No. 18-4139

In the

United States Court of Appeals

for the

Sixth Circuit

ZEHENTBAUER FAMILY LAND, LP; HANOVER FARMS, LP; and EVELYN FRANCES YOUNG, Successor Trustee of Robert Milton Young Trust,

Plaintiffs-Appellees,

– v. –

CHESAPEAKE EXPLORATION, L.L.C.; CHESAPEAKE OPERATING, INC.; CHK UTICA, L.L.C.; and TOTAL E&P USA, INC.,

Defendants-Appellants.

On appeal from the United States District Court
for the Northern District of Ohio, Case No. 4:17-cv-2449,
Hon. Benita Y. Pearson

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS-APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Sixth Circuit Rule 26.1, the Chamber of Commerce of the United States of America states that it is a non-profit corporation organized under the laws of the District of Columbia. It has no parent corporation. No publicly held corporation owns ten percent or more of its stock.

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INTEREST OF THE *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community.

Many of the Chamber's members and affiliates are defendants in class actions. The Chamber therefore has a keen interest in ensuring that courts rigorously analyze, consistent with Federal Rule of Civil Procedure 23 and the requirements of due process, whether a plaintiff has satisfied the prerequisites for class certification before certifying a class.

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[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus*, its members, or its counsel has made any monetary contributions intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

The district court did not engage in that rigorous analysis in this case. It certified a class of over two hundred individuals and entities whom the plaintiffs allege were not paid the full amount of royalties due on almost three hundred oil-and-gas leases. The court held that Rule 23(b)(3)'s predominance requirement was satisfied based almost entirely on the presence of similar language in the leases and plaintiffs' allegation that defendants' accounting method was improper.

But those two factors do not come close to answering the question of liability to each class member—namely, whether the particular class member was underpaid royalties. Resolving that question requires a host of individualized inquiries that should have precluded class certification. And the district court's approach, if permitted to stand, would effectively remove the critical due-process safeguards for defendants and absent class members provided by Rule 23(b)(3) and greatly expand the number of cases in which businesses are improperly subjected to the inexorable settlement pressure imposed by class proceedings.

The Chamber therefore has a strong interest in reversal of the certification order below.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Supreme Court has repeatedly recognized that abuse of the class action device imposes unfair, and substantial, burdens on both absent class members and defendants, and the Court has held that Rule 23 therefore must be construed in a manner that protects against these abuses. *E.g.*, *Comcast Corp. v. Behrend*, 569 U.S. 27, 33-34 (2013); *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 363 (2011); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 629 (1997). Because class actions are an "'exception to the usual rule'" that cases are litigated individually, it is essential that courts apply a "rigorous analysis" to the requirements governing class certification before a lawsuit is approved for class treatment. *Dukes*, 564 U.S. at 349, 351 (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979)).

Those principles require reversal of the district court's grant of class certification here. The district court certified this case as a class action based on its conclusion that all class members were challenging "the propriety of the 'netback' method" for calculating the royalties due under several hundred natural gas leases. RE 123, Page ID 3850. But by both beginning and ending its analysis there, the district court stopped far short of satisfying its obligation to ensure that plaintiffs

met their burden to satisfy the "demanding" predominance requirement of Rule 23(b)(3). *Amchem*, 521 U.S. at 623-24.

The Supreme Court's teachings make clear that predominance means that common proof will answer all of the questions at the core of the plaintiffs' claims—outweighing any plaintiff-specific inquiries. If the central issues necessary to adjudicate a plaintiff's claim of liability require numerous individualized inquiries to resolve, then a Rule 23(b)(3) class may not be certified.

That is precisely the case here: assessing "the propriety of the 'netback' method" will not come close to determining whether any plaintiff was underpaid royalties. Instead, to establish a breach, a plaintiff must show that the method resulted in a price for oil and gas that was below market—*i.e.*, less than what that individual class member would have received from an arm's length transaction at the particular time at a particular wellhead (where such a transaction would take place).

This question cannot be answered on a class-wide basis. To the contrary, it is an inquiry that depends on a host of individualized factors that must be assessed to determine the market price to which the price produced by the challenged formula must be compared. That is

why the Fourth and Tenth Circuits, faced with claims nearly identical to those here, rejected the approach to predominance adopted by the district court below and found class certification improper.

Moreover, the lower court's loose approach to class certification carries significant adverse practical consequences. The failure to rigorously enforce the due process protections embodied in Rule 23(b)(3) opens the door to an increase in abusive, illegitimate class-action litigation, harming not just businesses but also their customers, employees, and investors. The Court should reverse the district court's grant of class certification.

ARGUMENT

I. THE DISTRICT COURT ERRED IN CONCLUDING THAT PLAINTIFFS SATISFIED THE PREDOMINANCE REQUIREMENT OF RULE 23(B)(3).

A. The Individualized Issues That Must Be Resolved For Any Putative Class Member To Establish Liability Overwhelm Any Common Issues.

1. "[T]he class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the named parties only.'" *Dukes*, 564 U.S. at 49 (quoting *Califano*, 442 U.S. at 700-01). District courts must therefore must engage in "a rigorous analysis" to ensure

"that the prerequisites of Rule 23[] have been satisfied" before certifying a class. *Comcast*, 569 U.S. at 33-34.

This rigorous analysis is especially critical when courts apply Rule 23(b)(3)'s requirement that "the questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). Because Rule 23(b)(3) is "an adventuresome innovation, * * * designed for situations in which class-action treatment is not as clearly called for," trial courts considering certifying a proposed Rule 23(b)(3) class bear a special "duty to take a close look at whether common questions predominate over individual ones." *Comcast*, 569 U.S. at 34 (quotation marks omitted). Indeed, the "mission" of the Rule's "demanding" predominance requirement—which winnows out proposed class actions in which the members' claims cannot be resolved without resort to individualized assessments—is to "assure the class cohesion that legitimizes representative action in the first place." *Amchem*, 521 U.S. at 623-24.

To achieve that end, Rule 23(b)(3)'s predominance requirement mandates that for a class to be certified, the issues susceptible to common proof must essentially determine the merits of the plaintiffs'

claims. As the Supreme Court has explained in the context of the commonality requirement of Rule 23(a)(2)—a significantly lower bar—"[w]hat 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*." *Dukes*, 564 U.S. at 350 (emphasis added) (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 132 (2009)). In other words, class members' claims must "*depend upon* a common contention * * * 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." *Id.* (emphases added).

If common issues must be "central to the validity" of the class claims in order to satisfy Rule 23(a)(2) commonality, then *a fortiori* the predominance test must require such commonality for all of the key elements of the claims—because the predominance standard "is even more demanding than Rule 23(a)." *Comcast*, 569 U.S. at 34; *accord, e.g.*, *Amchem*, 521 U.S. at 609 (explaining that Rule 23(a) commonality "is

subsumed under, or superseded by, the more stringent Rule 23(b)(3) requirement" of predominance).

Indeed, the Supreme Court has endorsed that conclusion, stating that "[t]he predominance inquiry asks whether the common, aggregation-enabling, issues in the case are *more prevalent or important* than the non-common, aggregation-defeating, individual issues." *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016) (emphasis added) (quotation marks omitted). "[I]f the *main issues* in a case require the separate adjudication of each class member's individual claim or defense, a Rule 23(b)(3) action would be inappropriate." Charles Alan Wright et al., *Federal Practice & Procedure* § 1778 (3d ed. 2018) (emphasis added).

2. The district court's analysis did not satisfy this fundamental requirement. Resolving the issue that the district court found to predominate—"the propriety of the 'netback' method" (RE 123, Page ID 3850)—does little to advance this litigation or the resolution of any individual's claim for underpayment of royalties.

The Fourth Circuit reached that precise conclusion in a case involving claims similar to those here, stating that "[e]ven a plethora of

identical practices will not satisfy the predominance requirement if the defendants' common conduct has little bearing on the central issue in the litigation—in this case, *whether the defendants underpaid royalties*." *EQT Prod. Co. v. Adair*, 764 F.3d 347, 366 (4th Cir. 2014) (emphasis added). And in another similar case, the Tenth Circuit vacated a district court's certification order, explaining that "predominance is not established simply by virtue of a uniform payment methodology." *Wallace B. Roderick Revocable Living Trust v. XTO Energy, Inc.*, 725 F.3d 1213, 1220 (10th Cir. 2013).

As in *EQT Production* and *Wallace*, the central issue in this breach-of-contract case is whether defendants "breached [their] lease obligations * * * by failing to pay the full royalties due under the leases," which in turn depends entirely on whether the particular price that defendants used in paying each individual royalty was "at a price below market value" for the well in question. Compl. ¶¶ 45, 85, RE 1-1, Page ID 26, 28-29; *see also id.* ¶ 28, Page ID 23-24 (lease language, providing that "if the sale [of natural gas] is to an affiliate of Lessee, the price upon which royalties [paid by the Lessee to the Lessor] are based shall be

comparable to that which could be obtained in an arm's length transaction").

Determining fair market value for the particular form of natural gas produced from a particular well at a particular point in time involves a host of individualized factual determinations. These include, to name just a few:

- the relative proportions of differently valued component hydrocarbons;
- variations in quality;
- differing pipeline access to lucrative markets; and
- fluctuations in the natural gas market over time.

Defs. Opening Br., Dkt. 27, at 39-43; *see also* API *Amicus* Br., Dkt. 33, at 11-15. To assess whether there was a breach of contract for any particular royalty payment, the price used to determine the amount of each royalty payment must be compared to the price that an arms-length transaction would yield—*i.e.*, the market value. Notably, the transaction-by-transaction determination of market price is necessary to establish whether there has been a breach of contract—and thus to assess defendants' liability—not simply to the calculation of damages.

Assessing the propriety of the netback method therefore does little to drive the resolution of any plaintiff's claim because that question has nothing to do with analyzing what the market price for gas at a particular wellhead in an arm's length transaction would be. And that inquiry—the one that ***is*** central to determining liability—is not remotely susceptible to resolution by common proof. As in *Dukes*, then, the class members' claims thus do not "in fact depend on the answers to common questions." 564 U.S. at 355-56. Instead, this is precisely the case in which "the main issues * * * require the separate adjudication of each class member's individual claim." *Federal Practice & Procedure*, *supra*, at § 1778.[2]

B. The District Court's Class Certification Order Violates The Rules Enabling Act And The Due Process Principles Underlying Rule 23.

By papering over the individualized inquiries required to resolve each putative class member's claim in service of class certification, the

[2] In addition, as defendants correctly explain (Defs. Opening Br., Dkt. 27, at 43-45), the inability to resolve the question of damages using class-wide proof is an independent reason that the district court erred in holding that predominance was satisfied here. *See Comcast*, 569 U.S. at 34.

district court's decision also runs afoul of the Rules Enabling Act and the Constitution's guarantee of due process.

The Supreme Court recognized nearly four decades ago that the class action is merely a procedural device, "ancillary to the litigation of substantive claims." *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 332 (1980); *see also Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 408 (2010) (plurality opinion) (a class action "leaves the parties' legal rights and duties intact and the rules of decision unchanged").

The requirements for class certification must be applied in a manner consistent with the Rules Enabling Act, which states that procedural rules cannot "abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b); *see also Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 845 (1999) ("[N]o reading of [Rule 23] can ignore the Act's mandate that rules of procedure shall not abridge, enlarge or modify any substantive right.") (quotation marks omitted); *Amchem*, 521 U.S. at 613 ("Rule 23's requirements must be interpreted in keeping with * * * the Rules Enabling Act"). As the majority in *Tyson Foods* explained, courts may not violate the "Rules Enabling Act's pellucid instruction that use of the

class device cannot 'abridge * * * any substantive right.'" *Tyson Foods*, 136 S. Ct. at 1046; *see also Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228, 234 (2013) (rejecting a reading of Rule 23 that would likely violate the Rules Enabling Act).

The Supreme Court stated in *Dukes* that, in light of the Rules Enabling Act, "a class cannot be certified on the premise that [a defendant] will not be entitled to litigate its statutory defenses to individual claims." 564 U.S. at 367 (citations omitted). But nothing in *Dukes* limits that principle to "statutory defenses"; as the First Circuit recently recognized, a defendant must for the same reason be permitted to bring a "challenge to a plaintiff's ability to prove an element of liability." *In re Asacol Antitrust Litig.*, 907 F.3d 42, 53 (1st Cir. 2018). Accordingly, the district court "must at the time of certification offer a reasonable and workable plan" for how a defendant will be able to bring such challenges "in a manner that is protective of the defendant's constitutional rights and does not cause individual inquiries to overwhelm common issues." *Id.* at 58.

Plaintiffs did not offer the district court a viable plan, and the district court did not generate one either. The absence of any such plan is

unsurprising, because it would be entirely unmanageable to try to resolve in a single trial the comparison between the royalties paid to each of the over two hundred plaintiffs and the prevailing market values for all of the oil and gas sold by defendants—which would differ from well to well and would vary based on the market conditions in the areas where the individual wells are located.

The supposedly class-wide proceeding would thus quickly devolve into a trial requiring proof of hundreds of discrete facts with individualized proof—the "market prices at different wellheads for different volumes of different products at different times" (Defs. Opening Br., Dkt. 27, at 40)—an entirely unmanageable affair. Yet the due process principles underlying Rule 23(b)(3) require that courts "consider 'how a trial on the alleged causes of action would be tried.'" *Robinson v. Texas Auto. Dealers Ass'n*, 387 F.3d 416, 425 (5th Cir. 2004) (quoting *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 752 (5th Cir. 1996)); *accord Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1278-79 (11th Cir. 2009).

* * *

In sum, the district court's class certification decision did not comport with the "rigorous analysis" mandated by the Supreme Court's

precedents. *Comcast*, 569 U.S. at 33-34. By focusing on a common practice that "has little bearing on the central issue" of royalty underpayment (*EQT Prod.*, 764 F.3d at 366), the district court ignored the Supreme Court's teachings and failed to "take [the] close look" at whether plaintiffs had satisfied the requirements of Rule 23(b)(3). *Comcast*, 569 U.S. at 34 (quotation marks omitted). If the district court had undertaken the proper inquiry, it would have been apparent that the individualized issues required to resolve each plaintiff's underpayment claim necessarily overwhelm any common issues.

II. THE DISTRICT COURT'S IMPROPERLY LAX APPROACH TO CLASS CERTIFICATION WILL HARM BUSINESSES AND THEIR CUSTOMERS AND EMPLOYEES.

Finally, failure to vigilantly apply the requirements of Rule 23 carries significant adverse practical consequences. If endorsed by this Court, the district court's loosening of Rule 23(b)(3)'s deliberately "stringent" standards (*Amchem*, 521 U.S. at 609) will allow the current steady stream of abusive class actions—designed to coerce unjustified settlements—to become a flood. The consequences for businesses; their owners, customers, and employees; and the judicial system as a whole will be troubling and far-reaching.

Defendants in class actions already face tremendous pressure to capitulate to what Judge Friendly termed "blackmail settlements." Henry J. Friendly, *Federal Jurisdiction: A General View* 120 (1973). As this Court observed in permitting this appeal, "the decision to certify a class in this case, as in many cases, may 'place[] undue pressure on the defendant[s] to settle.'" RE 138, Page ID 4014 (quoting *In re Delta Air Lines*, 310 F.3d 953, 957 (6th Cir. 2002) (per curiam)).

That is because the stakes of a class action, once it has been certified, immediately become so great that "even a complaint which by objective standards may have very little chance of success at trial has a settlement value to the plaintiff out of any proportion to its prospect of success at trial." *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 740 (1975); *see also, e.g.*, *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011) (recognizing the "risk of 'in terrorem' settlements that class actions entail"); *Shady Grove*, 559 U.S. at 445 (Ginsburg, J., dissenting) ("A court's decision to certify a class * * * places pressure on the defendant to settle even unmeritorious claims."); *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978) ("Certification of a large class may so increase the defendant's potential damages liability and

litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense.").

It therefore is not surprising that businesses often yield to the hydraulic pressure generated by class certification and settle even meritless claims. Indeed, "virtually all cases certified as class actions and not dismissed before trial end in settlement." Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical Legal Stud. 811, 812 (Dec. 2010).

Faithful application of Rule 23(b)(3) is therefore critical to avoid further incentivizing unjustified class litigation. Allowing easy certification of Rule 23(b)(3) damages classes will encourage plaintiffs' counsel to file abusive class actions rife with individualized inquiries that would block certification if Rule 23(b)(3)'s predominance requirement were applied properly.

The ripple effects of such unjustified (but potentially lucrative) class lawsuits will be felt throughout the economy. Defending and settling the lawsuits would require defendants to expend enormous resources. These costs would not, however, be borne by business and governmental defendants alone. Rather, the vast majority of the expenses

would likely be passed along to innocent customers and employees in the form of higher prices and lower wages and benefits; and much of the remainder of the burden would fall on innocent investors.

CONCLUSION

The Court should reverse the district court's class certification order.

Dated: February 5, 2019

Respectfully submitted,

/s/ *Andrew J. Pincus*

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 29(a)(4) and 32(g), the undersigned counsel for *amici curiae* certifies that this brief:

(i) complies with the word limitation of Rule 29(a)(5) because it contains 3,359 words, including footnotes and excluding the parts of the brief exempted by Rule 32(f); and

(ii) complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word 2010 and is set in Century Schoolbook font in a size equivalent to 14 points or larger.

Dated: February 5, 2019 /s/ *Andrew J. Pincus*

CERTIFICATE OF SERVICE

I hereby certify that that on February 5, 2019, I electronically filed the foregoing brief with the Clerk of the Court using the appellate CM/ECF system. I further certify that all participants in this case are registered CM/ECF users and that service will be accomplished via CM/ECF.

Dated: February 5, 2019 /s/ *Andrew J. Pincus*