United States Court of Appeals

for the

Third Circuit

Case No. 15-3791

IN RE: CLASS 8 TRANSMISSION INDIRECT PURCHASER ANTITRUST LITIGATION

RYAN AVENARIUS, on behalf of themselves and all others similarly situated; BIG GAIN, INC.; CARLETON TRANSPORT SERVICE; JAMES CORDES, on behalf of Cordes Inc.; MEUNIER ENTERPRISES LLC; PAUL PROSPER; RODNEY E. JAEGAR; PURDY BROTHERS TRUCKING CO.; TC CONSTRUCTION CO. INC.; PHILLIP E. NIX,

Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

REDACTED BRIEF FOR PLAINTIFF-APPELLANT

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INTRODUCTION

Defendants/Appellees' ("Defendants") brief is focused on the red herring of creating individual issues. Market participants are never entirely the same. There are some with larger purchasing power, or some that occasionally buy different products. Finding "differences" in the natural world is not hard. The issue on class certification, however, is to decide which differences are meaningful. To do that, a rigorous analysis is required. Not only did the District Court fail to conduct such a rigorous analysis, but it inexplicably dismissed *all* named plaintiffs because of perceived inadequacies with only several of them.

The differences Defendants raise here are not meaningful on class certification because they are all manifest in both the actual and but for world. For example, differences in purchasing power between fleet buyers and small dealers, or between how rebates were applied to various truck purchases, are immaterial where none of those differences arise from Defendants' conspiracy.

Defendants also take unfair shots at Plaintiffs' expert's regression models and his selection of data to populate those models. These criticisms are again superficial and rigorous analysis reveals they're nothing but a facade. Plaintiffs' expert Dr. Russell Lamb crafted regression models that were well-tailored to the specific markets he analyzed. They were informed by a thorough review of the

economic realities of the market and analyze *all the available data*. Where Defendants suggest otherwise, they are merely glossing over the truly relevant factors to create the illusion of inconsistencies or deficiencies. Scratching beneath the surface, as the District Court should have done in a rigorous analysis, reveals these criticisms lack merit.

Finally, just last week the Supreme Court issued its decision in *Tyson Foods, Inc. v. Bouaphakeo*, No. 14-1146, 2016 WL 1092414 (U.S. Mar. 22, 2016), in which it decided and clarified many of the issues on this appeal. In *Tyson*, the issue was whether at trial the plaintiffs could use representative evidence to establish class-wide damages for employees who spent different amounts of time donning and doffing their protective gear. Both the trial court and circuit court held the class was properly certified and the evidence proper for trial. The Supreme Court affirmed these holdings, and in the process, made several statements which made it clear the District Court should have certified the class at issue here. The Court stated "[w]hen 'one or more of the central issues in the action are common to the class and can be said to predominate, the action may be considered proper under rule 23(b)(3) even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members'." *Id.* at *7.

The Supreme Court held that once a "District Court finds evidence to be admissible" (and there was no FRE 702 preclusion of Dr. Lamb's report here), its persuasiveness is a matter for the jury. *Id.* at 11. In light of this new guidance from the Supreme Court, and for the other reasons that follow, the District Court here abused its discretion in denying class certification and dismissing this case.

ARGUMENT

I. There Was No Intra-Class Conflict

On appeal, Defendants attack the adequacy of the class representatives based on a supposed intra-class conflict about how class members purchased their trucks. Appellees/Defendants Response Brief, filed on March 11, 2016 ("Opp. Br.") at 65-70. It is well-established that"[d]iffering purchasing methods and prices do not necessarily defeat a finding of typicality and adequacy, provided that the alleged misconduct applies across the array of methods and prices." *In re Processed Egg Prods. Antitrust Litig*., 312 F.R.D. 171, 180 (E.D. Pa. 2015) (*citing Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 599 (3d Cir. 2012) ("When a class includes purchasers of a variety of different products, a named plaintiff that purchases only one type of product satisfies the typicality requirement if the alleged misrepresentations or omissions apply uniformly across the different product

types.")).[1] *Eggs Prods.,* 312 F.R.D. at 179 ("[u]nlike the other Rule 23(a) requirements, the burden of proving that class representatives are inadequate falls to the party challenging the class representation") (citation and footnote omitted).

Moreover, not just any minor conflict will defeat adequacy. A "conflict must be 'fundamental' to violate Rule 23(a)(4)." *Dewey v. Volkswagen*, 681 F.3d 170, 184 (3d Cir. 2012). "A fundamental conflict exists where some [class] members claim to have been harmed by the same conduct that benefitted other members of the class." *Id*. Despite the District Court's presumption, Opinion at 13, n.7 [A-20], nothing in the record suggests any indirect purchasers benefitted from the antitrust conspiracy. Rather, the District Court focused not on liability, which drives class certification, but on damage *motives* (which is not the proper test).[2]

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[1] *See also In re Chocolate Confectionary Antitrust Litig.*, 289 F.R.D. 200, 217 (M.D. Pa. 2012) ("that customers paid different prices or purchased different brands of products does not defeat typicality"); *In re Flat Glass Antitrust Litig.,* 191 F.R.D. 472, 480 (W.D. Pa. 1999) ("the overarching scheme is the linchpin of plaintiffs' amended complaint, regardless of the product purchased, the market involved or the price ultimately paid"); NEWBERG ON CLASS ACTIONS § 3:35 (5th ed.) ("In price–fixing actions, the proposed class representative's claims are generally held to be typical of the class members' claims even if there are variations in the manner in which members of the class purchased from the defendant, variations in the kind of product purchased, differences in price, and other factors.").

[2] The District Court held "the truck resellers within the class have an interest in proving they passed-through zero overcharge in order to recover 100% of the ***damages*** attributable to each resale, while the downstream purchasers have an opposite interest". Opinion at 13 n. 7 (emphasis added) [A-20]. This damage allocation within the class does not defeat class certification, as such an allocation

The District Court below failed to recognize established law that different purchasing methods do not prevent class certification, and failed to perform the required rigorous analysis of the facts. But more importantly, the supposed differences in bargaining power alleged here between individual truck and fleet truck owners are *irrelevant*. Both must prove the same conspiracy and its impact.

For example, consider the purchase of a Class 8 truck with a fair market value of $100,000, an extra $1,000 of which was as a result of the conspiracy. According to Defendants, a volume fleet purchaser might have paid only $98,000 for the vehicle due to its enhanced bargaining power. In that instance, there no evidence in this case that a fleet purchaser somehow avoided the $1,000 overcharge. This is unsurprising for two reasons. First, none of the dealers were even aware of an alleged overcharge until Meritor sued Eaton. Transcript of March 25, 2015 Class Certification Hearing ("3/25 Tr.") at 243:18-22 [A-905]. Thus, a dealer could not have negotiated down or away the overcharge on the transmission, since none of them had any reason to suspect an overcharge existed in the first

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can be handled by the District Court or through the settlement process. This reasoning applies equally to the District Court's erroneous some benefitted through long term contractual volume rebates. *See Tyson*, 2014 WL 1092414, at *12 (finding it premature to addressed whether a damages award can be properly allocated among class members); *In re Nexium Antitrust Litig.*, 777 F.3d 9, 19 (1st Cir. 2015) (finding uninjured class members need not be identified at the class-certification stage so long as it will be possible to distinguish uninjured from injured class members prior to judgment).

place. Second, each dealer has acknowledged fact that none of them ever specifically negotiated the individual price of a transmission (as opposed to the price of the truck as whole).Thus, it is evident that none of the supposed individual issues regarding purchasing practices or bargaining power could have had any individual impact on the damages here, since none of them had any impact on the price of the transmission.

II. The District Court Erred By Denying The Timely Motion To Substitute Class Representatives

Defendants cannot decide whether the motion to substitute the California and Kansas representatives was moot (and therefore irrelevant, Opp. Br. at 71-72) or whether it justified class certification denial (Opp. Br. at 70-71). Defendants made both those arguments and neither is correct.

First, although the District Court suggested it was a moot issue, [A-36] ("Plaintiffs' motion [to] substitute class representatives … is denied as moot"), the District Court actually considered the issue, erroneously, in the decision not to certify the class. Opinion at 11-12 [A-18-19]. Thus, it is not simply a moot issue as Defendants contend.

Second, a motion to substitute class representatives is hardly unusual in indirect purchaser class actions, and moving to substitute when the class

certification motion is filed can scarcely be called too late or prejudicial.[3] Defendants had a chance to, and did, depose the two new class representatives. Class Representatives, even substitute ones, cannot be found inadequate without some evidence and reasoning why. Here, the District Court provided none, and on this appeal, Defendants do not either. Opp. Br. at 70-71.

III. There Was No Basis To Dismiss This Case In its Entirety

There was no basis to dismiss the case on the merits. If class certification denial is upheld, the reasons for denial can be corrected below, or in the alternative, Plaintiffs can continue individually. Defendants' summary judgment motions were never addressed by the District Court, and the case cannot be dismissed *sua sponte*. Even Defendants cite no case law in support of this extreme dismissal decision, and implicitly recognize it as improper. Opp. Br. at 74 n. 80.

This case should not have been dismissed. The dismissal of each and every plaintiff as not having standing has no basis in law or fact. This Court has already found Eaton's conduct anticompetitive and that it had impact. *ZF Meritor, LLC v. Eaton Corp.*, 696 F.3d 254 (3d Cir. 2012). Class members impacted by that antitrust conspiracy should be compensated, and at least given the chance to prove their case in court.

[3] Indeed, the District Court cited no case law for untimeliness and found no prejudice to Defendants. Defendants did not even argue legal prejudice to this Court.

IV. The District Court Erred In Finding That The Common, But Not Identical Issues Regarding Indirect Purchasers Of Trucks Precluded Class Certification

Each of the issues examined by the District Court and relied on by Defendants to argue that the "District Court's ruling was correct" were decided contrary to the facts and/or law, and are reversible error.

A. Customization of Certain Trucks Does Not Create Individual Issues That Predominate

Defendants incorrectly assert that a class cannot be certified because some trucks were "highly customized for use in different applications." Opp. Br. at 42. While Defendants note that "the final transaction price for any given truck turned on numerous factors—including the size and history of the customer, the size of the order, sales programs, the potential profit margin for the transaction, competition from other truck sellers, and competition among dealers," (Opp. Br. at 43) these factors are irrelevant in determining whether an *overcharge* for the *transmission* existed. None of these factors would be different in the but for world, and thus none of these factors impacts the transmission overcharge or would be relevant to a class certification analysis. For example, Dr. Lamb has opined:

[redacted]

As noted above, if dealers were unaware of an overcharge during the Class Period, it could not have possibly affected the negotiation of truck prices. The entire purchase prices of trucks were negotiated in the normal course, only unbeknownst to the dealers, that price was slightly inflated by the effect of the conspiracy *on the price of the transmission*.

Robert Nuss did not have a contrary opinion, despite Defendants' mischaracterization of his testimony. In fact, he confirmed that customers always "buy the whole, they buy the complete truck. Even as a dealer, I don't buy transmissions; I buy a complete truck." (Tr. at 187:22-22) [A-891]. One cannot

[4] Defendants' assertion that "the sale terms obtained by some of the named plaintiffs reflect significant, yet individualized, financial incentives" (Opp. Br. at 14-15) is irrelevant to determining common issues on transmission pricing. As explained in Appellants' Opening Brief at 33-39, such financial incentives would have been available in the but for world and thus would not impact the overcharge. Thus, it is irrelevant whether "financial incentives effectively lower the truck's sale price and may even exceed the entire price of any transmission (~$3,000-$6,000) that the Truck Manufacturer buys from Eaton" (see Opp. Br at 14) because, as stated above, such financial incentives would be identical in the but for world.

infer from such testimony that *transmission* "price increases are regularly absorbed by either the Truck Manufacturer or the truck dealer to secure the sale." Opp. Br. at 45 n.64. Even Defendants note that "Truck Manufacturers and dealers negotiate the price of a completed truck and do not negotiate or even break out individual component price." Opp. Br. at 11. Mr. Nuss's testimony does not demonstrate that *the overcharge price of a transmission* is absorbed by a dealer.[5]

While Defendants argue Plaintiffs "have offered no common approach that could possibly account for all of the individual complexities and financial incentives associated with each transaction in their proposed class" (Opp. Br. at 43), that argument misses the mark. None of the "complexities" or "incentives" would ultimately affect the final overcharge *on the price of the transmission*.[6] In

[5]Furthermore, Defendants' submission of a handful of affidavits stating that cost increases are sometimes not passed on is not sufficient evidence to disprove these economic findings. *See, e.g.*, *In re OSB Antitrust Litig.*, 06-cv-826, 2007 WL 2253425, at *12 (E.D. Pa. Aug. 3, 2007) (rejecting the contention that testimony from a few individuals that price increases were not always passed through should defeat certification).

[6] The two cases cited by Defendants are distinguishable. *In re Optical Disk Drive Antitrust Litig.*, 303 F.R.D. 311, 324(N.D. Cal. 2014) is distinguishable because, "[a]mong other things, the IPPs have not presented a persuasive explanation as to why it would have been reasonable to assume a uniform pass through rate given that ODDs typically make up a relatively small portion of the cost of the products into which they are incorporated, and given the existence of price points – i.e. the common practice in the industry of selling products costing in the hundreds of dollars at prices just under the next $100 mark." Here, by contrast, the transmission is a major component in the price of a truck, and there is no similar "price point" pricing of a truck. *Newton v. Merrill Lynch*, 259 F.3d 154, 187 (3d Cir. 2001)

other words, even these "complexities" are common to the Class because they exist in the same form in the actual and but for worlds. The District Court committed reversible error when if found that such factors led to the predominance of individual issues.

B. The Distribution Chain Does Not Create Individual Issues That Predominate

Defendants incorrectly assert that "the complex distribution chain frustrates the process of determining the amount of pass-through on a transmission based on the price of a truck." Opp. Br. at 42. The distribution chain is not complex here. The majority of truck sales happened in one way – the OEMs sold a truck to a dealer, who in turn sold the truck to an end user.[7] [redacted]

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concerned automated execution of trade orders which did not necessarily injure every class member. The court held that "[w]hether a class member suffered economic loss from a given securities transaction would require proof of the circumstances surrounding each trade, the available alternative prices, and the state of mind of each investor at the time the trade was requested." *Id.* There are no such similar variables here.

[7] In *In re Graphics Processing Units Antitrust Litig.*, 253 F.R.D. 478, 506-07 (N.D. Cal. 2008), the court found that the methodology for proving class-wide impact was flawed where plaintiffs' expert, on her own initiative, used different variables in various reseller-specific regressions. This raised a concern about the "individualized nature of [the expert's] methodology" and "significant concerns about the manageability of this potential class action." *Id.* at 504. In that case, where indirect purchasers could have purchased either a graphics card containing the computer chip, or an entire computer containing such a graphics card, from "potentially thousands of different retailers and manufacturers," that expert's own decision to utilize an inherently individualized methodology highlighted the complex nature of the market and led to denial of certification. *Id.* at 499, 504.

[redacted] Accordingly, the District Court committed reversible error when it found that such factors precluded expert testimony on impact.

C. Rebates and SPIFs Do Not Prevent Expert Testimony on Impact

Defendants also argue "rebates complicate the damages issue not only because the rebates benefitted some members of the class through price reduction, but also in terms of individualized transactions and the inability to account for them through common proof." Opp. Br. at 45. However, as stated in this opening brief, the Court's analysis, and thus Defendants' reliance on the analysis, was flawed[8]The District Court made findings that certain named plaintiffs "benefitting" from an overcharge, Opinion at 24-25, but there is *no* evidence that any class member actually benefitted from the price reduction, [redacted]

However, as stated above, the distribution channels are much simpler here, mainly consisting of dealers that sell to end users.

[8]Defendants' citation to *In re Intel Corp. Microprocessor Antitrust Litig.*, MDL No. 05-1717-LPS, 2014 WL 6601941 (D. Del. Aug. 6, 2014), is unavailing. Unlike in *Intel*, there is no reliable evidence that rebates actually resulted in *lower prices than any truck purchaser would have paid in the but for world*. Also, in *Intel*, that court's discussion of "real-world facts surrounding this complicated market" concerned multiple distribution levels which are not present here. *Id*., at 15-16.

[redacted]

Thus, Defendants' conspiracy is the only difference between the "but for" world and actual world. Unless Defendants' anticompetitive conduct transformed some buyers into better negotiators or induced some into adding a significant body to a truck, then the purported individualized nature of the truck market had no effect on the overcharge or pass-through. In other words, "[v]ariations in the negotiating skill of the purchaser would not eliminate the injury; the hard bargainer might have gained a good price, but would have done better yet in the absence of a conspiracy." *See In re Mercedes-Benz Antitrust Litig.*, 213 F.R.D. 180, 189 (D.N.J. 2003) (noting "[t]his Court is not the first to recognize that common proof of impact is possible in the automobile market 'notorious for haggling and negotiations in purchasing'") (quoting *Rosack v. Volvo of Am. Corp.*, 131 Cal. App. 3d 741, 759 (Cal. App. 1982)). Again, the fact that none of the dealers were ever aware of a possible overcharge on the transmission prices means there is no possible way it could have affected the negotiations. Even Dr. Johnson admitted he has seen no evidence that any truck purchaser specifically negotiated a transmission price nor any evidence that any buyer was able to avoid an overcharge by "pushing back against the overcharge." 3/25 Tr. at 243:3-17 [A-905].

Regardless, the Supreme Court in *Tyson* just reiterated that a damage difference among class members is no excuse to deny class certification. *Tyson*, 2016 WL 1092414, at *7 (predominance met even if damages have to be tried separately). Accordingly, the District Court committed reversible error.[9]

V. The District Court Erred By Failing To Consider Relevant Evidence

While Defendants argue there is "no requirement that a District Court cite and reject every piece of evidence that an expert considers", Opp. Br. at 64, the District Court has a duty to rigorously examine evidence which would influence the class certification analysis. Several pieces of evidence which the District Court did not consider address issues "that [Defendants'] expert and the District Court determined condemn Dr. Lamb's model" and "otherwise constitute[] sufficient common evidence of classwide antitrust impact." *Cf.* Opp. Br. at 64.

For example, Defendants' documents demonstrate they were aware that dealers passed through price increases to end-user customers. Those documents also demonstrate the OEMs' own knowledge that price increases were passed through, and not absorbed by OEMs or dealers. [redacted] Yet the District Court did not explain why Defendants' own documents on this issue should be ignored.

[9]Defendants also raise a *Comcast* argument. This fails for the reasons addressed in Plaintiffs' opening Brief, namely that Plaintiffs have not proffered multiple theories of antitrust liability, and the District Court has not dismissed some theories while sustaining others. Opp. Br. at 49-51.

Similarly, economic theory predicts that firms pass through monopoly overcharges, and absorbing such overcharge hardly ever occurs. [redacted] Here, the tight margins in the truck sales industry require that overcharges be passed through to the customer. [redacted] The District Court did not explain why the specific circumstances of this case would fall outside the general economic rule that overcharges are passed through to the end user. Regardless, this would go to the weight, and not the admissibility, of Plaintiffs' expert opinion on impact. Accordingly, the District Court, by ignoring Defendants' relevant documents and the economic conditions of the market, failed to rigorously analyze these issues and committed reversible error.

VI. Dr. Lamb Has Demonstrated Classwide Impact And Damages

Defendants' response brief largely re-argues the class-certification motion, but the issue before the Court is whether the District Court conducted a rigorous analysis or abused its discretion in denying Plaintiffs' class-certification motion. To the extent Defendants raise arguments not addressed in the District Court's opinion, it is impossible to know whether the District Court would have found these arguments persuasive. This Court need not "speculate as to what the District Court must have considered." *See Neale v. Volvo Cars of N. Am., LLC*, 794 F.3d 353, 372 (3d Cir. 2015). Rather, the District Court must "provide sufficient information"

for this Court "to engage in meaningful appellate review." *See New Directions Treatment Servs. v. City of Reading*, 690 F.3d 293, 313 (3d Cir. 2007). It did not.

Nevertheless, these arguments also fail when subjected to a rigorous analysis. Defendants make at least 18 references to Dr. Lamb "excluding" data throughout their Brief. Repetition does not constitute reality. In reality, all these "excluded" data fall into one of three categories: (1) data that does not exist as a result of Defendants' anticompetitive conduct (a performance transmission benchmark), (2) data that is unusable (Daimler, PACCAR, and Navistar transactions), or (3) data that is unavailable to the parties (sales data from non-subpoenaed dealers). Dr. Lamb has analyzed all available, usable data.

A. Dr. Lamb Demonstrates An Overcharge

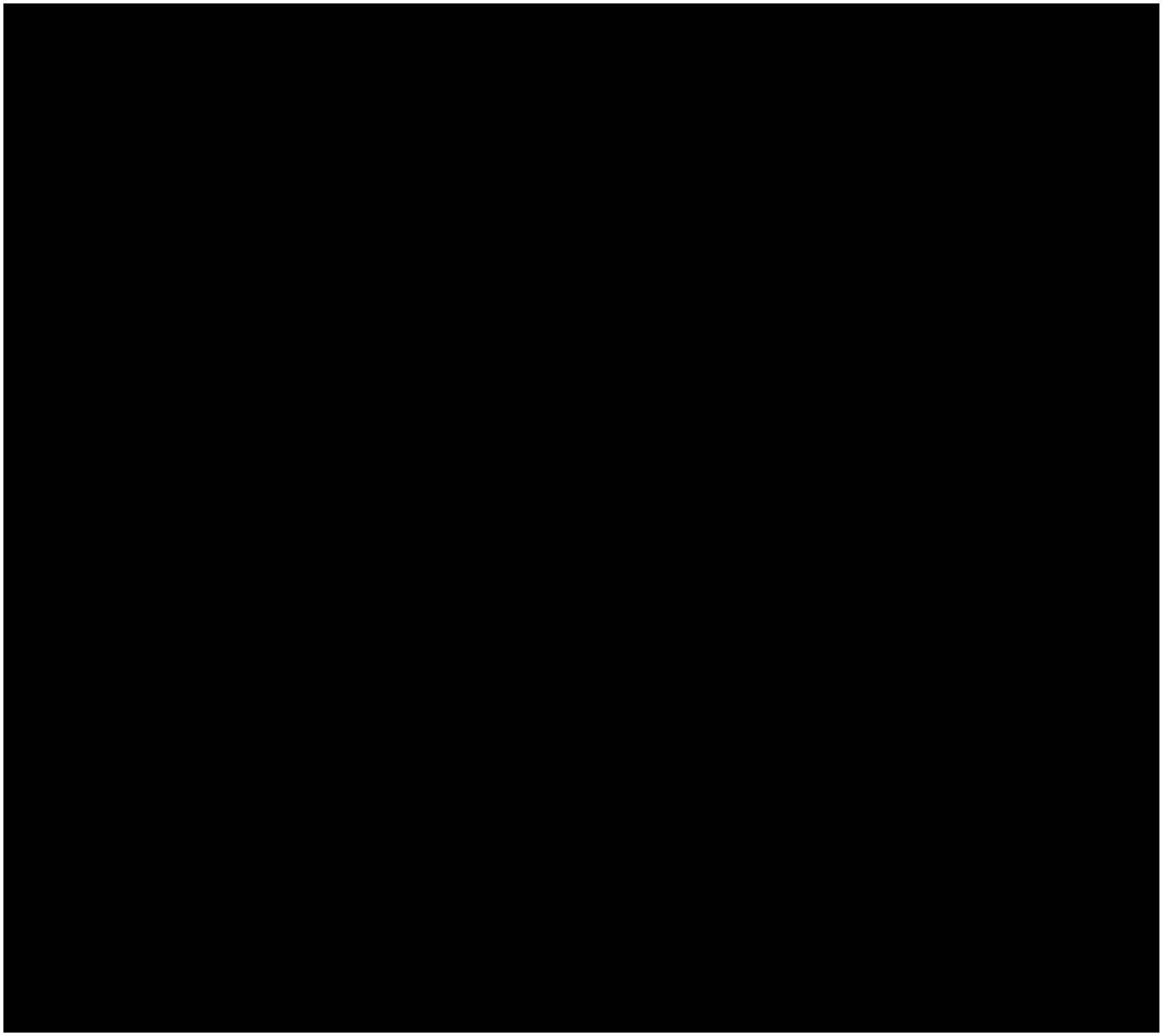
Plaintiffs have proffered a reliable methodology for establishing antitrust injury and calculating damages on a class-wide basis, starting with the overcharge from Eaton to the OEM Defendants on Class 8 truck transmissions. As Dr. Lamb has explained, Eaton has always been a monopolist in the performance transmission market. 3/25 Tr. at 70:23-71:1 [A-862]. As a result, there is no benchmark period from which Plaintiffs can calculate "but for" prices.[10] Since Defendants' misconduct eliminated the possibility of a benchmark period in the

[10]"There simply is no benchmark period for performance transmissions as a result of the challenged conduct. As a result of the alleged misconduct in the marketplace, ZF Meritor never was able to gain a foothold in that marketplace, and so there is no benchmark period." 3/25 Tr. at 88:1-12 [A-866].

performance transmission market, Dr. Lamb utilized the well-established yardstick approach by looking to a related market, i.e., the market for Class 8 linehaul truck transmissions. *See id.* at 71:10-18 [A-862].

When conducting a yardstick analysis, the yardstick market is, by definition, different from the market being studied. [redacted] Utilizing a similar market unaffected by challenged conduct, such as the pre-October 2002 linehaul transmission market, is an accepted methodology. *See Bradburn Parent/Teacher Store v. 3M*, 02-cv-7676, 2004 U.S. Dist. LEXIS 16193, at *46 (E.D. Pa. Aug. 17, 2004) (noting damages may be calculated by looking at a market with similar characteristics). The District Court's opinion is silent on

whether the linehaul transmission market is such an inappropriate yardstick as to render the opinion inadmissible.



[12]*See Fond Du Lac Bumper Exch., Inc. v. Jui Li Enter. Co.*, No. 09-cv-0852, U.S. Dist. LEXIS 23768, at *12-13 (E.D. Wis. Feb. 26, 2016) ("Dr. Lamb explained that even if his benchmark period contains some anticompetitive conduct, it would only render his overcharge estimate conservative. This makes sense; if anti-competitive conduct occurred during the benchmark period, then the but for price Dr. Lamb calculated using the benchmark period would presumably be higher."); *see also Egg Prods.*, 312 F.R.D. at 195 (noting anticompetitive activity during the benchmark period would understate the effect of anticompetitive conduct).

Accordingly, Plaintiffs put forth reliable models for establishing the overcharge in the linehaul and performance transmission markets. Defendants should not escape liability merely because their anticompetitive acts were absolutely effective in excluding ZF Meritor from the performance transmission market. *See Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 265 (1946) (noting a "wrongdoer may not object to the plaintiff's reasonable estimate of the cause of injury and of its amount, supported by the evidence, because not based on more accurate data which the wrongdoer's misconduct has rendered unavailable"); *see also In re Scrap Metal Antitrust Litig.*, 527 F.3d 517, 533 (6th Cir. 2008) (noting "it 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").

B. Dr. Lamb Demonstrates Pass-Through To Truck Dealers

The District Court was largely silent on Plaintiffs' usage of Volvo/Mack data to calculate pass-through from the OEMs to truck dealers; however, Defendants have raised this issue in their Brief. Opp. Br. at 51-53. [redacted] Notably, Dr. Johnson agrees that it would

[redacted]

[redacted] *See, e.g., In re Chocolate Confectionary Antitrust Litig*., 289 F.R.D. 200, 213 (M.D. Pa. 2012) (certifying class notwithstanding Dr. Johnson's critique of plaintiffs' expert for relying upon one customer's purchasing data); *Egg Prods.* 312 F.R.D. at 204 (certifying a shell-eggs subclass where plaintiffs' expert utilized data from four of eleven defendants).

C. Dr. Lamb Establishes Pass-Through All The Way To Truck Purchasers

Defendants characterize Dr. Lamb's model measuring pass-through from truck dealers to truck purchasers as excluding 97.8 percent of trucks sold. In reality, Dr. Lamb once again utilized all available data, which are sufficient for Dr. Lamb to measure the pass-through rate in a nationwide market. Similarly, as a matter of economics, there is no difference between a truck sold in a state that has passed an *Illinois-Brick* repealer statute and one that has not.

The transactional data Dr. Lamb utilized was obtained via subpoenas served on non-party truck dealers. [redacted]

[redacted]. As noted above, Plaintiffs used all available data, which account for more than two percent of all transactions. *See* 3/25 Tr. at 157:22-158:4 [A-883-84]. As the Supreme Court stated in *Tyson*, "[i]n many cases a representative sample is 'the only practicable means to collect and present relevant data' establishing defendant's liability." 2016 WL 1092414, at *8. Defendants were free to argue, as they did, that the data are unrepresentative or inaccurate. But the "defense is itself common to the claims made by all class members." *Id*. at 11.

Moreover, the Supreme Court recently held the usage of evidence based upon a sample to be permissible in class actions if such evidence would be permissible in an individual action. *See Tyson,* 2016 WL 1092414, at *10. Dr. Lamb has testified that the same methods offered to provide injury and damages on a class-wide basis would be necessary to prove the claims of individual litigants. 3/25 Tr. at 107:16-108:18 [A-871].

The reliability of this sample is supported both by economic theory and the evidence presented to the District Court. [redacted]

[redacted] Moreover, since truck dealers face nationwide competition, "[i]t means that you expect as a matter of economics pass-through rates to be similar across different dealers located in different parts of the country…It's appropriate to apply a single pass-through rate for the entire country." 3/25 Tr. at 98:21-99:2 [A-869]. As noted above, courts within the Third Circuit have certified classes based upon multiple-regression analyses run on a portion of all transactions. *See, e.g. In re Chocolate*, 289 F.R.D. at 213; *In Re Processed Egg Prods.,* 179 F.R.D. at 204. The District Court has not explained why these 7,590 transactions are insufficient as a matter of law, and it can deny class certification based upon such evidence only if it concludes no reasonable juror could find such evidence persuasive. *Tyson*, 2016 WL 1092414, at *11. The District Court stated no such conclusion. "Given the inherent difficulty of identifying the 'but for' world, we do not require that damages be measured with certainty." *Behrend v. Comcast Corp.*, 655 F.3d 182, 203 (3d Cir. 2011); *rev'd on other grounds* 133 S. Ct. 1426 (2013). [14]

[14]The District Court also confused total truck price with transmission overcharge price by asking for specific evidence of a change in truck prices. 3/25 Tr. 263:22-24. [A-915] This is not the proper measure of antitrust injury. It is entirely possible for prices to remain the same, or even decrease, in the actual world while consumers suffer antitrust injury if prices would have decreased at a greater rate in the "but for" world.

Likewise, Dr. Lamb's IPP pass-through model need not include only transactions from IPP states or the specific states for which Plaintiffs seek class certification. Not only are trucks sold in a nationwide market, creating a uniform pass-through rate, but there is no evidence in the record indicating the existence of an *Illinois-Brick* repealer statute would have any effect on the pass-through rate.

D. Defendants Incorrectly Argue That Dr. Lamb Assumes Uniformity

Defendants' final line of attack is that Dr. Lamb somehow assumes uniformity among all truck purchasers. First, Defendants erect a strawman based on averages. Although the use of averages is not inherently flawed,[15] this is not what Dr. Lamb has done. Rather, the data supplied by Eaton were aggregated on a monthly basis. *See* 3/25 Tr. 119:7-11 [A-874]. Data were not aggregated across manual and automated transmissions nor were they aggregated across OEMs. *Id*. at 119:12-120:8 [A-874]. The fact that Dr. Lamb calculated a uniform overcharge in a nationwide market in which OEMs and truck dealers face essentially the same supply and demand conditions does not mean he improperly calculated average injury or average damages. *See Fond Du Lac Bumper Exch., Inc.*, U.S. Dist.

[15] *See Tyson Foods*, 2016 WL 1092414, at *8 (finding the use of average time donning and doffing to be permissible for establishing class-wide injury); *In re Cathode Ray Tube (CRT) Antitrust Litig*., 308 F.R.D. 606, 628 (N.D. Cal. 2015) ("attacking averaged data is a standard defense tactic in antitrust cases, so it is unsurprising that courts have often evaluated and approved the appropriate use of averages").

LEXIS 23768 at *12-*13 (denying motion to exclude expert testimony certifying a class where Dr. Lamb calculated a uniform overcharge of 17.54%).

E. Defendants' Expert's Sub-Regressions Are Improper And Provide No Insight

Dr. Johnson's methods for "testing" do not reveal crucial differences among class members. [redacted] At best, the arguments go to the weight, not admissibility, of Dr. Lamb's expert opinion.

[redacted] This implies an inverse relationship between demand and price, contradicting the basic economic principles of how prices react to a change in demand. See 03/25 Tr. at

237:13-14 (Dr. Johnson stating increasing costs generally result in increasing prices) [A-903].

[redacted] Courts have rejected attacking overall studies by breaking down the data into subsets is roundly rejected in the legal literature. "It is intuitive that what would adequately describe the data as a whole might not accurately describe a certain subset of the data—and curious results like those noted by defendants are to be expected." *In re Processed Egg Prods. Antitrust Litig.*, 81 F. Supp. 3d 412, 434 (E.D. Pa. 2015); *see also Castro v. Sanofi Pasteur Inc.*, 11-cv-7178, 2015 U.S. Dist. LEXIS 132458, at *29 (D.N.J. Sept. 30, 2015) ("[defendant's expert] finds that narrowing the regression sample to a particular state eliminates the statistical significance of the regression. This is unremarkable. Obviously a smaller sample will frequently render a regression statistically insignificant. That does not defeat the statistical significance of the more complete regression").[16] Accordingly, it would be an abuse of discretion to find Dr. Lamb's models unreliable merely

[16]*See also In re Air Cargo Shipping Servs. Antitrust Litig.*, MDL No. 1775, 2014 U.S. Dist. LEXIS 180914, at *265-*66 (E.D.N.Y. Oct. 15, 2014) ("[t]he mere fact that the defendants' experts have found a way to exaggerate this variability by using questionable econometric practices to manipulate [plaintiffs' expert's] model is not a compelling reason to deny class certification.")

because they produce different results when run on much smaller subsets of the data, something Dr. Lamb's models were not designed to do.

VII. Defendants Misstate The Importance Of The District Court's Decision To Decline To Compel Post-March 2010 Transactional Data.

Defendants argue that Plaintiffs cannot contest the District Court's failure to require the production of post-March 2010 transactional data, incorrectly arguing that Plaintiffs never raised their purported need for additional data in their class certification briefing below. This is a misstatement of the record. Plaintiffs are not just appealing dismissal and denial of class certification – they are also appealing the separate-but-related ruling, made at a status conference in June 2013, in which the District Court declined to order the production of such data. *See* Notice of Appeal, at ¶ 2 [A-1]. Accordingly, the denial of this document discovery is properly before this Court.

CONCLUSION

For the foregoing reasons, as well as those in Plaintiffs' Opening Brief, the District Court's dismissal for lack of Article III Standing, for every plaintiff, as well as its denial of class certification, should be reversed.

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CERTIFICATE OF BAR MEMBERSHIP

I certify, pursuant to 3d Cir. L.A.R. 28.3(d) that I am a member of the bar of the Third Circuit.

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CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(a) AND LOCAL RULE 31.1

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify the following:

This brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because this brief contains 6,905 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii) of the Federal Rules of Appellate Procedure.

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Gregory B. Linkh

CERTIFICATE OF FILING AND SERVICE

I, Melissa Pickett, hereby certify pursuant to Fed. R. App. P. 25(d) that, on March 28, 2016 the foregoing Redacted Reply Brief Plaintiff-Appellant was filed through the CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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Melissa Pickett