 S.Ct., at 2558 (quoting *Amchem*, 521 U.S., at 614–615, 117 S.Ct. 2231). That explains Congress’s addition of procedural safeguards for (b)(3) class members beyond those provided for (b)(1) or (b)(2) class members (*e.g.*, an opportunity to opt out), and the court’s duty to take a “ ‘close look’ ” at whether common questions predominate over individual ones. *Id.*, at 615, 117 S.Ct. 2231.

## III

\*5 [6] [7] Respondents’ class action was improperly certified under Rule 23(b)(3). By refusing to entertain arguments against respondents’ damages model that bore on the propriety of class certification, simply because those arguments would also be pertinent to the merits determination, the Court of Appeals ran afoul of our precedents requiring precisely that inquiry. And it is clear that, under the proper standard for evaluating certification, respondents’ model falls far short of establishing that damages are capable of measurement on a classwide basis. Without presenting another methodology, respondents cannot show Rule 23(b)(3) predominance: Questions of individual damage calculations will inevitably overwhelm questions common to the class. This case thus turns on the straightforward application of class-certification principles; it provides no occasion for the dissent’s extended discussion, *post*, at — — — (GINSBURG and BREYER, JJ., dissenting), of substantive antitrust law.

## A

[8] [9] We start with an unremarkable premise. If respondents prevail on their claims, they would be entitled only to damages resulting from reduced overbuilder competition, since that is the only theory of antitrust impact accepted for class-action treatment by the District Court. It follows that a model purporting to serve as evidence of damages in this class action must measure only those damages attributable to that theory. If the model does not even attempt to do that, it cannot possibly establish

that damages are susceptible of measurement across the entire class for purposes of [Rule 23\(b\)\(3\)](#). Calculations need not be exact, see *Stony Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563, 51 S.Ct. 248, 75 L.Ed. 544 (1931), but at the class-certification stage (as at trial), any model supporting a “plaintiff’s damages case must be consistent with its liability case, particularly with respect to the alleged anticompetitive effect of the violation.” ABA Section of Antitrust Law, *Proving Antitrust Damages: Legal and Economic Issues* 57, 62 (2d ed. 2010); see, e.g., *Image Tech. Servs. v. Eastman Kodak Co.*, 125 F.3d 1195, 1224 (C.A.9 1997). And for purposes of [Rule 23](#), courts must conduct a “ ‘rigorous analysis’ ” to determine whether that is so. *Wal-Mart, supra*, at —, 131 S.Ct., at 2551–2552.

The District Court and the Court of Appeals saw no need for respondents to “tie each theory of antitrust impact” to a calculation of damages. 655 F.3d, at 206. That, they said, would involve consideration of the “merits” having “no place in the class certification inquiry.” *Id.*, at 206–207. That reasoning flatly contradicts our cases requiring a determination that [Rule 23](#) is satisfied, even when that requires inquiry into the merits of the claim. *Wal-Mart, supra*, at —, and n. 6, 131 S.Ct., at 2551–2552, and n. 6. The Court of Appeals simply concluded that respondents “provided a method to measure and quantify damages on a classwide basis,” finding it unnecessary to decide “whether the methodology [was] a just and reasonable inference or speculative.” 655 F.3d, at 206. Under that logic, at the class-certification stage *any* method of measurement is acceptable so long as it can be applied classwide, no matter how arbitrary the measurements may be. Such a proposition would reduce [Rule 23\(b\)\(3\)](#)’s predominance requirement to a nullity.

## B

\*6 There is no question that the model failed to measure damages resulting from the particular antitrust injury on which petitioners’ liability in this action is premised.<sup>5</sup> The scheme devised by respondents’ expert, Dr. McClave, sought to establish a “but for” baseline—a figure that would show what the competitive prices would have been if there had been no antitrust violations. Damages would then be determined by comparing to that baseline what the actual prices were during the charged period. The “but for” figure was calculated, however, by assuming a market that contained none of the four distortions that respondents attributed to petitioners’ actions. In other words, the model assumed the validity of all four theories of antitrust impact initially advanced by respondents: decreased penetration by satellite providers, overbuilder deterrence, lack of benchmark competition, and increased bargaining power. At the evidentiary hearing, Dr. McClave expressly admitted that the model calculated damages resulting from “the alleged anticompetitive conduct as a whole” and did not attribute damages to any one particular theory of anticompetitive impact. App. 189a–190a, 208a.

This methodology might have been sound, and might have produced commonality of damages, if all four of those alleged distortions remained in the case. But as Judge Jordan’s partial dissent pointed out:

“[B]ecause the only surviving theory of antitrust impact is that clustering reduced overbuilding, for Dr. McClave’s comparison to be relevant, his benchmark counties must reflect the conditions that would have prevailed in the Philadelphia DMA but for the alleged reduction in overbuilding. In all respects unrelated to reduced overbuilding, the benchmark counties should reflect the actual conditions in the Philadelphia DMA, or else the model will identify ‘damages’ that are not the result of reduced overbuilding, or, in other words, that are not the certain result of the wrong.” 655 F.3d, at 216 (internal quotation marks omitted).

The majority’s only response to this was that “[a]t the class certification stage we do not require that Plaintiffs tie each theory of antitrust impact to an exact calculation of damages, but instead that they assure us that if they can prove antitrust impact, the resulting damages are capable of measurement and will not require labyrinthine individual calculations.” *Id.*, at 206. But such assurance is not provided by a methodology that identifies damages that are not the result of the wrong. For all we know, cable subscribers in Gloucester County may have been overcharged because of petitioners’ alleged elimination of satellite competition (a theory of liability that is not capable of classwide proof); while subscribers in Camden County may have paid elevated prices because of petitioners’ increased bargaining power vis-à-vis content providers (another theory that is not capable of classwide

proof); while yet other subscribers in Montgomery County may have paid rates produced by the combined effects of multiple forms of alleged antitrust harm; and so on. The permutations involving four theories of liability and 2 million subscribers located in 16 counties are nearly endless.

\*7 In light of the model's inability to bridge the differences between supra-competitive prices in general and supra-competitive prices attributable to the deterrence of overbuilding, [Rule 23\(b\)\(3\)](#) cannot authorize treating subscribers within the Philadelphia cluster as members of a single class.<sup>6</sup> Prices whose level above what an expert deems “competitive” has been caused by factors unrelated to an accepted theory of antitrust harm are not “anticompetitive” in any sense relevant here. “The first step in a damages study is the translation of the *legal theory of the harmful event* into an analysis of the economic impact of *that event*.” Federal Judicial Center, Reference Manual on Scientific Evidence 432 (3d ed. 2011) (emphasis added). The District Court and the Court of Appeals ignored that first step entirely.

The judgment of the Court of Appeals for the Third Circuit is reversed.

*It is so ordered.*

Justice [GINSBURG](#) and Justice [BREYER](#), with whom Justice [SOTOMAYOR](#) and Justice [KAGAN](#) join, dissenting.

\*7 Today the Court reaches out to decide a case hardly fit for our consideration. On both procedural and substantive grounds, we dissent.

## I

This case comes to the Court infected by our misguided reformulation of the question presented. For that reason alone, we would dismiss the writ of certiorari as improvidently granted.

**Comcast** sought review of the following question: “[W]hether a district court may certify a class action without resolving ‘merits arguments’ that bear on [[Federal Rule of Civil Procedure](#)] 23’s prerequisites for certification, including whether purportedly common issues predominate over individual ones under [Rule 23\(b\)\(3\)](#).” Pet. for Cert. i. We granted review of a different question: “Whether a district court may certify a class action without resolving *whether the plaintiff class has introduced admissible evidence*, including expert testimony, to show that the case is susceptible to awarding damages on a class-wide basis.” 567 U.S. —, 133 S.Ct. 24, 183 L.Ed.2d 673 (2012) (emphasis added).

Our rephrasing shifted the focus of the dispute from the District Court’s [Rule 23\(b\)\(3\)](#) analysis to its attention (or lack thereof) to the admissibility of expert testimony. The parties, responsively, devoted much of their briefing to the question whether the standards for admissibility of expert evidence set out in [Federal Rule of Evidence 702](#) and [Daubert v. Merrell Dow Pharmaceuticals, Inc.](#), 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), apply in class certification proceedings. See Brief for Petitioners 35–49; Brief for Respondents 24–37. Indeed, respondents confirmed at oral argument that they understood our rewritten question to center on admissibility, not [Rule 23\(b\)\(3\)](#). See, e.g., Tr. of Oral Arg. 25.

\*8 As it turns out, our reformulated question was inapt. To preserve a claim of error in the admission of evidence, a party must timely object to or move to strike the evidence. [Fed. Rule Evid. 103\(a\)\(1\)](#). In the months preceding the District Court’s class certification order, **Comcast** did not object to the admission of Dr. McClave’s damages model under [Rule 702](#) or [Daubert](#). Nor did **Comcast** move to strike his testimony and expert report. Consequently, **Comcast** forfeited any objection to the admission of Dr. McClave’s model at the certification stage. At this late date, **Comcast** may no longer argue that respondents’ damages evidence was inadmissible.

**Comcast's** forfeiture of the question on which we granted review is reason enough to dismiss the writ as improvidently granted. See *Rogers v. United States*, 522 U.S. 252, 259, 118 S.Ct. 673, 139 L.Ed.2d 686 (1998) (O'Connor, J., concurring in result) (“[W]e ought not to decide the question if it has not been cleanly presented.”); *The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 183, 79 S.Ct. 710, 3 L.Ed.2d 723 (1959) (dismissal appropriate in light of “circumstances ... not fully apprehended at the time certiorari was granted” (internal quotation marks omitted)). The Court, however, elects to evaluate whether respondents “failed to show that the case is susceptible to awarding damages on a class-wide basis.” *Ante*, at —, n. 4 (internal quotation marks omitted). To justify this second revision of the question presented, the Court observes that **Comcast** “argued below, and continue[s] to argue here, that certification was improper because respondents had failed to establish that damages could be measured on a classwide basis.” *Ibid*. And so **Comcast** did, in addition to endeavoring to address the question on which we granted review. By treating the first part of our reformulated question as though it did not exist, the Court is hardly fair to respondents.

Abandoning the question we instructed the parties to brief does “not reflect well on the processes of the Court.” *Redrup v. New York*, 386 U.S. 767, 772, 87 S.Ct. 1414, 18 L.Ed.2d 515 (1967) (Harlan, J., dissenting). Taking their cue from our order, respondents did not train their energies on defending the District Court's finding of predominance in their briefing or at oral argument. The Court's newly revised question, focused on predominance, phrased only after briefing was done, left respondents without an unclouded opportunity to air the issue the Court today decides against them. And by resolving a complex and fact-intensive question without the benefit of full briefing, the Court invites the error into which it has fallen. See *infra*, at — — —.

## II

\*9 While the Court's decision to review the merits of the District Court's certification order is both unwise and unfair to respondents, the opinion breaks no new ground on the standard for certifying a class action under [Federal Rule of Civil Procedure 23\(b\)\(3\)](#). In particular, the decision should not be read to require, as a prerequisite to certification, that damages attributable to a classwide injury be measurable “ ‘on a class-wide basis.’ ” See *ante*, at — — — (acknowledging Court's dependence on the absence of contest on the matter in this case); Tr. of Oral Arg. 41.

To gain class-action certification under [Rule 23\(b\)\(3\)](#), the named plaintiff must demonstrate, and the District Court must find, “that the questions of law or fact common to class members predominate over any questions affecting only individual members.” This predominance requirement is meant to “tes[t] whether proposed classes are sufficiently cohesive to warrant adjudication by representation,” *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 623, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997), but it scarcely demands commonality as to all questions. See [7AA C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 1778, p. 121 \(3d ed. 2005\)](#) (hereinafter Wright, Miller, & Kane). In particular, when adjudication of questions of liability common to the class will achieve economies of time and expense, the predominance standard is generally satisfied even if damages are not provable in the aggregate. See Advisory Committee's 1966 Notes on [Fed. Rule Civ. Proc. 23](#), 28 U.S.C.App., p. 141 (“[A] fraud perpetrated on numerous persons by the use of similar misrepresentations may be an appealing situation for a class action, and it may remain so despite the need, if liability is found, for separate determination of the damages suffered by individuals within the class.”); [7AA Wright, Miller, & Kane § 1781, at 235–237.](#)\*

Recognition that individual damages calculations do not preclude class certification under [Rule 23\(b\)\(3\)](#) is well nigh universal. See 2 W. Rubenstein, *Newberg on Class Actions* § 4:54, p. 205 (5th ed. 2012) (ordinarily, “individual damage[s] calculations should not scuttle class certification under [Rule 23\(b\)\(3\)](#)”). Legions of appellate decisions across a range of substantive claims are illustrative. See, e.g., *Tardiff v. Knox County*, 365 F.3d 1, 6 (C.A.1 2004) (Fourth Amendment); *Chiang v. Veneman*, 385 F.3d 256, 273 (C.A.3 2004) (Equal Credit Opportunity Act); *Bertulli v. Independent Assn. of Continental Pilots*, 242 F.3d 290, 298 (C.A.5 2001) (Labor–Management Reporting and Disclosure Act and Railway Labor Act); *Beattie v. CenturyTel, Inc.*, 511 F.3d 554, 564–566 (C.A.6 2007) (Federal Communications Act); *Arreola v. Godinez*, 546 F.3d 788, 801 (C.A.7 2008) (Eighth Amendment). Antitrust cases, which typically involve common allegations of antitrust violation, antitrust impact, and the fact of

damages, are classic examples. See *In re Visa Check/MasterMoney Antitrust Litigation*, 280 F.3d 124, 139–140 (C.A.2 2001). See also 2A P. Areeda, H. Hovenkamp, R. Blair, & C. Durrance, *Antitrust Law* ¶ 331, p. 56 (3d ed. 2007) (hereinafter *Areeda & Hovenkamp*); 6 A. Conte & H. Newberg, *Newberg on Class Actions* § 18:27, p. 91 (4th ed. 2002). As this Court has rightly observed, “[p]redominance is a test readily met” in actions alleging “violations of the antitrust laws.” *Amchem*, 521 U.S., at 625, 117 S.Ct. 2231.

The oddity of this case, in which the need to prove damages on a classwide basis through a common methodology was never challenged by respondents, see Brief for Plaintiffs–Appellees in No. 10–2865(CA3), pp. 39–40, is a further reason to dismiss the writ as improvidently granted. The Court's ruling is good for this day and case only. In the mine run of cases, it remains the “black letter rule” that a class may obtain certification under [Rule 23\(b\)\(3\)](#) when liability questions common to the class predominate over damages questions unique to class members. 2 Rubenstein, *supra*, § 4:54, at 208.

### III

\*10 Incautiously entering the fray at this interlocutory stage, the Court sets forth a profoundly mistaken view of antitrust law. And in doing so, it relies on its own version of the facts, a version inconsistent with factual findings made by the District Court and affirmed by the Court of Appeals.

### A

To understand the antitrust problem, some (simplified) background discussion is necessary. Plaintiffs below, respondents here, alleged that **Comcast** violated §§ 1 and 2 of the Sherman Act. See 15 U.S.C. §§ 1, 2. For present purposes, the § 2 claim provides the better illustration. A firm is guilty of monopolization under § 2 if the plaintiff proves (1) “the possession of monopoly power in the relevant market” and (2) “the willful acquisition or maintenance of that power[,] as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.” *United States v. Grinnell Corp.*, 384 U.S. 563, 570–571, 86 S.Ct. 1698, 16 L.Ed.2d 778 (1966). A private plaintiff seeking damages must also show that (3) the monopolization caused “injur[y].” 15 U.S.C. § 15. We have said that antitrust injuries must be “of the type the antitrust laws were intended to prevent and that flo[w] from that which makes defendants' acts unlawful.” *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 334, 110 S.Ct. 1884, 109 L.Ed.2d 333 (1990) (quoting *Brunswick Corp. v. Pueblo Bowl–O–Mat, Inc.*, 429 U.S. 477, 489, 97 S.Ct. 690, 50 L.Ed.2d 701 (1977)). See 2A *Areeda & Hovenkamp* ¶ 391a, at 320 (To prove antitrust injury, “[a] private plaintiff must identify the economic rationale for a business practice's illegality under the antitrust laws and show that its harm flows from whatever it is that makes the practice unlawful.”).

As plaintiffs below, respondents attempted to meet these requirements by showing that (1) **Comcast** obtained a 60% or greater share of the Philadelphia market, and that its share provides it with monopoly power; (2) **Comcast** acquired its share through exclusionary conduct consisting of a series of mergers with competitors and “swaps” of customers and locations; and (3) **Comcast** consequently injured respondents by charging them supra-competitive prices.

If, as respondents contend, Philadelphia is a separate well-defined market, and the alleged exclusionary conduct permitted **Comcast** to obtain a market share of at least 60%, then proving the § 2 violation may not be arduous. As a point of comparison, the government considers a market shared by four firms, each of which has 25% market share, to be “highly concentrated.” Dept. of Justice & Federal Trade Commission, *Horizontal Merger Guidelines* § 5.3, p. 19 (2010). A market, such as the one alleged by respondents, where *one* firm controls 60% is far worse. See *id.*, § 5.3, at 18–19, and n. 9 (using a concentration index that determines a market's concentration level by summing the squares of each firm's market share, one firm with 100% yielding 10,000, five firms with 20% each yielding 2000, while a market where one firm accounts for 60% yields an index number of *at least* 3,600). The Guidelines, and any standard antitrust treatise, explain why firms in highly concentrated markets normally have the power to raise prices significantly above competitive levels. See, e.g., 2B *Areeda & Hovenkamp* ¶ 503, at 115.

**B**

\*11 So far there is agreement. But consider the last matter respondents must prove: Can they show that Comcast injured them by charging higher prices? After all, a firm with monopoly power will not necessarily exercise that power by charging higher prices. It could instead act less competitively in other ways, such as by leading the quiet life. See J. Hicks, Annual Survey of Economic Theory: The Theory of Monopoly, 3 *Econometrica* 1, 8 (1935) (“The best of all monopoly profits is a quiet life.”).

It is at this point that Dr. McClave's model enters the scene. His model first selects a group of comparable *outside*-Philadelphia “benchmark” counties, where Comcast enjoyed a lower market share (and where satellite broadcasting accounted for more of the local business). Using multiple regression analysis, McClave's model measures the effect of the anticompetitive conduct by comparing the class counties to the benchmark counties. The model concludes that the prices Philadelphia area consumers would have paid had the Philadelphia counties shared the properties of the benchmark counties (including a diminished Comcast market share), would have been 13.1% lower than those they actually paid. Thus, the model provides evidence that Comcast's anticompetitive conduct, which led to a 60% market share, caused the class to suffer injuriously higher prices.

**C****1**

The special antitrust-related difficulty present here stems from the manner in which respondents attempted to prove their antitrust injuries. They proffered four “non-exclusive mechanisms” that allegedly “cause[d] the high prices” in the Philadelphia area. App. 403a. Those four theories posit that (1) due to Comcast's acquisitions of competitors, customers found it more difficult to compare prices; (2) one set of potential competitors, namely Direct Broadcast Satellite companies, found it more difficult to obtain access to local sports broadcasts and consequently decided not to enter the Philadelphia market; (3) Comcast's ability to obtain programming material at lower prices permitted it to raise prices; and (4) a number of potential competitors (called “overbuilders”), whose presence in the market would have limited Comcast's power to raise prices, were ready to enter some parts of the market but decided not to do so in light of Comcast's anticompetitive conduct. 264 F.R.D. 150, 161–162 (E.D.Pa.2010).

For reasons not here relevant, the District Court found the first three theories inapplicable and limited the liability-phase proof to the “overbuilder” theory. See App. to Pet. for Cert. 192a–193a. It then asked the parties to brief whether doing so had any impact on the viability of McClave's model as a measure of classwide damages. See 264 F.R.D., at 190. After considering the parties' arguments, the District Court found that striking the three theories “does not impeach Dr. McClave's damages model” because “[a]ny anticompetitive conduct is reflected in the [higher Philadelphia] price [which Dr. McClave's model determines], not in the [the model's] selection of the comparison counties, [*i.e.*, the lower-price ‘benchmark counties’ with which the Philadelphia area prices were compared].” *Id.*, at 190–191. The court explained that “whether or not we accepted all [four] ... theories ... is inapposite to Dr. McClave's methods of choosing benchmarks.” *Ibid.* On appeal, the Third Circuit held that this finding was not an abuse of discretion. 655 F.3d 182, 207 (2011).

**2**

\*12 The Court, however, concludes that “the model failed to measure damages resulting from the particular antitrust injury on which petitioners' liability in this action is premised.” *Ante*, at ——. To reach this conclusion the Court must consider fact-

based matters, namely what this econometric multiple-regression model is about, what it proves, and how it does so. And it must overturn two lower courts' related factual findings to the contrary.

We are normally “reluctant to disturb findings of fact in which two courts below have concurred.” *United States v. Doe*, 465 U.S. 605, 614, 104 S.Ct. 1237, 79 L.Ed.2d 552 (1984). See also *United States v. Virginia*, 518 U.S. 515, 589, n. 5, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996) (SCALIA, J., dissenting) (noting “our well-settled rule that we will not ‘undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error’ ” (quoting *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275, 69 S.Ct. 535, 93 L.Ed. 672 (1949))). Here, the District Court found McClave's econometric model capable of measuring damages on a classwide basis, even after striking three of the injury theories. 264 F.R.D., at 190–191. Contrary to the Court's characterization, see *ante*, at ———, n. 5, this was not a legal conclusion about what the model proved; it was a factual finding about *how* the model worked. Under our typical practice, we should leave that finding alone.

In any event, as far as we can tell, the lower courts were right. On the basis of the record as we understand it, the District Court did not abuse its discretion in finding that McClave's model could measure damages suffered by the class—even if the damages were limited to those caused by deterred overbuilding. That is because respondents alleged that **Comcast's** anticompetitive conduct increased **Comcast's** market share (and market power) by deterring potential entrants, in particular, overbuilders, from entering the Philadelphia area market. See App. 43a–66a. By showing that this was so, respondents' proof tends to show the same in respect to other entrants. The overbuilders' failure to enter deprives the market of the price discipline that their entry would have provided in other parts via threat of the overbuilders' expansion or that of others potentially led on by their example. Indeed, in the District Court, **Comcast** argued that the three other theories, *i.e.*, the three rejected theories, had no impact on prices. See 264 F.R.D., at 166, 176, 180–181. If **Comcast** was right, then the damages McClave's model found must have stemmed exclusively from conduct that deterred new entry, say from “overbuilders.” Not surprisingly, the Court offers no support at all for its contrary conclusion, namely, that the District Court's finding was “ ‘obvious [ly] and exceptional[ly]’ erroneous.” *Ante*, at ———, n. 5 (quoting *Virginia*, 518 U.S., at 589, n. 5, 116 S.Ct. 2264 (SCALIA, J., dissenting)).

We are particularly concerned about the matter because the Court, in reaching its contrary conclusion, makes broad statements about antitrust law that it could not mean to apply in other cases. The Court begins with what it calls an “unremarkable premise” that respondents could be “entitled only to damages resulting from reduced overbuilder competition.” *Ante*, at ———. In most § 2 cases, however, the Court's starting place would seem *remarkable*, not “unremarkable.”

\*13 Suppose in a different case a plaintiff were to prove that Widget, Inc. has obtained, through anticompetitive means, a 90% share of the California widget market. Suppose the plaintiff also proves that the two small remaining firms—one in Ukiah, the other in San Diego—lack the capacity to expand their widget output to the point where that possibility could deter Widget, Inc. from raising its prices. Suppose further that the plaintiff introduces a model that shows California widget prices are now twice those in every other State, which, the model concludes is (after accounting for other possible reasons) the result of lack of competition in the California widget market. Why would a court hearing that case restrict damages solely to customers in the vicinity of Ukiah and San Diego?

Like the model in this example, Dr. McClave's model does not purport to show precisely *how* **Comcast's** conduct led to higher prices in the Philadelphia area. It simply shows *that* **Comcast's** conduct brought about higher prices. And it measures the amount of subsequent harm.

3

Because the parties did not fully argue the question the Court now answers, all Members of the Court may lack a complete understanding of the model or the meaning of related statements in the record. The need for focused argument is particularly strong here where, as we have said, the underlying considerations are detailed, technical, and fact-based. The Court departs from

our ordinary practice, risks inaccurate judicial decisionmaking, and is unfair to respondents and the courts below. For these reasons, we would not disturb the Court of Appeals' judgment and, instead, would dismiss the writ as improvidently granted.

## Parallel Citations

13 Cal. Daily Op. Serv. 3396

## Footnotes

- \* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.
- 1 A “Designated Market Area” is a term used by Nielsen Media Research to define a broadcast-television market. Strictly speaking, the Philadelphia DMA comprises 18 counties, not 16.
- 2 Respondents sought certification for the following class: “All cable television customers who subscribe or subscribed at any times since December 1, 1999, to the present to video programming services (other than solely to basic cable services) from Comcast, or any of its subsidiaries or affiliates in Comcast’s Philadelphia cluster.” App. 35a.
- 3 The District Court did not hold that the three alternative theories of liability failed to establish antitrust impact, but merely that those theories could not be determined in a manner common to all the class plaintiffs. The other theories of liability may well be available for the plaintiffs to pursue as individual actions. Any contention that the plaintiffs should be allowed to recover damages attributable to all four theories in this class action would erroneously suggest one of two things—either that the plaintiffs may *also* recover such damages in individual actions or that they are precluded from asserting those theories in individual actions.
- 4 The question presented reads: “Whether a district court may certify a class action without resolving whether the plaintiff class had introduced admissible evidence, including expert testimony, to show that the case is susceptible to awarding damages on a class-wide basis.” 567 U.S., at —, 133 S.Ct. 24. Respondents contend that petitioners forfeited their ability to answer this question in the negative because they did not make an objection to the admission of Dr. McClave’s testimony under the Federal Rules of Evidence. See *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). Such a forfeit would make it impossible for petitioners to argue that Dr. McClave’s testimony was not “admissible evidence” under the Rules; but it does not make it impossible for them to argue that the evidence failed “to show that the case is susceptible to awarding damages on a class-wide basis.” Petitioners argued below, and continue to argue here, that certification was improper because respondents had failed to establish that damages could be measured on a classwide basis. That is the question we address here.
- 5 The dissent is of the view that what an econometric model proves is a “question of fact” on which we will not “undertake to review concurrent findings ... by two courts below in the absence of a very obvious and exceptional showing of error.” *Post*, at — (quoting *United States v. Virginia*, 518 U.S. 515, 589, n. 5, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996) (SCALIA, J., dissenting) (internal quotation marks omitted)). To begin with, neither of the courts below found that the model established damages attributable to overbuilding alone. Second, while the data contained within an econometric model may well be “questions of fact” in the relevant sense, what those data prove is no more a question of fact than what our opinions hold. And finally, even if it were a question of fact, concluding that the model here established damages attributable to overbuilding alone would be “obvious[ly] and exceptional[ly]” erroneous.
- 6 We might add that even if the model had identified subscribers who paid more solely because of the deterrence of overbuilding, it still would not have established the requisite commonality of damages unless it plausibly showed that the extent of overbuilding (absent deterrence) would have been the same in all counties, or that the extent is irrelevant to effect upon ability to charge supra-competitive prices.
- \* A class may be divided into subclasses for adjudication of damages. *Fed. Rule Civ. Proc. 23(c)(4)–(5)*. Or, at the outset, a class may be certified for liability purposes only, leaving individual damages calculations to subsequent proceedings. See 2 W. Rubenstein, *Newberg on Class Actions* § 4:54, pp. 206–208 (5th ed. 2012). Further, a certification order may be altered or amended as the case unfolds. *Rule 23(c)(1)(C)*.