AAI AMERICAN ANTITRUST INSTITUTE

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VIA EMAIL

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Re: Fortifying DOJ Plea Agreements Against Strategic Avoidance of Victim Restitution

Dear Assistant Attorney General Slater and Deputy Assistant Attorney General Assefi:

The American Antitrust Institute (AAI)[1] applauds the Antitrust Division of the Department of Justice (DOJ or the Department) for its strong commitment to criminal antitrust enforcement. We congratulate the DOJ for its recent spate of successful criminal prosecutions, including the guilty pleas obtained from two companies and their owners for a bid rigging scheme injuring New York City Public Schools and from eight individuals who conspired to fix prices and allocate the market for transmigrante forwarding agency services in South Texas.[2]

We also congratulate the Department for launching a Whistleblower Rewards Program.[3] AAI has long advocated for such a program as an important complement to the Department's Individual Leniency Policy.[4] These tools, together with the Department's

[1] AAI is an independent, nonprofit organization devoted to promoting competition that protects consumers, businesses, and society. For more information, *see* http://www.antitrustinstitute.org.

[2] U.S. DEP'T OF JUST., ANTITRUST DIV., TWO CONSULTING COMPANIES AND ITS [SIC] OWNERS PLEAD GUILTY TO BID RIGGING SCHEME INVOLVING NEW YORK CITY PUBLIC SCHOOLS (Mar. 20, 225), https://www.justice.gov/opa/pr/two-consulting-companies-and-its-owners-plead-guilty-bid-rigging-scheme-involving-new-york; U.S. DEP'T OF JUST., ANTITRUST DIV., EIGHT INDIVIDUALS PLEAD GUILTY TO WIDE-RANGING SCHEME TO MONOPOLIZE TRANSMIGRANTE FORWARDING INDUSTRY, FIX PRICES, EXTORT COMPETITORS, AND LAUNDER MONEY (Mar. 11, 2025), https://www.justice.gov/opa/pr/eight-individuals-plead-guilty-wide-ranging-scheme-monopolize-transmigrante-forwarding.

[3] U.S. DEP'T OF JUST., ANTITRUST DIV., JUSTICE DEPARTMENT'S ANTITRUST DIVISION ANNOUNCES WHISTLEBLOWER REWARDS PROGRAM (July 8, 2025), https://www.justice.gov/opa/pr/justice-departments-antitrust-division-announces-whistleblower-rewards-program.

[4] *See, e.g.*, Am. Antitrust Inst., *American Cartel Enforcement in Our Global Era* at 4, *in* 2016 AAI PRESIDENTIAL TRANSITION REPORT ON COMPETITION POLICY (2016), https://www.antitrustinstitute.org/wp-content/uploads/2018/08/Cartels.pdf.

Corporate Leniency Policy, help address the longstanding problem of cartel under-detection and under-deterrence.

AAI submits this letter because additional reforms are needed to ensure adequate restitution for cartel victims. The Department's policy toward restitution in criminal plea bargaining, as reflected in its Model Annotated Corporate Plea Agreement, has fallen into disharmony with the Department's Corporate Leniency Policy. The Model Corporate Plea Agreement needs updating to ensure that future successful criminal prosecutions cannot be undermined by strategic behavior that allows guilty defendants to keep ill-gotten gains and avoid making victims whole.

As the Model Corporate Plea Agreement explains, most of the Department's plea agreements rely on overlapping civil damages actions as a substitute for criminal restitution. However, when these civil damages actions must be pursued as class actions, defendants often mount strategic class certification challenges designed to prevent any victim recovery from being realized. When this strategy succeeds, the Department's plea agreements and restitution policies are undermined. Recent Supreme Court developments involving damages class actions, including the disposition of *Lab. Corp. of Am. ("Labcorp") v. Davis*,[5] discussed below, exacerbate the problem and create a new urgency for reform.

For the reasons explained in the remainder of this letter, the Department should take three important steps to fortify its criminal plea agreements against strategic avoidance of victim restitution by guilty criminal defendants:

1. ***When a guilty criminal defendant chooses to rely on civil damages as a substitute for victim restitution in a corporate plea agreement, the Department should clarify that only the actual payment of damages, and not merely the filing of civil suits that "potentially provide for a recovery,"[6] fulfills the defendant's restitution obligation.***
2. ***When a guilty criminal defendant chooses to rely on a civil class action as a substitute for victim restitution in a corporate plea agreement, the Department should condition the waiver of restitution on class certification being granted.***
3. ***If the guilty criminal defendant wishes to contest class certification despite relying on the class action as a substitute for victim restitution, the Department should require the defendant to provide a "reasonably achievable"[7] alternative plan for making restitution if class certification is denied.***

[5] No. 24-304 (U.S. Sup. Ct. June 5, 2025).

[6] U.S. DEP'T OF JUST., ANTITRUST DIV., MODEL ANNOTATED CORPORATE PLEA AGREEMENT 6–7 & n.6–7, 12 (last updated April 4, 2022) [hereinafter "MODEL CORPORATE PLEA AGREEMENT"], https://www.justice.gov/atr/page/file/1490326/dl.

[7] U.S. DEPT. OF JUST., ANTITRUST DIV., FREQUENTLY ASKED QUESTIONS ABOUT THE ANTITRUST DIVISION'S LENIENCY PROGRAM 13 (last updated Jan. 23, 2023) [hereinafter "DOJ LENIENCY PROGRAM FAQS"], https://www.justice.gov/atr/page/file/1490311/dl?inline.

I. Background

The Department's Model Annotated Corporate Plea Agreement explains that, "[i]n most criminal antitrust cases, restitution is not sought or ordered because civil causes of action are filed to recover damages."[8] Defendants typically argue that, because they will be liable for treble damages in these civil actions, restitution would be overdeterrent.[9] Sometimes they argue that criminal fines should also be reduced or eliminated to ensure they remain financially able to meet their obligation to pay civil damages.[10] When the Department agrees to forego victim restitution (and possibly fines), the overlapping civil damages actions are directly incorporated by reference into the text of the plea agreement.[11] The Department thus bases the restitution provisions in most of its criminal plea agreements on an expectation that the defendants will in fact pay civil damages.

When a defendant has pleaded guilty to a criminal antitrust violation, collateral estoppel prevents it from contesting liability in overlapping civil damages actions. However, defendants recognize that most civil claims seeking recovery for criminal *per se* violations must be brought as class actions to be economically viable.[12] *Per se* violations, such as price-fixing, often cheat large numbers of consumers out of individually small sums of money.[13] The individually small sums create "negative-value" claims, which are claims that cost more to litigate on an individual basis than the consumer can hope to recover if she wins.[14] Because of this economic reality, civil damages actions following criminal guilty pleas often must "proceed as a class action or not at all."[15]

Nothing in the Model Corporate Plea Agreement places any prudential limitations on guilty defendants' challenges to class certification. Notwithstanding that defendants who admit and plead guilty to criminal antitrust violations often make solemn professions of contrition and regret during sentencing proceedings,[16] many of these same defendants

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[8] MODEL CORPORATE PLEA AGREEMENT, *supra* note 6, at 15.

[9] *See, e.g.*, StarKist Co.'s Sentencing Mem. at 11–12, *United States v. StarKist Co.*, No. 18-CR-0513 EMC (N.D. Cal. filed May 15, 2019) (ECF No. 53) [hereinafter "SK Sentencing Mem."] (arguing that "[t]he damages paid in the civil case will adequately compensate the civil plaintiffs").

[10] *See id*. at 9–10 ("Without a significant reduction of the criminal fine … StarKist will not be able to fully compensate all of the civil plaintiffs from its projected free cash flow."); *see also* United States' Sentencing Mem. at 1, *United States v. StarKist Co.*, No. 18-CR-0513 EMC (N.D. Cal. filed May 15, 2019) (ECF No. 51) [hereinafter "U.S. Sentencing Mem."] (finding that StarKist had "grossly *inflate[d]* its hypothetical future civil damages" in seeking a reduced fine to escape punishment).

[11] *See, e.g.*, Plea Agreement at 7, *United States v. StarKist Co.*, No. 18-CR-0513 EMC (N.D. Cal filed Nov. 14, 2018).

[12] *See, e.g., Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997).

[13] *Id*.; *see also Hawaii v. Standard Oil Co.*, 405 U.S. 251, 265 (1972).

[14] *Amchem*, 521 U.S. at 617 (1997); *see also In re Modafinil Antitrust Litig.*, 837 F.3d 238, 257, n.21 (3d Cir. 2016).

[15] *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 161 (1974).

[16] *See, e.g.*, Def. Steven L. Hodge's Sentencing Mem., Ex. A at 2, *United States v. Steven L. Hodge*, No. 17-CR-00297-EMC (N.D. Cal. filed Dec. 23, 2020), ECF No. 44 ("For the rest of my life, I will feel remorseful and embarrassed …. This price fixing conspiracy harmed American consumers and I am sorry

choose to employ costly litigation strategies designed to defeat class certification and thereby block victim recovery, thwarting the plea agreement's mechanism for compensating victims and deterring repeat offenses. Worse, they often do so by manipulating technicalities of class certification law, without vindicating any legitimate interest in procedural fairness or judicial efficiency under the Federal Rules of Civil Procedure.

II. Strategic Class Certification Challenges

Confessed antitrust criminals who are foreclosed from contesting liability in private civil class actions have strong economic incentives to vigorously contest class certification, regardless of the merits of the plaintiffs' class certification motion. First and foremost, defeating class certification usually allows the defendant to escape the financial consequences of getting caught committing an antitrust crime. By the time the plaintiffs file their certification motion, the plea agreement usually will have already been entered, meaning the DOJ will have already agreed to forego restitution (and possibly fines). And because "only a lunatic or fanatic" brings a negative-value claim that would not repay the cost of suit,[17] defendants will not face such claims on an individual basis. By defeating class certification, defendants thus will get to keep their ill-gotten gains, which can run into the billions of dollars.[18]

Second, because liability must be conceded in light of the guilty plea, defendants can focus nearly the entirety of their civil defense—and the vast majority of their spending on legal and economic consulting fees—exclusively on defeating the plaintiffs' motion for class certification.

Third, because their cartel profits have not yet been disgorged at the time of the civil suit, defendants often can spend lavishly on legal and economic consulting fees using the very cartel profits at issue, such that the expenses associated with the fees will only dissipate assets that defendants will have to turn over anyway if the class certification motion is granted.[19]

Fourth, even if defendants cannot defeat class certification, they can win for losing by simply prolonging the litigation and delaying recovery. They can reduce the true cost of liability by investing and earning interest on the remaining cartel profits they hold during the pendency of the proceedings, which sometimes last for years.[20]

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that I was a part of it."); SK Sentencing Mem, *supra* note 9, at 10 (accepting responsibility for, among other things, Mr. Hodge's actions).

[17] *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (2004) (Posner, J.).

[18] Civil settlements disgorged $5.5 billion in ill-gotten gains in *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation*, $2.8 billion in *In re Blue Cross Blue Shield Antitrust Litigation*, and $2.8 billion in *House v. NCAA*. In 2023, a jury returned a verdict for $1.8 billion in damages in *Burnett v. National Association of Realtors*.

[19] *See* U.S. Sentencing Mem., *supra* note 10, at 1 (noting Starkist's depletion of its cash reserves and arguing at sentencing that Starkist "should not be permitted to spend money on itself at the expense of paying the price for its criminal acts").

[20] For example, in *In re Packaged Seafood Products Antitrust Litigation*, Bumble Bee Foods LLC and Starkist Co. pleaded guilty in 2015, but the extensive litigation and appellate proceedings over class certification did not conclude until November 2022, when the Supreme Court denied the defendants'

Unsurprisingly, criminal defendants who plead guilty to antitrust crimes almost always pursue this strategy, which from their perspective has high upside and little downside. Despite having confessed guilt and professed a desire to make things right at sentencing, these defendants typically exhaust every line of argument and every appellate opportunity during class certification, often relitigating well-trodden issues.[21] Trial and appellate judges sometimes fail to recognize the strategy when it is unfolding in front of them.

In antitrust class actions seeking private damages for criminal conduct subject to a guilty plea, the consequences of strategic class certification challenges have important implications for the Department's restitution policies. When these challenges succeed and confessed criminals get to keep their victims' stolen property, it undermines the Department's plea agreement, its restitution policies, and its criminal enforcement mission.

III. Aligning the Model Corporate Plea Agreement with the Corporate Leniency Policy

Through its Corporate Leniency Policy, the DOJ has made clear that restitution for victims is a core principle of federal cartel enforcement. Although the official language of the Corporate Leniency Policy requires only that leniency applicants make "best efforts" to make restitution to victims, the Department has explained that "[t]he 'best efforts' qualifier covers situations when providing full restitution is impossible," such as "when the applicant is in bankruptcy and prohibited by court order from making payments."[22] When doing so is not impossible, leniency applicants unequivocally "are required to make restitution to their victims."[23] Moreover, "[a]pplicants are encouraged to work with civil plaintiffs and the court to streamline damages determinations so that restitution to victims happens as swiftly as possible."[24] Applicants must devise restitution plans that are "reasonably achievable," and the Department encourages that "[i]n most cases" restitution should be "satisfied through settlements."[25]

Leniency applicants are the select subset of cartelists who manage to grow a conscience. They voluntarily choose to come forward and confess, albeit with inducements. It follows that the restitution obligations of defendants who do not come forward voluntarily, but rather plead guilty only after getting caught, should be at least as stringent as the restitution obligations of leniency applicants.

The restitution provisions in the Model Corporate Plea Agreement do not achieve this symmetry. The operative language is ambiguous and open to misinterpretation. It says restitution typically is not sought or ordered because "civil causes of action are filed

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petition for certiorari.

[21] Although not a criminal antitrust case, the defendants in *Labcorp* substantially delayed proceedings by appealing a moot class certification order, obtaining a grant of certiorari that the Court subsequently had to dismiss as improvident after more than a year of briefing and argument. *See infra* Part V.

[22] DOJ LENIENCY PROGRAM FAQS, *supra* note 7, at 13.

[23] *Id*.

[24] *Id*. at 15.

[25] *Id*. at 13, 15.

to recover damages."[26] Contrast this language with the Department's explanation for infrequent restitution orders in its ten-year workload statistics, which state that "damages are obtained through" such actions.[27]

There is a big difference between merely filing civil actions and actually obtaining damages through them. When the civil action is a class action that aggregates negative-value claims, restitution is not reasonably achievable unless the class is certified. Absent class certification, victims obtain no damages when they abandon their individual claims and incur *net losses* if they choose to pursue them (even if they win).

Consistent with its treatment of leniency applicants, the Department should encourage criminal defendants who plead guilty after getting caught to streamline damages determinations and settle the overlapping civil class actions, especially when the defendant itself agrees to rely on the class action as a substitute for restitution.[28] Moreover, the defendant's restitution obligation should be discharged only when damages are actually paid to victims, not merely when the action is filed. If the action is filed but does not lead to any recovery because class certification is denied, defendants should not simply keep the ill-gotten gains. They should have to provide a "reasonably achievable" alternative plan for returning the ill-gotten gains to victims unless doing so is "impossible." Any other rule treats noncooperating defendants more favorably than cooperating defendants.

IV. Foreclosing Frivolous Assertions that Confessed Price-Fixing Does Not Impact Purchasers

By far, defendants' most frequent challenge to class certification in class actions seeking cartel damages is to argue that questions common to the class would not predominate over questions individual to specific class members at trial.[29] Specifically, defendants argue that the "impact" of the antitrust violation—typically price fixing—is not common to every class member who purchased from the cartel. When the issue of impact could theoretically raise individualized questions at trial, defendants argue that class certification is inappropriate because Rule 23's predominance requirement is not met. However, this argument is often frivolous, not justifying the administrative costs of litigation or the use of judicial resources.

On its face, the idea that confessed criminal price fixing could fail to impact everyone who purchased the price-fixed product is counterintuitive. Basic economic logic, and the underlying rationale for having a *per se* rule and imposing criminal liability, hold that naked price fixing impacts all of those who purchase from the cartel.

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[26] MODEL CORPORATE PLEA AGREEMENT, *supra* note 6, at 6–7, n.6.

[27] U.S. DEP'T OF JUST., ANTITRUST DIV., ANTITRUST DIVISION WORKLOAD STATISTICS 4 (FY 2015–2024), *available at* https://www.justice.gov/atr/division-operations ("[F]requently restitution is not sought in criminal antitrust cases, as damages are obtained through separate treble damage actions filed by the victims."); *see also* ANTITRUST DIVISION WORKLOAD STATISTICS 12 (FY 2010–2019) ("are obtained through"); ANTITRUST DIVISION WORKLOAD STATISTICS 13 (FY 2000-2009) ("are obtained through").

[28] *See, e.g.*, SK Sentencing Mem., *supra* note 9, at 10–11 (arguing to court that it "should consider civil liability the functional equivalent of criminal restitution" because "the parties have expressly agreed that civil liability adequately substitutes for an order of restitution").

[29] *See* FRCP Rule 23(b)(3) (requiring predominance to certify a damages class action).

Defendants therefore try to challenge predominance under Rule 23 by arguing that the confessed violation did not have a common impact if certain class members who purchased from the cartel cannot prove that they paid any demonstrable overcharges.

For idiosyncratic reasons, it is "almost inevitable" that some cartel victims who purchased the price-fixed product will be unable to show that they paid demonstrable overcharges.[30] For example, sometimes one purchaser in a class may have an unusually high degree of bargaining power, allowing it to negotiate away the amount of the cartel overcharge that the other class members can be shown to have paid. Or, sometimes a temporary supply disruption—perhaps owing to an earthquake or weather event—forces the cartel to charge a price other than the cartel price for a period of time, and one class member may have made all of its purchases during that period. In such instances, certain purchasers may experience what the Ninth Circuit has described as "fortuitous non-injury."[31] Defendants also get lucky: To no credit of their own, they become liable for a lesser amount of total damages than they tried to inflict.

Defendants often spend a great deal of time and money identifying as many of these potentially uninjured cartel victims as possible, maintaining that they are proof that individualized issues would predominate over common issues if the case were to go to trial as a class action. For every cartel victim who did not pay demonstrable overcharges, defendants maintain, defense counsel would attempt to prove at trial that each one individually is not entitled to recover.[32] They urge courts to conclude that these mini-trials over the violation's impact on individual class members would swamp the class proceedings, and therefore the class certification motion should be denied and the class action should be dismissed.

This argument is frivolous in antitrust cases because it conflates antitrust class actions with "statutory damages" class actions. In statutory damages class actions, like the class action brought under the Americans with Disabilities Act (ADA) in *Labcorp*, the argument that uninjured class members would generate too many individualized trial questions is potentially credible. In such class actions, the amount of damages a defendant must pay is pegged to the number of individuals who suffer a violation. If each

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[30] *Kohen v. Pacific Inv. Mgmt. Co. LLC*, 571 F.3d 672, 677 (7th Cir. 2009) (Posner, J.) (explaining that uninjured class members are a "possibility or indeed inevitability" because "at the outset of the case … facts bearing on their claims may be unknown").

[31] *Ruiz Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1137 (2016).

[32] Notably, this under-scrutinized claim, which is often made implicitly rather than explicitly, does not stand up to reality. In conducting a Rule 23 predominance inquiry, courts are supposed to base it on a realistic assessment of how the class trial is likely to unfold. *See, e.g., Eisen v. Carlysle & Jacquelin*, 417 U.S. 156, 166 (1974) (Courts should "envision the form that a trial would take") (cleaned up); *In re Hydrogen Peroxide Antitrust Litig.,* 552 F.3d 305, 311 n.8 (3d Cir. 2008) (Courts should consider "how a trial on the merits would be conducted") (cleaned up). Numerous antitrust class actions have in fact gone to trial, and defendants never actually litigate individualized damages issues, including because plaintiffs often wisely choose not to claim any damages for people they cannot show were harmed. Joshua P. Davis & Eric L. Cramer, *Antitrust, Class Certification, and the Politics of Procedure*, 17 GEO. MASON L. REV. 969, 989–91 (2010). Numerous jury instructions and verdict forms, and the conspicuous absence of any pretrial dispositive motions or motions for judgment as a matter of law to exclude uninjured class members, strongly suggest that these issues are only ever raised as a ploy to defeat class certification. *See id*. at 991–93.

uninjured member included in the class creates additional financial exposure for the defendant, then the defendant has a pecuniary interest in challenging each of their claimed injuries to avoid paying more than it owes.

But in antitrust cases, the amount of damages a defendant must pay is almost always pegged to the cumulative, marketwide overcharges caused by the cartel, not the number of individuals who suffer a violation. This is usually a necessity because of uncertainty created by the defendant's antitrust violation itself. As a result, the inclusion of uninjured class members among a class of cartel purchasers does not affect the amount of damages the defendant owes the class, nor does it implicate any other concrete interest that the defendant is capable of vindicating.[33] On the contrary, it becomes important to ensure the defendant does not *benefit* from the uncertainty that its illegal behavior has caused.[34]

To appreciate the problem, start by recognizing that antitrust damages invariably depend on an unknowable counterfactual. Calculating the amount of damages requires comparing the price charged in the real world, where the antitrust violation occurred, to the price charged in an imaginary, hypothetical world in which the antitrust violation did not occur.[35] Because the denominator in this equation is a counterfactual, courts have always applied a relaxed standard for determining damages once a violation is proved, allowing plaintiffs to rely on statistical evidence that supports a "just and reasonable inference" of the amount of the damages.[36] Expert econometric techniques are an acceptable way to calculate damages so long as the technician (i.e. economist) uses reliable methodologies, satisfying *Daubert*.[37] Methodologies that have passed muster under *Daubert*, including the so-called "yardstick" method, the "before-during-after" method, and, most commonly, multivariate regression analysis, usually rely on a combination of economic logic, pricing data, and econometric analysis.[38]

In the vast majority of private antitrust cases—regardless of whether it is a class action or an individual action and irrespective of the chosen methodology—damages models cannot avoid taking measurements on an aggregate, marketwide basis rather than on an individual, victim-by-victim basis.[39] To compare the actual price charged in the real world to the hypothetical price charged in a but-for world, economists must rule out

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[33] Litigants on either side cannot assert the "deprivation of a procedural right without some concrete interest that is affected by the deprivation—a procedural right *in vacuo*." *Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009).

[34] *See, e.g.*, *In re Multidistrict Vehicle Air Pollution*, 591 F.2d 68, 73 (9th Cir. 1979) (In equity, "a wrongdoer should not profit from uncertainty caused by his own wrong.").

[35] James Langenfeld, Gregory G. Wrobel & Michael J. Waters, *Economic Experts* 229, *in* PRIVATE ENFORCEMENT OF ANTITRUST LAW IN THE UNITED STATES: A HANDBOOK (Albert A. Foer & Randy M. Stutz eds., 2012).

[36] *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 265–566 (1946); *Story Parchment Co. v. Paterson Parchment Co.*, 282 U.S. 555, 563 (1931).

[37] *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 455 (2016).

[38] *See* Langenfeld, Wrobel & Waters, *supra* note 35, at 228–33.

[39] *See id*. at 231; Davis & Cramer, *supra* note 32, at 971–73; Joshua P. Davis, *Classwide Recoveries*, 82 GEO. WASH. L. REV. 890, 893–94, 913–14, 919–20 (2014).

other market factors—such as bargaining power and supply disruptions—that could have influenced prices in the but-for world.[40] For the results to be sufficiently reliable and admissible under *Daubert*, the economists must use a statistically significant sample size.[41] Accordingly, to estimate damages reliably, using a reliable denominator and without an unduly small sample size, economists must calculate overcharges on an aggregate basis rather than an individual, victim-by-victim basis. That is, they must measure damages for the class as a whole.

Whenever uncertainties caused by the defendant's antitrust violation require plaintiffs to rely on aggregate damages measurements—which, again, is the norm—the existence of individual class members who might not have suffered provable injury or damages has the mathematical effect of adding zero to the aggregate sum. Defendants thus have no vindicable interest in the question of whether uninjured class members are included in the class. The answer is incapable of changing the amount of damages the defendants owe the class.

To be sure, the inclusion of uninjured members in an antitrust damages class has implications for *victims*. It is important for class representatives and courts to employ mechanisms designed to detect the idiosyncrasies that might have led some purchasers to avoid paying demonstrable overcharges. If they fail to do so prior to the claims administration process, uninjured victims could wrongly recover damages and wrongly dilute the recoveries of the injured victims, which would not be "just and reasonable" from the perspective of the injured victims.

But, critically, the *defendant* does not represent the interests of these injured victims, nor does it have any basis to assert *their* rights.[42] The defendant has an interest in ensuring that it pays no more damages than it owes, but it is the injured class members' counterparty in the litigation, not to mention the source of their injury and the cause of uncertainty in the amount of their damages.[43] When the defendant has confessed to criminal price fixing, it would be absurd to deny class certification and thus all recovery to all injured victims based on the guilty defendant's objection to how the *correct* amount of damages would be distributed among the class members.

V. Mitigating the Dangers that *Labcorp* Portends

Despite this absurdity, Supreme Court briefing and argument in the recent *Labcorp* case tacitly encourage courts to permit guilty defendants to leverage the

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[40] *See* Langenfeld, Wrobel & Waters, *supra* note 35, at 230; Davis, *Classwide Recoveries*, *supra* note 39, at 913–14.

[41] *See* Langenfeld, Wrobel & Waters, *supra* note 35, at 230–33; Davis, *Classwide Recoveries*, *supra* note 39, at 913–14.

[42] *Six (6) Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1307 (9th Cir. 1990) ("Where the only question is how to distribute the damages, the interests affected are not the defendant's but rather those of the silent class members."); *see also In re Antibiotic Antitrust Actions*, 333 F. Supp. 278, 287 (S.D.N.Y. 1971) ("If we assume that a price-fixing conspiracy is proven at trial . . . the defendants will certainly have no right to the 'pot of gold' created by their illegal activities.").

[43] *See J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 566–67 (1981) ("[I]t does not come with very good grace for the wrongdoer to insist upon specific and certain proof of the injury which it has itself inflicted.") (cleaned up).

uncertainty created by their antitrust violations to defeat class certification. This development imperils the principle of victim restitution in federal cartel enforcement and should prompt the DOJ to take protective steps. Nothing less than the viability of the antitrust class action—the principal restitution mechanism used in most DOJ plea agreements—is at risk.

The *Labcorp* petition for certiorari presented the question of whether a court may certify a class "when some members of the proposed class lack any Article III injury."[44] Petitioners asked the Court to require plaintiffs to offer common proof—at the class-certification stage—that every class member suffered a concrete, particularized injury in fact. If the Court had done so, many or most antitrust classes would have become impossible to certify because of the aforementioned "possibility or indeed inevitability" that some members will have failed to pay demonstrable overcharges for idiosyncratic reasons.[45] Because defendants who plead guilty to criminal violations have no obligation to provide an alternative plan for making restitution if class certification is denied, they would get to keep the often-massive ill-gotten gains derived from their confessed crimes.

In *Labcorp*, the plaintiffs were blind patients who made office visits for bloodwork at Labcorp locations offering touch-screen kiosks at check-in. The touch-screens allegedly were not ADA compliant. By statute, each individual ADA violation that causes an injury triggers a fixed monetary payment to the victim, and the class was defined to include all blind patients who visited *Labcorp* locations containing kiosks. However, some of the patients allegedly never attempted to use the kiosks, and some allegedly never wanted to use them.

If these patients were uninjured but nonetheless included in the class, then the amount of the damages at stake in the proceedings could have been affected. The damages potentially could be increased pro rata by the amount of the statutory payment that Labcorp could owe to each such patient. Labcorp and its supporting amici argued strenuously that plaintiffs should have to eliminate the risk that uninjured class members would raise the stakes of the litigation in this fashion—by increasing their liability exposure. They argued that the increase in their liability exposure creates unfair pressure on them to settle even unmeritorious claims.

In their briefing and argument, however, Labcorp and its amici repeatedly conflated aggregate damages class actions (where uninjured class members cannot affect the stakes) with statutory damages class actions (where they theoretically can). The U.S. Solicitor General's Office, to its credit, saw through the gambit. In an oral argument colloquy with Justice Kagan, the Solicitor General's advocate distinguished antitrust class actions from the case at bar and suggested that purchasers from a price-fixing cartel should be permitted to certify a class notwithstanding the presence of idiosyncratically uninjured members.[46]

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[44] Order Granting Certiorari, *Labcorp v. Davis*, No. 24-304 (filed Jan 24, 2025).

[45] *Kohen v. Pacific Inv. Mgmt. Co. LLC*, 571 F.3d 672, 677 (7th Cir. 2009) (Posner, J.).

[46] Transcript of Oral Argument at 102, *Labcorp. v. Davis*, No. 24-304 (filed Apr. 29, 2025), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2024/24-304_3e04.pdf (If "the class is defined as all purchasers of the product during the period of price-fixing where there were super-competitive [sic] prices, we think that would be a valid class definition even if there's some idiosyncratic person that likes

However, despite this important observation, and despite numerous amicus briefs explaining how antitrust class actions differ fundamentally from statutory damages class actions,[47] neither Labcorp nor Justice Kavanaugh, who dissented from the *per curiam* Court's dismissal of certiorari, revealed any appreciation of the differences nor the consequences of ignoring them.[48] Using a rhetorical sledgehammer rather than a scalpel, Justice Kavanaugh wrote unequivocally that he "would hold that a federal court may not certify a damages class that includes both injured and uninjured members."[49] Taken literally, this would mean that plaintiffs must prove injury in fact to every individual class member at the class certification stage. A district court thus could not certify an antitrust class that is forced to rely on aggregate statistical proof of impact and damages because of uncertainties created by the defendant's antitrust violation. Such a holding would prevent any and all victim recovery in antitrust class actions the Department routinely relies on as a substitute for restitution in its criminal plea agreements.

Perhaps construing Justice Kavanaugh's dissent as an invitation, other defendants are now actively seeking to put the same issue back in front of the Court.[50] Going forward, defendants will exhaust every opportunity to challenge class certification whenever class definitions may arguably include some uninjured class members, regardless of whether the class is an antitrust class or a statutory damages class. The Department can and should take simple steps that would help mitigate the risks posed by this sledgehammer approach to class actions.

VI. Conclusions and Recommendations

The Department should take three actions to address the problem of strategic class certification challenges following criminal guilty pleas:

First, the restitution provisions in the DOJ's Model Corporate Plea Agreement should be brought into symmetry with the restitution provisions in the Corporate Leniency Policy. The Department should make clear that civil actions do not satisfy the defendant's obligation to make restitution simply because they are filed. Rather, they do so only when they actually lead to the recovery of damages. Moreover, settlements of such actions should be encouraged, along with the streamlining of damages calculations to ensure that victims are made whole as swiftly as possible.

Second, the Model Corporate Plea Agreement should be amended to expressly state that where the private civil action is a class action, the waiver of restitution is contingent on class certification being granted. Making this an express condition in the

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paying higher prices for whatever reason.").

[47] *See* Amicus Brief of the American Antitrust Institute, *Labcorp v. Davis*, No. 24-304 (filed Apr. 7, 2025); Amicus Brief of Nobel Laureate Economist Joseph Stiglitz, et al., *Labcorp v. Davis*, No. 24-304 (filed Apr. 7, 2025); Amicus Brief of National Community Pharmacists Association, *Labcorp v. Davis*, No. 24-304 (filed Apr. 7, 2025).

[48] *See* Order Dismissing Certiorari as Improvidently Granted, *Labcorp v. Davis*, No. 24-304 (filed June 5, 2025) (Kavanaugh, J., dissenting).

[49] *Id*. at 7 (slip op.).

[50] *See, e.g.*, Petition for a Writ of Certiorari 1, *Nissan North America v. Johnson*, No. 24-1289 (filed June 13, 2025) (citing Justice Kavanaugh's dissent in *Labcorp*).

plea agreement would (1) help reduce guilty defendants' economic incentives to spend lavishly on defeating and delaying class certification, (2) ensure guilty defendants do not keep their ill-gotten gains when they defeat class certification on a technicality, and (3) ensure that victims are not left holding the bag.

Third, the Model Corporate Plea Agreement should be amended to provide that, if guilty criminal defendants who rely on a class action as a substitute for criminal restitution nonetheless wish to challenge class certification, they must first provide a reasonably achievable alternative plan for making restitution. Doing so would ensure that guilty defendants who leverage the uncertainty created by their antitrust violation to contest class certification cannot avoid making victims whole, and that they cannot misappropriate injured class members' own interests to prevent them from realizing any recovery.

Thank you for considering the views of the American Antitrust Institute. The undersigned are available to discuss these views or answer any questions.

Sincerely,

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