No. 10-2514

In the United States Court of Appeals for the Seventh Circuit

STEVEN MESSNER, AMIT BERKOWITZ, HENRY LAHMEYER, PAINTERS DISTRICT COUNCIL NO. 30 HEALTH & WELFARE FUND, PLAINTIFFS-APPELLANTS

v.

NORTHSHORE UNIVERSITY HEALTHSYSTEM, DEFENDANT-APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION,
NO. 07 C 4446, HON. JOAN HUMPHREY LEFKOW, PRESIDING

OPPOSITION BRIEF OF DEFENDANT-APPELLEE

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DISCLOSURE STATEMENT

Appellate Court No: **10-2514**

Short Caption: ***Messner, et al. v. NorthShore Univ. HealthSystem***

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing the item #3):

NorthShore University HealthSystem (f/k/a Evanston Northwestern Healthcare)

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Winston & Strawn LLP

(3) If the party or amicus is a corporation:

(i) Identify all its parent corporations, if any; and
None

(ii) List any publicly held company that own 10% or more of the party's or amicus' stock:
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JURISDICTION

Plaintiffs-appellants' jurisdictional statement is complete and correct.

INTRODUCTION

Plaintiffs' appeal is in large measure an effort to sandbag the district court with arguments that were never presented below and, in many cases, are flatly contrary to the arguments Plaintiffs *did* present. Although Plaintiffs now run from their own expert, and from the factual record they created, they cannot escape the district court's simple, unassailable finding, made after a live hearing and *de novo* review of the contracts at issue, that their class-certification effort fell of its own weight.

Plaintiffs' suit is an antitrust challenge to the merger of two Chicago-area hospitals, Defendant Evanston Northwestern Healthcare Corporation ("ENH"), now known as NorthShore University HealthSystem, and Highland Park Hospital. To establish predominance, Plaintiffs, who purchased health-care services from the combined entity, willingly assumed the burden of showing that they could establish antitrust injury across their putative class using common proof. And, although they now attempt to reverse course on appeal, Plaintiffs pledged repeatedly and unequivocally—even under oath in open court—that they would carry that burden in only one way: by showing that the health-care contracts on which their claims are based revealed *uniform* price increases.

Yet the contracts on their face showed otherwise. After Plaintiffs' counsel told the district court, "I think you're just going to have to look at the numbers yourself …," A1410-11, the district court accepted the invitation. And after a *de novo* review, the

court found that "even a cursory examination of the [contracts] makes clear that the prices of some services changed at a variable rate." A56. Accordingly, the district court concluded that "plaintiffs' proposed method relies on an assumption that they have not been able to validate." A57.

With Plaintiffs thus lacking any common proof of injury, the district court *could not* certify a class. That conclusion is confirmed by the admission of Plaintiffs' largest putative class member, which swore to the district court that "[t]he conduct which [ENH] allegedly engaged in, as stated in this case, did not cause [the putative member] any injury or damage." A722-23. And Plaintiffs' own expert conceded that potentially *thousands* of class members were not injured by this decade-old merger. A1337-38.

Simply put, Plaintiffs' effort to certify a class self-destructed. And the district court's honest recognition of that fact, and consequent refusal to certify the class, affords no basis for second-guessing its broad discretion.

Plaintiffs' attempt to invoke this Court's decision in *American Honda Motor Co. v. Allen*, 600 F.3d 813 (7th Cir. 2010), decided a few days *after* the decision at issue here, is likewise fundamentally misguided—both because Plaintiffs failed to mount any *Daubert* challenge to the specific observations of the defense expert cited by the district court, and because those observations were confirmed by the district court's own *de novo* analysis of the pertinent contracts. And Plaintiffs' other arguments—touting contract "restructuring" and allegations that the district court applied the wrong legal standards—are irrelevant makeweights. Likewise misplaced are the concerns of Plaintiffs' *amici*, who fail to engage the case as it was actually litigated below.

In short, the district court correctly declined to certify the class proposed in this case, not because of any broad principles of antitrust or class-action law, but based on its factual finding that the single, flawed method proposed by these particular Plaintiffs was insufficient to carry their burden. The district court's order should be affirmed.

COUNTERSTATEMENT OF THE ISSUES

1. Whether the district court abused its discretion in declining to rule on Plaintiffs' motion to strike ENH's expert where, as shown on the face of the record, Plaintiffs' proffered methodology for showing classwide impact, and hence predominance, failed on its own terms.

2. Whether, even if the district court should have ruled on Plaintiffs' motion to strike, the district court abused its discretion in refusing to certify a class where, as shown on the face of the record, Plaintiffs' proffered methodology for showing classwide impact failed on its own terms.

COUNTERSTATEMENT OF FACTS

Plaintiffs overlook or distort facts critical to understanding this case and the decision below. These include: (A) the dramatic difference between Plaintiffs' burden at the class certification stage of an antitrust case, and the task of the FTC in its prior action challenging the merger; (B) the extent of Plaintiffs' attempt to piggyback on the FTC's methodology; (C) Plaintiffs' concession that their application of the FTC's methodology would work here *only* if prices increased "uniformly"; (D) the district court's decision to hold a full evidentiary hearing to address new analysis provided by Plaintiffs for the first time in their reply; (E) the factual basis for the district court's finding that prices

here did *not* increase uniformly; and (F) Plaintiffs' attempt to strike one of ENH's expert's reports.

A. Plaintiffs attempt to meet their burden of showing classwide impact by borrowing irrelevant conclusions from the FTC action.

As they did below, Plaintiffs rely heavily on the prior FTC action, incorrectly approaching certification in this private antitrust action as if they stood in the government's shoes, and ignoring major differences between the FTC case and their claims on behalf of the proposed class. *E.g.*, Br. 25-26, 34, 39. What Plaintiffs do not mention, however, is that at first they attempted to borrow—almost wholesale—the FTC's *conclusions* to establish common proof of antitrust injury. Thus, according to Plaintiffs, their expert "did not conduct an actual [statistical] analysis in his initial report but he described what had been done in the FTC proceeding and how he would tweak it for this case." Pl.'s 23(f) Pet. 16. To understand why Plaintiffs' attempt merely to "tweak" the FTC's analysis failed, it is important to appreciate how this antitrust class action differs from the FTC proceeding.

Because "individual injury (also known as antitrust impact) is an element of the cause of action," "to prevail on the merits" in an antitrust class action, "every class member must prove at least some antitrust impact resulting from the alleged violation." *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 311-12 (3d Cir. 2008). Thus, "the task for Plaintiffs at class certification is to demonstrate that the element of antitrust impact is capable of proof at trial through evidence that is common to the class rather than individual to its members. Deciding this issue calls for the district court's rigorous as-

sessment of the available evidence and the method or methods by which plaintiffs propose to use the evidence to prove impact at trial." *Id.* As the Fifth Circuit has pointed out, "where fact of damage cannot be established for every class member through proof common to the class, the need to establish antitrust liability for individual class members defeats Rule 23(b)(3) predominance." *Bell Atl. Corp. v. AT&T Corp.*, 339 F.3d 294, 302 (5th Cir. 2003).

These were not the questions facing the FTC. Far from having to offer a methodology capable of showing that all putative class members suffered an *actual*, common injury, the FTC's complaint counsel needed only to show that the effect of the merger "*may be* substantially to lessen competition, or tend to create a monopoly." 15 U.S.C. § 18 (emphasis added). "Congress used the phrase, 'may be substantially to lessen competition,'" the FTC explained, "to indicate that its concern was with probabilities, not certainties." A429 (citation omitted).

The FTC did not merely face a lighter legal burden. Complaint counsel also attempted to make its case as to a much smaller group of consumers, purchasing a much smaller subset of services, for a much shorter period. Specifically, complaint counsel challenged only (1) the rates to selected managed care organizations ("MCOs"), (2) for inpatient services, (3) for a three-year period, 2000-2003. The FTC considered customers like the named Plaintiffs here irrelevant, calling patients' relationships with the hospitals "a marginal issue at best." A674. The FTC also rejected including outpatient services in its case on the ground that such services constitute a different product market. A432.

Here, by contrast, Plaintiffs propose to represent a class of essentially every private individual or entity who "purchased or paid for" any service from any ENH hospital in the past decade after January 1, 2000. Thus, unlike the FTC action, Plaintiffs' claims implicate the markets for both inpatient and outpatient services, and the markets and prices at both the insurer and patient levels. Accordingly, while the FTC sought to establish average overcharges to a *few* very large insurers, Plaintiffs here sought to use the class action vehicle to establish common overcharges to *every* patient, insurer, or other entity that paid for ENH services over the last decade, regardless of the service received.

Using what is known as "difference-in-difference" ("DID") methodology, the FTC's complaint counsel persuaded the Commission that ENH's merger "enabled [ENH] to exercise market power and that the resulting anticompetitive effects were not offset by merger-specific efficiencies." A381. DID analysis works as follows: After calculating "simple changes in *average* net prices," experts attempt to control for potentially benign causes of price increases (such as changes in cost, demand, and regulation) by comparing those average changes with those of a control group of hospitals that did not merge. A407. If the analysis is done properly, and followed with a regression analysis to weed out causes other than market power, the difference in differences between the price increases for the merged hospital and the control group may be the increase in "average net price" to the market at issue. A407, 410-11.

Plaintiffs, however, gloss over the fact that the DID analysis in the FTC case confirmed that for Blue Cross/Blue Shield of Illinois ("BCBSI")—the largest purchaser of

ENH services among the five MCOs considered by the FTC—"*[n]early every empirical test found little or no unexplained merger-coincident average net price increase*." A415 (emphasis added). Nor do Plaintiffs mention their expert's concessions that (1) BCBSI's customers served by ENH "could be in the thousands"; (2) that those thousands "are purported class members"; or (3) that BCBSI and those thousands of class members *were not injured* by ENH's inpatient rates for 2000-2004. A1337-39; A2548 & n.100.

Further, Plaintiffs nowhere mention the likely reason that BCBSI and its thousands of ENH customers suffered no injury. The reason, according to the FTC, is that "prices in the hospital market are determined through bilateral bargaining," which "can result in different prices for the same product, depending on the alternatives available to the negotiating parties." A438. Thus, as the Commission itself noted, there is a "sticky and unsettled issue" resulting from "[t]he potential for a merger in a bargaining market to have *disparate effects on different customers* …." A439 (emphasis added). But the Commission concluded that, given its conclusions about ENH's average prices, and the "incipient market power" standard applicable in FTC merger proceedings, it "need not delve into" this "sticky and unsettled" issue. *Id.* In short, the FTC's analysis was fundamentally different from the analysis that Plaintiffs were required to undertake to establish common impact and, hence, predominance.

B. Plaintiffs request an immensely broad and diverse class, but at first attempt to show antitrust impact using the common proof of averages.

Ignoring these warnings about "disparate effects on different customers," the lack of evidence that BCBSI suffered injury, and the Commission's reliance on average

rather than individual prices, Plaintiffs filed a broad class action complaint seeking to represent all types of private payors—individuals, self-insured entities, and MCOs—who purchased inpatient or outpatient services from 2000 to 2009. *See* A3. In addition, the largest member of Plaintiffs' putative class was BCBSI, the very entity as to which the Commission concluded its averages-based analysis was problematic, and which served "thousands" of putative class members. Moreover, although the parties disagree as to the precise percentage of the proposed class that pays prices negotiated by BCBSI, there is no dispute that it is substantial: as much as 56% (according to ENH), and no less than 33% (according to Plaintiffs). *See* A2448-49 n.1.

Despite the vast breadth of this class, Plaintiffs at first attempted to use "the same method used in the FTC proceeding by both the government's expert and by ENH's expert, to demonstrate impact." A126. This method, Plaintiffs said, would show "a common course of conduct toward all class members." *Id.* Thus, as Plaintiffs admit, their expert, Dr. David Dranove, "did not conduct an actual DID analysis in his initial report but he described what had been done in the FTC proceeding and how he would tweak it for this case." Pl.'s 23(f) Pet. 16; *see* A1325-26. Accordingly, Plaintiffs moved to certify their class without conducting any actual DID analysis, but simply predicting that they could employ the FTC's methods. A126.

C. Plaintiffs abandon their "averages" approach, instead asserting that scrutiny of individual contracts would show uniform price increases across services—and across contracts.

ENH opposed class certification, noting that Dr. Dranove had not performed any analysis and, in any event, that the FTC's "averages" approach could not work here, be-

cause Plaintiffs' putative class so far exceeded in size and scope the market examined in the FTC action. In reply, Plaintiffs insisted they could still show common impact—but now, suddenly, they *disclaimed* relying on averages: "In theory," Plaintiffs conceded, "an increase in average price does not imply that all patients pay higher prices." A2460 (internal citations and quotation marks omitted). Thus, Dr. Dranove now declared, "*common impact is a direct consequence of the structure of the contracts between ENH and insurers and not the statistical analyses I have conducted*." A2523 (emphasis added).

Accordingly, Plaintiffs now contended that "[c]ommon impact inheres throughout the contracts because price increases are uniform across service categories." A2448. According to Plaintiffs' expert, this was a "crucial fact." A2523. And so, when asked *by the district court* whether the "viability of [his] method" depended on whether "ENH really increase[d] prices at a uniform rate across services," he responded, "*That's exactly correct*." A1324 (emphasis added).

Based on what he called the "record evidence," Dr. Dranove concluded that "price increases under ENH's contracts with insurers are uniform across each respective payer-contract, typically represented as a single across the board number or percentage." A2460. And he relied on this conclusion dozens of times in his reply report.[1]

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[1] *E.g.*, A2517-2635 at ¶5 ("While ENH does set different prices for different service categories, the contracts show that for any given insurance plan, over time *ENH almost invariably increases prices at the same rate for all or nearly all service categories*. This is true for both inpatient care and outpatient care. Thus, the exercise of market power over, for example, inpatient services in a particular time period, can be reduced to a single number—the *uniform* inpatient price increase."), ¶6 ("because *contracts tend to specify uniform price increases* … estimates of overall price increases for a given payer-plan are necessarily also valid and reliable estimates of the price increases applicable to substantially all patients covered by that payer-plan"), ¶8 ("when a contract calls for price increases, *those increases are applied across-the-board* for *all or nearly all* ser-

Thus, Plaintiffs ultimately "tweak[ed]" the FTC's method only by abandoning it. Instead of relying on averages, as the FTC did with its DID method, Plaintiffs now relied on the individual contracts. DID was relegated to calculating damages, while antitrust impact, Plaintiffs insisted, would be established (or not) on the face of the contracts.

D. The district court holds a live hearing to examine Plaintiffs' new attempt to show common impact by scrutinizing ENH's contracts.

To explore Plaintiffs' new approach to predominance, the district court held a live evidentiary hearing. There Dr. Dranove conceded that his method of showing common impact now turned *entirely* on review of the contracts. A1324; A1340. He also conceded that he had not looked at the contracts until he read the report of ENH's expert, Dr. Noether. *See* A1326-27. Having now reviewed the contracts, though, Dr. Dra-

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vices"), ¶10 ("*common impact is inherent in the contracts because they show that in the vast majority of cases price changes are uniform across service categories*"), ¶11 ("because price increases to a given plan tend to be *across-the-board* increases, … the overcharges calculated by the DID methodology will accurately reflect the overcharges for individual inpatient and outpatient services"), ¶23 ("A direct implication of *common prices changes across services* is common price changes to class members"), ¶31 ("hospitals typically increase prices *across the board*, which establishes common impact from price increases"), ¶125 ("*To be clear, I am not claiming that there is common impact solely because prices to BCBSI increased on average* as a result of ENH's merger with HPH. Instead, the compelling evidence of common impact stems from my separate analyses of contracts between ENH and insurers (see section III.1). *The terms of these contracts apply across the board to all patients, implying that if any one patient is impacted, then all patients are impacted* …."), ¶126 ("To be entirely clear, the two distinct sets of analyses that establish both common impact and injury are as follows: 1. Common impact. A review of ENH's contracts shows that, *with minor variations, ENH increases its inpatient and outpatient prices across the board*. This means that when the average price of inpatient services increases by, say, 20%, the prices of each subcategory of inpatient services also increased by 20%. Accordingly, the prices to insurers and patients on behalf of the patients who receive those services will also have increased by 20%."), ¶156 ("In fact, *contracts between hospitals and insurers consistently apply a uniform price increase across all or substantially all service categories*.… Thus, the exercise of market power over, for example, inpatient services in a particular time period, *can be reduced to a single number—the uniform inpatient price increase*.") (all emphasis added).

nove testified that they showed that "ENH really [did] increase prices at a uniform rate across services." A1324. And this became the linchpin of Plaintiffs' attempt to demonstrate that common issues predominated over individual issues.

But Dr. Dranove's analysis was misguided. His core error, as it turned out, was focusing on escalator clauses within individual contracts. Such clauses imposed automatic, across-the-board increases, at certain times, over the lifespan of a given contract. *See* A1380-81; A1410. If there were market power, however, it could not be exercised when these pre-existing clauses are triggered; rather, the critical moment is when contracts are *renegotiated*.

To be sure, Dr. Dranove testified that his uniformity conclusion was not limited to changes carried out pursuant to escalator clauses within existing contracts: He said he "did, in fact, look at *both* within contract changes *and changes across contracts*." A1386 (emphasis added); *accord* A54. Yet his own report collected his contract analysis in an Appendix titled, "Uniformity of price increases *within* contracts" (A2608 (emphasis added)), and Dr. Dranove plainly believed (wrongly) when he wrote the report that the escalator clauses had significance. *See* A2610-18 (Appendix D tables, comprised almost exclusively of within-contract changes); *see also* A1411 (Plaintiffs' counsel arguing that Dranove deals with contract negotiations, not in his tables, but "in his *footnotes* to the tables in Appendix D") (emphasis added).

Further, Dr. Dranove was forced to concede at the hearing that changes *between* contracts *did* show "differential prices." A1387. But Dr. Dranove attributed this unpredicted variability in price increases to what he called "fundamental restructuring." *Id*.

Such "restructuring," Dr. Dranove said, occurred when "contracts … redefine service categories, resulting in substantial differences in the rates of price increases for different services." A2530. Dr. Dranove acknowledged, however, that he "didn't mention restructuring in [his] first report," and "didn't realize quite how profound [the] restructuring was" until he took "a very close look" prompted by Dr. Noether, who "did the appropriate job of pointing out those contracts." A1326-27.

Dr. Dranove also acknowledged that these non-uniform price increases occurred precisely at the point at which ENH had its only opportunity to exercise its alleged market power—that is, when contracts were renegotiated. For example, Dr. Dranove explained that "BCBSI negotiated a three-year contract with ENH in 2000 with an effective date of Jan. 1, 2000. *The next point at which ENH could raise prices to BCBSI was under the new contract, which took effect in 2004*." A2553 n.113 (emphasis added); *accord* A2548 n.100; A1338; A1341. Apart from this "restructuring" when market power was allegedly exercised, Dr. Dranove disavowed any significant variability in prices.

E. Based on the faces of the contracts, the district court finds that prices did not increase uniformly, and rejects Plaintiffs' explanation that price variation was caused by "restructuring."

As the hearing ended, the district court stated (without disagreement from Plaintiffs' counsel), "I think we all agree that the validity of Dr. Dranove's method rests on an assumption that ENH increases prices at a *uniform* rate across services, all right, that's an assumption he's making." A1404 (emphasis added). And, addressing the issue again during Plaintiffs' counsel's closing argument, the court added, "So I think, if I understand this, that the defense is saying that that's just based on escalator clauses and

you're saying—he's saying no, I didn't do that[,] but we don't really have any way of verifying yes or no on that." Plaintiffs' counsel responded: "Well, I think you're just going to have to look at the numbers yourself …." A1410-11. And that is precisely what Judge Lefkow did.

For example, according to Dr. Dranove's report, one contract (with an MCO referred to as "Payor A") "listed 18 prices, all of which increased [between 2001 and 2002] at the same rate. It further indicates that between the years 2002 and 2003, each of these 18 prices increased at a *uniform* rate." A55-56. However, the court noted that "on September 22, 2002, a new contract went into effect and, as a result, 10 of the 18 prices increased at *variable* rates." A56.

Although this statement cited "Noether's analysis," the court ultimately did not rely upon Dr. Noether at all. Instead, after reviewing the contracts *de novo,* the court issued its own finding: "*The court's own examination* of the contracts indicates that, of the 18 prices listed in the renegotiated September 22, 2002 contract, 6 increased at a uniform rate, 9 increased at variable rates, and 3 changed pricing methodologies from the previous contract, making it difficult to draw a comparison." A56 (emphasis added). The court further concluded that "[i]f [Dr. Dranove] had examined both within and across contract price changes, he could not have reported a 100% uniform price increase across all 18 services between 2002 and 2003. Indeed, even a cursory examination of the [two contracts] makes clear that the prices of some services changed at a variable rate." *Id.*

The factual record fully supports the district court's conclusions. For example, in the Payor A contract on which the district court relied, prices for the following nine services changed at non-uniform rates:

Service	**Price Change**
Valve w/ Pump & Catheterization	-9.3%
Valve w/o Pump & Catheterization	-11.3%
Bypass w/PTCA	-12.9%
Bypass w/Catheterization	-12.7%
Bypass w/o Catheterization	-13.0%
Cardiac Angioplasty	+14.8%
Cardiac Angioplasty w/ Stents	+60.9%
Inpatient (PPO)	-12.5%
Outpatient (PPO)	-7.5%

A2724-30. Other prices in other contracts likewise increased and decreased at varying rates. A1386-88.

The district court acknowledged that Dr. Dranove had *attempted* to accommodate variable price increases. But here again, the court observed, Dranove's analysis still "rests on [an] assumption that any price increase due to the merger was distributed evenly across services." A57. And, because Plaintiffs "ha[d] not put forth credible evidence to validate" this assumption, the district court concluded that they had failed to offer a "reliable method of proving classwide impact." *Id.* Accordingly, the district

court denied Plaintiffs' motion to certify a class because Plaintiffs "failed to meet [their] burden" of proof as to predominance. *Id*.

F. Plaintiffs seek unsuccessfully to exclude a portion of ENH's expert analysis that ultimately played no role in the district court's resolution of the dispositive issue.

In December 2009—at the same time that Plaintiffs filed the reply report from Dr. Dranove abandoning averages and adopting a methodology dependent on uniform price increases—Plaintiffs moved to exclude Dr. Noether's report. Plaintiffs' brief, however, fails to make clear that this motion was expressly directed at Dr. Noether's *initial* report (filed in June 2009)—*not* her testimony at the hearing (in February 2010) or her supplemental report (filed March 2010). The sequence of events shows this clearly:

- As discussed above, Dr. Dranove's opening report, submitted in February 2009, did not perform any analysis of ENH's contracts or make any mention of "restructuring." Instead, he merely provided a sketch of the analysis he planned to do. A1325-26.

- In June 2009, pointing out that the "rigorous analysis" required at the certification stage could not be met by mere promises, ENH submitted a report from Dr. Noether identifying some of the problems Dr. Dranove would face if and when he performed any actual analysis. A1792; A2292.

- By way of reply, in December 2009, Plaintiffs submitted a new report from Dr. Dranove in which he proposed for the first time his theory that the "critical fact" for establishing classwide impact is the supposed "uniformity of price increases." *See* note 1, above.

- At the same time, Plaintiffs filed a motion to strike Dr. Noether's report—that is, to strike the analysis Noether had already done with respect to Plaintiffs' motion for certification and Dr. Dranove's initial report. *See* A2637. This was Plaintiffs' *only* motion to strike any analysis or testimony by Dr. Noether.

ENH then responded by filing a motion to strike the new theories raised by Plaintiffs in reply. R.321. The district court initially agreed that it would "not consider … any new arguments raised for the first time in reply." R.355. But, although that might have disposed of Dr. Dranove's belated theory entirely, the district court then determined to give Plaintiffs every opportunity to satisfy Rule 23. As the court subsequently explained, "once we got into it, it seemed like it was important [for ENH] to respond to what the plaintiff was saying." A1285-86. Thus, rather than strike Plaintiffs' reply submissions:

- In February 2010, the district court held a full evidentiary hearing, giving ENH its first opportunity to respond to Plaintiffs' untimely review of the structure of the contracts. And at the outset of the hearing, the district court advised ENH, "it is implicit here that you will get to file something in writing, that's a surreply, if you want to." A1286.

- Although Plaintiffs now refer to a "new Dr. Noether report, submitted only hours before the hearing" (Br. 4), in fact there was no such report. Instead, as a courtesy, ENH provided Plaintiffs' counsel with *background data* regarding Dr. Noether's analysis of Dr. Dranove's new opinions regarding BCBSI. This data was not a "report," nor was it filed with the district court. *See* A1350-51.

- At the hearing, Plaintiffs had the opportunity to cross-examine Dr. Noether, which they declined. They also did not move to strike her testimony. Instead, they called Dr. Dranove to testify a second time. A1386.

- Also at the hearing, *before* Dr. Noether testified, Plaintiffs advised the court, "we would renew our motion to strike *the report* of Dr. Noether." A1288 (emphasis added); *accord* A2637 ("Dr. Monica Noether's Expert Report (public version filed at Dkt. No. 285 …) should be stricken.").

- Following the hearing, Dr. Noether submitted a surreply report limited to questions raised by the district court. A1414. Other than its motion to strike, this was ENH's *only* written response to Plaintiffs' 161 pages of reply filings.

- Also following the hearing, Plaintiffs submitted a Notice of Intention to Object, which referenced their earlier *Daubert* motion only for their contention that Dr. Noether's initial report was flawed for lack of data. *See* A1440. At no time did Plaintiffs challenge Dr. Noether's qualifications or methodology with respect to her new analysis, which was a critique of Dranove's new analysis.[2]

In its order denying class certification, at the beginning of a 20-page assessment of predominance, the district court ruled that "plaintiffs' motion to exclude Noether's report is denied." A37-38. Reflecting the fact that Plaintiffs had challenged only Noether's opening report, and not her supplemental analysis, the district court noted, "plaintiffs had two opportunities—in their reply brief and at oral argument—to respond to the conclusions contained in Dr. Noether's report; the court understands its limitations." A38. Accordingly, the court determined that the report would be "give[n] the weight [the court] believes it is due." A37.

But that report was not given *any* weight in the court's analysis of the dispositive issue; the court considered it only with regard to other issues *decided in Plaintiffs' favor*. *See* A50-52. As to Plaintiffs' flawed methodology for establishing classwide impact, the district court referred only to Dr. Noether's *supplemental* analysis, which was not the subject of a *Daubert* challenge. And—more importantly—the court based its decision on its "own examination" of the record. A56.

[2] Plaintiffs sought leave to submit a third Dr. Dranove report, which was denied. They tendered a new report anyway, which the district court declined to accept. *See* Br. 13-14.

SUMMARY OF ARGUMENT

Attempting to avoid the abuse of discretion standard of review, Plaintiffs purport to present "two legal errors of law." Br. 18. But this case is not about legal error. It is about Plaintiffs' failure to provide a methodology for proving classwide impact that was consistent with the factual record, and sufficient to persuade the district court to exercise its broad discretion under Rule 23. Plaintiffs' expert believed that the contract prices for all ENH services increased at a uniform rate; Plaintiffs thus proposed a single methodology to show classwide impact; and this method, by Plaintiffs' own repeated admission, depended on that assumption. But the assumption proved to be wrong as a matter of fact. A54-57. Based on a full evidentiary hearing and assessment of hundreds of pages of briefs, documentary evidence, and testimony, the district court concluded that the specific method of proving classwide impact proposed by Plaintiffs is not viable. The district court did not abuse its discretion, much less commit legal error, by resting its ruling squarely on an analysis of Plaintiffs' own proposed methodology and on the factual record.

I. Arguing by analogy to *American Honda Motor Co. v. Allen*, 600 F.3d 813 (7th Cir. 2010), Plaintiffs nevertheless contend that the district court should not have denied class certification without first conducting a full *Daubert* analysis of ENH's expert. Br. 18-19. This argument presents a question of discretion, not law. *See Am. Honda*, 600 F.3d at 816-17 (referring to error in granting class certification, without first resolving a *Daubert* challenge to "testimony … integral to the plaintiffs' satisfaction of Rule 23's requirements," as an "abuse of discretion"). And it fails for four reasons:

First, although the district court carefully evaluated the parties' expert opinions, it relied on its own examination of the record; Dr. Noether's analysis thus was not "critical" to the decision. *Second*, Plaintiffs never made a *Daubert* challenge to Dr. Noether's analysis of the dispositive issue, nor did they attack her qualifications to perform that analysis—which (by the way) the FTC had not done, either. Accordingly, *American Honda* is not even implicated, much less a basis for reversal. *Third*, this Court's concern in *American Honda* was with what amounts to "provisional" certification—certifying a class while holding open the possibility that evidence necessary to certification could ultimately be held inadmissible. The Court did not address whether district courts must reach and decide *Daubert* motions before class certification may be *denied*. And, as illustrated by this case, there are good reasons not to adopt such a rule. *Fourth*, even if ENH's expert had been stricken, the result would have been the same. Thus, if there were any error under *American Honda,* it would be harmless.

II. Plaintiffs' other scattershot arguments are equally meritless. For example, Plaintiffs challenge the district court's conclusion that they failed to provide a plausible method of proving classwide antitrust impact. *See* Br. 18. But this issue, as it arises in this case, is not a legal issue, but a matter of discretion: Plaintiffs themselves repeatedly conceded that they would establish common impact by showing uniform price increases across services—and across contracts. As the district court found, however, the contracts show on their face that this did not happen. Because Plaintiffs thus lacked "credible evidence" to validate what they conceded was a "crucial" assumption, the district court had no choice but to deny class certification on these facts. This was not an

abuse of discretion; it was the necessary result of Plaintiffs' own strategy of offering a single common impact methodology that fell of its own weight.

Nor is there any merit to Plaintiffs' argument, based on *Kohen v. Pacific Investment Management Co.*, 571 F.3d 672 (7th Cir. 2009), that they should not be required to show injury to each and every class member. Plaintiffs' certification effort did not fail because Plaintiffs could not prove that every class member was injured; it failed because, by Plaintiffs' own admission, their methodology required uniformity to show that *any* particular class member had suffered an antitrust injury.

Moreover, this case presents the classic situation contemplated in *Kohen* in which "many" putative class members have suffered no injury—and therefore certification must be denied. *Kohen*, 571 F.3d at 677. Plaintiffs' largest putative class member, BCBSI—which the undisputed evidence shows is responsible for between 33% and 56% of ENH's private payer business—submitted a sworn affidavit confirming that it suffered no injury. It is no abuse of discretion to refuse to certify a class where the largest putative class member—with thousands of others who paid BCBSI-negotiated prices—suffered no injury.

Nor, finally, is there any merit to Plaintiffs' newly-minted argument that, even if antitrust impact requires individualized analysis, the district court should have found predominance based on common "liability" issues. Accepting Plaintiffs' argument would create a circuit split, which this Court should decline to do, particularly given that Plaintiffs did not make this argument below. The district court did not abuse its discretion by failing to give Plaintiffs something for which they never asked.

For these reasons, the district court's order should be affirmed.

ARGUMENT

I. The District Court Did Not Violate *American Honda* Or Otherwise Abuse Its Discretion In Declining To Perform A *Daubert* Analysis On ENH's Expert.

Plaintiffs' argument under *American Honda* rests upon misreading that decision in multiple ways. The district court there, despite having "definite reservations about the reliability of [the scientific] standard" advanced by the plaintiffs' expert, nevertheless relied, directly and critically, on that very standard in granting class certification. *See Am. Honda*, 600 F.3d at 815. On appeal, this Court reversed: "We hold that when an expert's report or testimony is *critical* to class certification, as it is here, a district court must conclusively rule on any challenge to the expert's qualifications or submissions prior to ruling on a class certification motion. That is, the district court must perform a full *Daubert* analysis before *certifying* the class *if* the situation warrants." *Id.* at 816 (internal citation omitted; emphasis added).

American Honda thus applies where (a) expert testimony that is "critical" or "necessary" to a decision granting class certification (b) is challenged under *Daubert*. *Id.* at 815-16. As we demonstrate below, neither of these requirements is satisfied here. Indeed, as we also demonstrate, because the *proponent* of class certification bears the burden of satisfying the requirements for certification, *American Honda* need not and should not be extended to decisions *denying* certification. And even if the Court were inclined to extend *American Honda* that far, that holding would still not be a basis for reversal here.

A. Dr. Noether's analysis was not necessary, much less critical, to the district court's decision.

The most obvious reason *American Honda* is inapplicable here is that Dr. Noether's reasoning was neither "necessary" nor "critical" to the class certification decision. *See Am. Honda*, 600 F.3d at 815. Plaintiffs were not prevented by Dr. Noether's methodology from showing common antitrust impact with common proof. Rather, Plaintiffs' attempt self-destructed.

As the district court found by simply looking at ENH's contracts, the price changes for services across contracts were *not* uniform, as required by Plaintiffs' theory—they varied. A56. Of course, Dr. Noether made the same observation. But that observation was not her expert "methodology." It was a fact. A *Daubert* analysis was not required in this situation, and Plaintiffs never argued it was until this appeal.

Plaintiffs also point out that Dr Noether said Dr. Dranove's method requires uniformity. Br. 24-25. But Dr. Dranove said the same thing: he conceded—indeed, insisted—that his method of showing classwide impact was based on uniform price increases, across all services, from one contract to the next. *See* note 1, above (collecting passages from Dr. Dranove's Reply Report). If Plaintiffs wanted to contest the need for uniformity, they needed to do so in the district court. *See* below at Part II.A. Instead, they took precisely the opposite position: they assured the district court that the parties' disputes over the FTC's DID methodology and the breadth of the class could be set aside, because Plaintiffs would show classwide impact based on contractual uniformity.

As the district court explained, certification was denied based on *Plaintiffs'* own inability to put forth "credible evidence" that *their* "assumptions" were correct. A56.

Thus, while Plaintiffs find it convenient after *American Honda* to argue otherwise, the district court's opinion makes clear that the court did not rely on Dr. Noether's opinions in any critical respect. Indeed, even if the district court had excluded those opinions, based on the court's "own examination" of the record, it still would have found that Plaintiffs "failed to meet [their] burden" under Rule 23. A56-57.

B. Plaintiffs did not file a *Daubert* motion challenging Dr. Noether's analysis of the dispositive issue, thus waiving any objection under *American Honda*.

A second and equally dispositive problem with Plaintiffs' *American Honda* challenge is that Plaintiffs not only did not seriously challenge Dr. Noether's qualifications,[3]

[3] Plaintiffs' motion asserted that, "[w]hile Dr. Noether may possess experience with antitrust issues regarding hospital competition, her expertise does not extend to the relationships between MCOs and their customers." A2640. But that was merely an attack on the "helpfulness" of her testimony, not her qualifications to provide it. *See United States v. Hall*, 165 F.3d 1095, 1102-03 (7th Cir. 1999) ("because the government challenged [expert] testimony solely on the basis that it would not assist the trier of fact, … a claim that the court failed to conduct a proper inquiry under the first prong of *Daubert* and Rule 702 cannot form a basis for [reversal]").

And in any event, there was no question that Dr. Noether was well qualified to assess both ENH's contracts with its MCO customers, and Dr. Dranove's flawed analysis of those contracts: "Whether a witness is qualified as an expert can only be determined by comparing the area in which the witness has superior knowledge, skill, experience, or education with the subject matter of the witness's testimony." *Carroll v. Otis Elevator Co.*, 896 F.2d 210, 212 (7th Cir. 1990) (cited by *Am. Honda*, 600 F.3d at 815). Dr. Noether is the principal of a leading economics firm, she previously worked as an economist in the FTC's antitrust division, and *she was admitted as an expert in the FTC proceeding without objection*. *See* A1346-47; A954. In addition, as Plaintiffs themselves acknowledged, "[Dr. Noether's] resume includes many assignments regarding antitrust issues by and between hospitals and healthcare plans." A2640; *see also* A1326 (Dranove testifying that "Dr. Noether in her report, I think, did the appropriate job of pointing out" price changes in the BCBSI contracts). Dr. Noether was thus well-qualified to say whether ENH changed prices for all services at a uniform rate across contracts with its MCO customers.

they never made a *Daubert* challenge to her analysis of the issue that proved dispositive to the district court.

As explained previously, Dr. Dranove filed an initial report in which he explained the analysis he *planned to do* to show classwide impact and damages. ENH responded by pointing out that plaintiffs seeking class certification must provide analysis, not promises. *See In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 318 (3d Cir. 2008). In addition, Dr. Noether provided a report addressing various adequacy and typicality issues, and explaining that, if and when Dr. Dranove undertook any actual analysis, he would face numerous challenges in light of the breadth of Plaintiffs' proposed class. *See generally* A2292-2379.

In reply, Plaintiffs conceded they could not use averages to establish impact. Instead, Plaintiffs declared that the "structure of the contracts" would show that "impact was uniform across class members." A2447; A2523. And they filed a new report by Dr. Dranove in which he concluded, incorrectly as it turned out, that "the contracts show that for any given insurance plan, over time *ENH almost invariably increases prices at the same rate* for all or nearly all service categories." A2523 (original emphasis). Dr. Dranove, however, made a critical mistake: He focused on escalator clauses *within* contracts, which provided for uniform price increases at certain periods within the terms of individual contracts. And he later admitted that this focus on escalator clauses was erroneous. *See* A1341 (conceding that ENH could only exercise market power at the time contracts were renegotiated).

Plaintiffs' motion to strike Dr. Noether's report, filed at this same time, was infected by a similar error: Plaintiffs argued that the report disregarded the "fact" that, "whenever ENH negotiated price increases for its contracts with MCOs, these price increases were invariably negotiated and implemented by a single across-the-board percent-based price increase." A2640. And again, that premise proved untrue upon inspection of the contracts.

Incredibly, Plaintiffs declare in this appeal that the uniformity of price increases is undisputed. *E.g.*, Br. 28, 37. Following Plaintiffs' reply submissions, however, the defining feature of the proceedings below was testing the supposed "fact" of uniformity. This issue was the focus of the hearing held by the district court, at which both Drs. Noether and Dranove testified. It was also the focus of Dr. Noether's *supplemental* report, as to which Plaintiffs never asserted a *Daubert* challenge. And that issue was the basis of the district court's decision denying class certification.[4] In light of this history, Plaintiffs' allegation of a procedural error under *American Honda* is thoroughly misguided: The court did not ignore a *Daubert* challenge to critical expert testimony. Instead, it was Dr. Noether who responded to *Plaintiffs'* new analysis—*and that response was never challenged by Plaintiffs on* Daubert *grounds*. Accordingly, no *Daubert* analysis was needed. *Compare Hall*, *supra* at note 3; *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 602 (9th Cir.

[4] Plaintiffs can try to pretend otherwise, but the record is clear: In their reply submissions, they abandoned averages and conceded that their ability to show common impact hinged on ENH having negotiated and adopted single, across-the-board increases. *See supra* at 8-12. As discussed in Part II below, Plaintiffs' failure to prevail on this factual issue is dispositive of the merits of their appeal—even if there had been a procedural error under *American Honda*, and even if that error had not been waived.

2010) (en banc) (no *Daubert* question raised where a party "challenges *only* whether certain inferences can be persuasively drawn from [an expert's] data … because *Daubert* does not require a court to admit or exclude evidence based on its persuasiveness").

As Dr. Noether explained at the hearing, "[w]hat I did was I took the contracts that Dr. Dranove lists in his Appendix D [to his Reply Report] and instead of just focusing on the within contract changes in prices, I also looked at what happened when contracts were renewed." A1358. Plaintiffs themselves, both at the hearing below and in their brief on appeal, characterized Dr. Noether's supplemental analysis as "new analysis." *See* Br. 12-13 & nn. 9-10 (citing A1348-49, A1350–51, A1378). And so it was. Plaintiffs made new factual claims in their reply submissions, and ENH responded. Plaintiffs' *Daubert* motion, however, was filed months before, and it was expressly directed at Dr. Noether's *initial* report. *See* A2637. Plaintiffs renewed that motion at the start of the hearing, but they expressly (and accurately) referred to their "motion to strike *the report* of Dr. Noether." A1288 (emphasis added). They never challenged Dr. Noether's supplemental analysis on *Daubert* grounds.

Nor did Plaintiffs attempt to expand their *Daubert* challenge after the hearing. After ENH filed Dr. Noether's supplemental report, Plaintiffs responded with an "*Intention* To File Objection" in which they complained about ENH's "improper attempt" to remedy its supposed "strategic decision" to provide minimal information in Dr. Noether's initial report. A1440. But Plaintiffs did not argue that Dr. Noether's supplemental analysis was flawed under *Daubert*. Instead, at best, they renewed their objection that Dr. Noether had "failed to quantify" her opinions *in her original report*. *See id.* That

is not sufficient to put the district court on notice of any *Daubert* problem with Dr. Noether's supplemental report—particularly given that, when Plaintiffs followed this "Notice of Intention" with an actual objection (A1444-63), Plaintiffs did not assert any *Daubert* challenge to Dr. Noether's analysis of the dispositive issue.

In short, Plaintiffs waived any argument that the district court violated the yet-to-be-announced rule of *American Honda*. *See, e.g., Hale v. Victor Chu*, __ F.3d __, 2010 WL 3075619, at *2-3 (7th Cir. Aug. 9, 2010) (rejecting party's attempt to raise issue on appeal that was never argued in the district court); *Economy Folding Box Corp. v. Anchor Frozen Foods Corp.*, 515 F.3d 718, 720 (7th Cir. 2008) ("[I]t is axiomatic that an issue not first presented to the district court may not be raised before the appellate court as a ground for reversal.") (citations omitted); *Domka v. Portage County, Wis.*, 523 F.3d 776, 783 & n.11 (7th Cir. 2008) (rejecting "attempts to skirt this waiver rule" by claiming "essence" of argument was presented below); *id.* at 784 n.12 (rejecting explanation that it was "understandable," given specific ground of district court's decision, that an argument not developed below would take "center stage now").

C. In any event, *American Honda* should not be extended to denials of class certification.

A third problem with Plaintiffs' argument is that a district court should not be required—as a condition of *denying* class certification—to assess whether expert testimony offered by the non-moving party is *Daubert*-qualified. The rationale of *American Honda* does not apply to this situation, nor does extending the rule make sense as a matter of sound judicial administration.

Granting class certification is an affirmative act. It requires affirmative findings, and such findings must be based on admissible evidence, as *American Honda* recognizes. 600 F.3d at 817. But this is merely an application of the settled rule that a district court may not take a "provisional" approach to certification. *See id.* (citing *Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672, 676 (7th Cir. 2001); *West v. Prudential Sec., Inc.*, 282 F.3d 935, 938 (7th Cir. 2002)). Thus, by its terms and its holding, *American Honda* does not apply to decisions denying class certification. *See id.* at 815 (issue is whether "the testimony challenged is integral to the plaintiffs' satisfaction of Rule 23's requirements"); *id.* at 816 (re-stating holding as follows: "the district court must perform a full *Daubert* analysis before certifying the class if the situation warrants"); *id.* at 817 (error was failing to address admissibility of testimony "necessary to show that Plaintiffs' claims are capable of resolution on a class-wide basis and that the common defect … predominates over the class members' individual issues").

To be sure, the broader principle applied in *American Honda* is applicable to all class-related issues, not just disputes over expert testimony. That settled principle is that, "[b]efore deciding whether to allow a case to proceed as a class action, … a judge should make whatever factual and legal inquiries are necessary under Rule 23." *Szabo*, 249 F.3d at 676. But the concern underlying that principle is that a *grant* of certification not rest on an uncertain basis. *See also West*, 282 F.3d at 938 (rejecting certification based on "clash" of experts because it "amounts to a delegation of judicial power to the plaintiffs, who can obtain class certification just by hiring a competent expert"). Indeed, *American Honda*, *Szabo*, and *West* are all cases in which an erroneous grant of class certi-

fication was reversed. *See also In re Initial Pub. Offering Sec. Litig.*, 471 F.3d 24, 42 (2d Cir. 2006) (disavowing suggestion that expert's testimony may establish component of class certification "simply by being not fatally flawed").

This focus on decisions granting certification follows from the fact that would-be class representatives bear the burden of satisfying Rule 23's requirements. *Compare Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 662 (7th Cir. 2004) (declining to reverse where district court required defendants to raise objections to certification, because district court "was explicit that the burden of persuasion on the validity of the objections would remain on the plaintiffs"), *with In re Am. Medical Sys., Inc.*, 75 F.3d 1069, 1086 (6th Cir. 1996) (reversing where "the practical effect of the proceeding below was to place the burden on defendants to disprove plaintiffs' 'entitlement' to class certification"). If plaintiffs need expert evidence to carry their burden, a district court should ensure as a threshold matter that such evidence is admissible. On the other hand, although parties opposing certification *may* submit evidence, including expert opinions, they need not do so if the movant's own showing falls short. *See Sullivan v. DB Investments, Inc.*, __ F.3d __, 2010 WL 2736947, *11 (3d Cir. July 13, 2010) ("A defendant's decision not to contest the requirements of Rule 23 does not relieve a district court of its independent obligation to ensure that those requirements are satisfied."), *vacated, rehearing en banc granted*, 2010 WL 3374167 (3d Cir. Aug. 27, 2010); *also compare Valley Drug Co. v. Geneva Pharm., Inc.*, 350 F.3d 1181, 1196 (11th Cir. 2003) (plaintiffs can be required "to bring forth evidence" that interests of class members are not conflicting), *with Horton v. Goose Creek Indep. Sch. Dist.*, 690 F.2d 470, 485-86 (5th Cir. 1982) (even though defendant offered no

evidence, certification properly denied based on the "real possibility of antagonism" between class members). It follows that, where the movant's *own* evidence falls short, there is no need to conduct a *Daubert* analysis of the non-movant's expert evidence.

For that reason, extending *American Honda* to all denials of class certification would be a recipe for inefficiency. A denial on one ground frequently makes it unnecessary for a district court to assess every one of Rule 23's many elements. For example, a decision that named plaintiffs are inadequate class representatives might allow the predominance analysis to be pretermitted. Or vice versa. *See, e.g.*, *There to Care, Inc. v. Comm'r of Ind. Dep't of Revenue*, 19 F.3d 1165, 1167 (7th Cir. 1994) ("Federal courts decide cases, not legal issues in the abstract."); *AlliedSignal, Inc. v. B.F. Goodrich Co.*, 183 F.3d 568, 576 n.4 (7th Cir. 1999) (where one ground for antitrust standing established, declining to address an alternative ground). Surely *American Honda* does not make it reversible error for a district court to decline a *Daubert* analysis where the expert's assessment of one issue has already been rendered moot by the court's resolution of another. *See also In re Hydrogen Peroxide*, 552 F.3d at 310 ("The trial court, well-positioned to decide which facts and legal arguments are most important to each Rule 23 requirement, possesses broad discretion to control proceedings and frame issues for consideration under Rule 23."). Courts should not be required to decide issues unnecessarily, just for the sake of doing so. And for that reason, if the Court finds it necessary to reach the issue, Plaintiffs' request to extend *American Honda* beyond its rationale should be rejected.

D. Even if the district court should have conducted a *Daubert* analysis, any error was harmless.

Finally, any error, if such it was, was harmless. *See* 28 U.S.C. § 2111. As explained previously, Plaintiffs were not prevented from certifying their class because of Dr. Noether, but because of the deficiencies in Dr. Dranove's analysis. So even if *both* of Dr. Noether's reports were stricken, Plaintiffs still would have failed to carry their burden of showing antitrust impact with common proof. *See also* Part II, below.

To be sure, the district court expressed concerns about Dr. Noether's opening report, but principally as to her assessment of the reliability of Dr. Dranove's proposed use of DID to quantify *damages*. *See* A53-54 (finding Dranove persuasive with respect to the design of the control group for DID). The use of DID for damages, however, was ultimately irrelevant because the threshold assumption necessary to Plaintiffs' use of DID to establish common antitrust *impact* was wrong. Moreover, there was no reason to decide whether to exclude Dr. Noether's critique because *the district court independently agreed with Dr. Dranove* that, if price increases were uniform across services, DID could be used to calculate damages.

With respect to the dispositive issue of common antitrust impact, on the other hand, the district court expressly agreed with Dr. Noether—as a matter of fact, and based on the court's own *de novo* review of the documentary record. A54-56. For that reason, not only was the court's approach to certification consistent with *American Honda*, as discussed above, but it is also obvious that the court would not have excluded Dr. Noether's analysis on this point because the court plainly did not find her assessment of

Dr. Dranove's error "confusing," "irrelevant," "entirely unrelated to an analysis of anti-trust impact," or otherwise "unhelpful." Br. 9, 22. Accordingly, it would be pointless to vacate and remand for the district court to mechanically recite the *Daubert* factors when it is clear what the result would be for the pertinent part of her analysis. *See* A56 ("Despite the weakness of Noether's presentation in other respects, Noether's analysis here does cast doubt on Dranove's representation that his contract analysis encompassed both within and across contract price changes," which the court confirmed by "[its] own examination").

For all these reasons, the district court's failure to conduct a *Daubert* analysis of Dr. Noether's submissions is not reversible error. That decision was well within the court's considerable discretion.

II. The District Court Did Not Abuse Its Discretion By Denying Class Certification Where Plaintiffs' Methodology For Proving Classwide Impact Fell Under The Weight Of Its Own False Assumptions.

Plaintiffs' remaining attacks on the district court's exercise of its discretion are equally misguided. Although Plaintiffs bury it at the back of their brief, we address the dispositive issue first: Plaintiffs now contend that price variation is no bar to certification (Br. 31-33) and that the district court erroneously rejected Dr. Dranove's methodology for proving classwide impact (Br. 34-38). In the district court, however, Plaintiffs insisted that uniform price increases were *critical* to Dr. Dranove's methodology, yet subsequent analysis proved that such uniformity did not exist as a matter of fact. By Plaintiffs' own admission, therefore, certification had to be denied. Similarly, Plaintiffs' arguments that they should not be required to show injury to every class member, and

that, in any event, the evidence proved that all class members were impacted (Br. 28-31), not only distort the decision below and the record, but are foreclosed by the undisputed fact that thousands of class members were *not* injured. And Plaintiffs' newly-minted argument that predominance can be established based on common "liability" issues (Br. 26-28) is similarly meritless.

A. Because Plaintiffs abandoned their "econometric methodology" and conceded that common impact depended on prices increasing uniformly across services, the district court did not abuse its discretion by focusing on uniformity of price increases.

Plaintiffs castigate the district court for being "distracted by variations among prices" (Br. 16) and argue that "Dr. Dranove proposed to use the same [DID] methodology" as the FTC "to demonstrate impact to the Class" (Br. 34). But this incredible contention is contrary to how the case was litigated in the district court, where Plaintiffs expressly and repeatedly insisted that it was contract structure—"*and not the statistical analyses*"—that established impact, and where they *conceded* that their case for common impact depended on *uniform price increases*. *E.g.*, A2523 (emphasis added); A2460.

1. Plaintiffs cannot establish an abuse of discretion by changing their position on appeal. As this Court has recognized, "[t]o reverse the district court on grounds not presented to it would undermine the essential function of the district court." *Economy Folding Box*, 515 F.3d at 720 (citation omitted). This Court's decision in *International College of Surgeons v. City of Chicago*, 153 F.3d 356 (7th Cir. 1998), is illustrative. There a party conceded that it had not challenged the district court's discretionary exercise of supplemental jurisdiction over certain state law claims because it expected to prevail on

the merits. On appeal, this Court held the issue waived: "Now that the district court has resolved those claims against it, [the party] must live with the consequences of its strategic decision." *Id.* at 366. The same is true here. *See also, e.g.*, *Phelps v. Alameida*, 569 F.3d 1120, 1131 (9th Cir. 2009) (a party "is not free on appeal to rely on [a position that] is directly contrary to the argument that [party] presented to the district court"); *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 654-55, 661 (7th Cir. 2002) (in assessing summary judgment in price fixing case, holding plaintiffs to implicit concession that a tacit meeting of the minds is not actionable under Section 1 of the Sherman Act); *Siegel v. Shell Oil Co.*, __ F.3d __, 2010 WL 2977315, at *3 (7th Cir. July 30, 2010) (affirming denial of class certification based in part on plaintiff's factual concessions).

To be sure, Plaintiffs *at first* promised to employ "the same method used in the FTC proceeding by both the government's expert and by ENH's expert, to demonstrate impact." A126. But then ENH pointed out that the FTC's "averages" approach would capture massive numbers of uninjured class members. Indeed, as the FTC itself found, the averages approach concealed the lack of injury to BCBSI, ENH's largest customer, which represented thousands of other putative class members.

And Dr. Dranove agreed. In his Reply Report, Dranove provided the following illustration of ENH's point:

> Suppose one knows that all students in a class grow in height at the same rate. Then, in order to know the amount by which each and every student grew in a year, all that is necessary is to know the average rate of growth of students in that class room. In this situation, … the average growth rate is an accurate and reliable estimate of the growth rate of individual students. This is in stark contrast to the very different scenario in which one does not know that all students grow at the same rate. In such scenario, …

> the average rate of growth may not be an accurate estimate of any individual student's growth rate.

A2523 n.1. Likewise at the hearing, Dr. Dranove conceded that, "in theory an increase in average price *does not* imply that all patients pay higher prices. It could be the price escalated substantially more than average for some ENH patients, but not for others." *See* A1343 (emphasis added).

As a result, Plaintiffs abandoned averages, instead contending that "*common impact is a direct consequence of the structure of the contracts between ENH and insurers and not the statistical analyses I have conducted*." A2523 (emphasis added). Accordingly, "Dr. Dranove reviewed in detail numerous MCO contracts and correspondence with ENH, finding that the contracts imposed uniform price increases." A2458. This contract-based prediction—that prices increased uniformly within and across contracts—then became the heart of Plaintiffs' new effort to show common impact. *See* A2523 ("the contracts show that for any given insurance plan, over time ENH almost invariably increases prices at the same rate for all or nearly all service categories"). "Detailed examination of ENH contracts," Dr. Dranove declared, "shows that ENH uniformly exercised market power, which establishes common impact." A2532; *see also* note 1, above.

The district court confirmed that this was Plaintiffs' bottom line at the hearing:

> THE COURT: [T]he viability of your method, it seems to me, comes down to two questions. One is did ENH really increase prices at a uniform rate across services.
>
> [DR. DRANOVE]: That's exactly correct.

A1324. Dr. Dranove also "testified that this conclusion was with respect to changes within contracts *and across* contracts." A54 (emphasis added). And nothing in Dr. Dranove's reply report mentioned anything about *variability* in prices for the same services across contracts. To the contrary, the report boldly declared that, between the years 2002 and 2003, each of the eighteen prices in exemplary Payor A contracts increased at a uniform rate. A2608; A2615; A55-56.

Yet, as the district court found, Dr. Dranove did not adequately analyze the contracts—because, in fact, prices *did* vary for the same services across contracts. "If [Dr. Dranove] had examined both within and across contract price changes," the court found, "he could not have reported a 100% uniform price increase across all 18 services between 2002 and 2003." A56. Instead, "Dranove's analysis focused primarily on price changes within contracts—changes that are usually attributable to escalator clauses…. Accordingly, the court cannot accept Dranove's contract analysis contained in Appendix D as credible evidence that ENH increased prices across contracts at uniform rates across services." *Id.*

2. In an effort to escape this conclusion, Plaintiffs declared below, as they do here, that all significant variations in the contract were due to "restructuring"—that is, redefining service categories so that apples-to-apples price comparisons became impossible. A2530. But even if "restructuring" could explain *why* some prices varied across contracts, it still did not explain why Dr. Dranove failed to predict *that* prices varied across contracts. As Dr. Dranove himself conceded, he "failed to look at what was going on" adequately across contracts—when, as it turns out, there were "differential

price[]" changes. A1387. By itself, this would have been enough for the district court to exercise its discretion to refuse to certify the class.

But the district court went further, observing that "restructuring" could not explain all the price variations the court could see with its own eyes. For example, the district court noted, only a small subset of the Payor A contract prices were restructured: "The court's own examination of the contracts indicates that of the 18 prices listed in the renegotiated September 22, 2002 contract, 6 increased at a uniform rate, 9 increased at variable rates, and *3 changed pricing methodologies from the previous contract, making it difficult to draw a comparison*." A56 (emphasis added). Thus, the district court concluded, "[w]hile the court understands [Dr. Dranove's] point with respect to restructuring, it is not convinced that *every* variable price increase was due to restructuring such that it should have been excluded from the analysis." A55 n.30 (original emphasis). Given its first-hand review of the record, the district court was entitled to conclude that Dr. Dranove fell short in simply declaring that all variations (which he previously said did not exist) were due to "restructuring." As Plaintiffs concede, this Court will not find an abuse of discretion unless "the record contains *no evidence* on which the trial court could have rationally based its decision." Br. 18 (quoting *United States v. Turner*, 591 F.3d 928, 935 (7th Cir. 2010)) (emphasis added). But here there is ample evidence that the Plaintiffs' own theory of common antitrust impact was based on a misreading of the very contracts on which they relied.

Plaintiffs now contend that "[d]ifferences in prices that different class members paid for different products or services" do not matter. Br. 31. The issue is actually dif-

ferences in price *increases*, but more to the point, Plaintiffs' own cases show that would-be class representatives must propose a viable method to overcome variability. *See id.* And that simply did not happen here.

3. Plaintiffs also argue that the district court "misunderstood" or "misread" the managed care contracts admitted into evidence at the class certification hearing, specifically, that the district court's analysis wrongly compared "apples to oranges" because ENH carved out professional fees for cardiac cases and reimbursed them differently. Br. 24, 36-37. As an initial matter, the district court did not compare apples to oranges on the face of the contracts. Even if this were correct—and it is not—any such differences are not reasons why antitrust impact can be established with common evidence; rather, they are reasons why it cannot. Dr. Dranove initially said that "100%" of the terms of those contracts were changed uniformly (A2615), but then in his rebuttal report (which the district court properly excluded), he conceded: "A contract may, in fact, separately select some specific services for nonuniform increases, as in the above example involving cardiac services." A2720. Thus, by Dr. Dranove's own admission, the district court was correct in finding that the Plaintiffs had failed to establish that they could prove antitrust impact through common proof, using *uniform* price increases.

Furthermore, even if most non-uniform price increases were a product of "restructuring," that only helps Plaintiffs if the *restructuring* occurred uniformly. Otherwise, each "restructuring" will still need to be analyzed, contract-by-contract, to determine whether the customer faced a price increase—and, if so, whether it was attributable to market power. In other words, characterizing price changes as a product of re-

structuring merely pushes Plaintiffs' burden of showing "common proof" back a step—to the individual "restructurings." And again, "[i]f proof of the essential elements of the cause of action requires individual treatment, then class certification is unsuitable." *In re Hydrogen Peroxide*, 552 F.3d at 311. In short, attributing price variations to "restructuring" does not enable Plaintiffs to carry their burden; it simply gives that burden a new name.

To surmount this problem, Plaintiffs now declare it "undisputed" that ENH exercised market power with respect to all services. Indeed, they and their *amici* make this declaration repeatedly. *E.g.*, Br. 17, 25, 28; Consumer Fed. Br. 1, 3. It will come as no surprise to the Court, however, that this is very much in dispute: ENH does not agree that *any* of its prices increased because of unlawful market power, much less that all of them did.

More to the point, to establish predominance on this basis, Plaintiffs would have to show not just that ENH exercised market power, but that it did so uniformly across customers—something Plaintiffs cannot do. Indeed, Plaintiffs' evidence that every service was impacted by ENH's supposed market power was the supposed uniformity of price increases. Yet there is no such uniformity. Nor is that surprising: Each contract between an insurer and ENH is the result of arm's-length negotiations. The contracts are typically re-negotiated every few years and the parties take into account changes in costs or demand, new services, advances in medicine, etc. *See, e.g.*, A1366-67 (discussing changes in relative demand for angioplasty). In addition, each MCO represents a unique constituency. Factors such as patient mix, type of insurance plan, and size of the

MCO all impact negotiations of particular rates for particular services. *See also* A439 (recognizing the "potential for a merger in a bargaining market to have disparate effects on different customers").

The deficiencies in Plaintiffs' own evidence also refutes the argument by Plaintiffs' *amici* that the decision below makes it impossible to bring private class in hospital or multi-product situations. *See* Consumer Fed. Br. 9-12. In fact, the district court concluded no more (and no less) than that *this* expert and *this* method fail for the class proposed in *this* case. The holding below does not foreclose a better effort in future cases. It just says that, in this case, these Plaintiffs failed to carry their burden. A57.

In short, Plaintiffs' motion was denied because, at every turn, their predictions failed to predict and their explanations failed to explain. Under these circumstances, the abuse of discretion would have been *allowing* a class action to go forward.

B. The district court did not require Plaintiffs to establish that "every person or service be impacted" by the alleged violations.

Plaintiffs and their *amici* also argue that Plaintiffs cannot be required to prove that each and every member of the class was injured, but that a showing of "widespread injury" is sufficient. *See* Br. 28-31; AAI Br. 12-17; Consumer Fed. Br. 5 (all citing *Kohen*). Even if this were a correct statement of Plaintiffs' burden under Rule 23 (and it is not), these arguments mistake the dispositive issue. The class obviously includes numerous un-injured members (as we discuss further in the next section below). But certification was not denied because Plaintiffs failed to show that *each and every* class

member was injured; it was denied because Plaintiffs failed to provide a common method to show antitrust injury to *any* given class member.

That is, because price changes are not uniform, Plaintiffs were left with the averages produced by the DID analysis. By Plaintiffs' own admission, however, averages cannot be used to show that any class member in particular was injured. Recall Dr. Dranove's analogy to a classroom of students: If all students grow in height at the same rate, to know the average rate is to know the rate for each individual student. But, "in stark contrast" is "the very different scenario in which one does *not* know that all students grow at the same rate. In such [a] scenario, … the average rate of growth may not be an accurate estimate of *any* individual student's growth rate." A2523 n.1 (emphasis added).

This is a case where all students are not growing at the same rate. Some grow; some stay the same; some are shrinking. Plaintiffs correctly recognized the problems with using averages in such a situation—and so too did the district court. *See* A54 ("the court cannot rely on DID analysis to prove classwide impact in the instant case, as neither Dranove nor plaintiffs have demonstrated that an increase in average prices at ENH is also a reliable estimate of the price increases (if any) that each individual class member faced").

The same problem has been recognized in other decisions, and by respected commentators. *See, e.g., Reed v. Advocate Health Care*, __ F.R.D __, 2009 WL 3146999, *17-18 (N.D. Ill. Sept. 28, 2009) (in a case alleging conspiracy to suppress nurses' wages, rejecting proposed use of averages to show classwide impact because it "unacceptably

masks the significant variation" among class members); ABA Section of Antitrust Law, *Econometrics: Legal, Practical, and Technical Issues* 220 (2005) ("Sometimes the prices used by economists are averages of a number of different prices charged to different customers or for somewhat different products. Using such averages can lead to serious analytical problems. For example, averages can hide substantial variation across individual cases, which may be key to determining whether there is common impact.") (quoted in *Reed*). In *Reed*, Judge Grady was faced with—and rejected—the very argument made here: "Plaintiffs have made much of a recent Seventh Circuit decision in which the Court stated that the possibility, or even near-inevitability, of a class including persons who have not been injured by a defendant's conduct does not preclude class certification. *See* [*Kohen*]. But defendants do not quarrel with that principle; rather, they maintain that plaintiffs have failed to demonstrate that they have a reliable *common* method for determining injury." 2009 WL 3146999, at n.7 (emphasis added). The Third Circuit has similarly explained: "We do not question plaintiffs' general proposition, … that a conspiracy to maintain prices could, in theory, impact the entire class despite a decrease in prices for some customers in parts of the class period, and despite some divergence in the prices different plaintiffs paid. But the question at class certification stage is whether, if such impact is plausible in theory, it is also susceptible to proof at trial through available evidence *common* to the class." *In re Hydrogen Peroxide*, 552 F.3d at 325 (emphasis added). So too here: because the Plaintiffs's effort to establish antitrust impact by *uniform price increases* proved implausible, they were left with no means of proving impact through "evidence common to the class."

This case is thus readily distinguishable from *Schleicher v. Wendt*, __ F.3d __, 2010 WL 3271964 (7th Cir. Aug. 20, 2010), in which this Court held that class certification is "routine" in securities fraud cases under § 10(b). Critical to that decision is the fraud-on-the-market presumption in securities law—a presumption that "supplants 'reliance' as an independent element [of the class members' claims] by establishing a more direct method of causation." *Id.* at *1. In this action, by contrast, impact must be established, not presumed. *Compare Siegel*, 2010 WL 2977315, at *3-4 (affirming denial of class certification because causation required individualized proof).

Plaintiffs also note that some courts have applied a "presumption of common impact" in price-fixing cases. *See* Br. 29, 33. But this is a merger case, not a price-fixing case. Moreover, Plaintiffs cannot seriously claim a "presumption" of antitrust impact across this overbroad class of all individuals, insurance companies, and other entities who paid for any ENH service at any ENH hospital at any time over a 10-year period. As discussed above, Plaintiffs conceded that generalized evidence of average harm was *not* sufficient. And even if their belated about-face could establish an abuse of discretion (and it can't), even now Plaintiffs admit there can be no presumption where "the record suggest[s] a lack of general injury" (Br. 29)—which is the case here. *See also In re Hydrogen Peroxide*, 552 F.3d at 325-26 (discussing when a presumption might be appropriate); *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 166, 179 n.21 (3d Cir. 2001) ("In antitrust class actions, injury may be presumed when it is clear the violation results in harm to the entire class."). Here again, Plaintiffs' arguments fall of their own weight.

C. Plaintiffs' overbroad class also could not be certified because it plainly contains "a great many persons" who suffered no injury.

Plaintiffs further assert that "*ENH* did not produce any evidence that a large percentage of class members did not suffer any antitrust impact," and that the district court erred "in refusing to certify a class in the absence of any evidence which *disproved* impact to substantial numbers of Class Members." Br. 35, 37 (emphasis added). Setting aside Plaintiffs' improper attempt at burden shifting, Plaintiffs have not identified an error; they have highlighted another, independent reason why a class could not be certified here: "a class should not be certified if it is apparent that it contains a great many persons who have suffered no injury at the hands of the defendant." *Kohen*, 571 F.3d at 677.

Most notably, Plaintiffs ignore the unqualified admission by BCBSI that it suffered no injury. As noted, BCBSI is no run-of-the-mill class member. Indeed, it is not one class member at all. Rather, BCBSI is Plaintiffs' largest putative class member—representing 33% to 56% of ENH's private-payor business and "*thousands*" of other individual class members who purchased ENH services as BCBSI customers. A1338 (emphasis added); A2448-49 n.1. Yet, as soon as BCBSI was served with third-party discovery in this case, it filed an affidavit disproving Plaintiffs' contentions:

- "From 1990 to the present, BCBSI paid [ENH] … fair and reasonable prices for health care services provided by [ENH]."
- "BCBSI did not pay artificially inflated prices to [ENH] for those health care services."
- "The conduct which [ENH] allegedly engaged in, as stated in this case, did not cause BCBSI any injury or damage."

- "BCBSI declines to be included as a class member in any class that may be certified in this case."

A722-23.

Not surprisingly, Plaintiffs have no satisfactory answer to this evidence, which is consistent with the FTC's conclusion that "[n]early every empirical test found little or no unexplained merger-coincident average net price increase for BCBSI." A415. The reason, as noted, is that "prices in the hospital market are determined through bilateral bargaining," which "can result in different prices for the same product, depending on the alternatives available to the negotiating parties." A438. Thus, as the Commission found, the "[t]he potential for a merger in a bargaining market to have disparate effects on different customers potentially creates sticky and unsettled issues for merger analysis …." A439. The Commission, however, concluded that it "need not delve into" these matters "because … the record demonstrates that the merger likely gave ENH sufficient market power to increase the average price that it charged to all MCOs." *Id.*

But what averages could paper over in the FTC proceeding, they cannot paper over here. As we have explained, the FTC's complaint counsel needed only to show that some market power "may" have been exercised as a result of the merger, so counsel could ignore the lack of injury to BCBSI. Plaintiffs here, though, must show common antitrust impact across their class using common proof. So when the FTC concludes that the largest putative class member, representing one-third to one-half of ENH's market, was *not* injured, and that member itself swears it was not injured, that strikes at the heart of Plaintiffs' motion for class certification. Indeed, Dr. Dranove him-

self concluded for inpatient services from 2000 to 2004, there appears to have been no damage to BCBSI—or to any of potentially *thousands* of class members who paid BCBSI-negotiated rates. A1337-39.

Further, large numbers of putative class members saw no impact because any price increases were passed on or borne by someone other than the class member. Others had no impact because their specific agreement, plan, or contract protects against any price increases. Still other purchasers had no impact because ENH simply cannot increase any prices that those proposed class members are required to pay. For example, Dr. Dranove conceded that 2.4% of the proposed class members met their annual plan out-of-pocket maximum or their deductible regardless of any price increase. A2633-35. Thus, quite apart from Plaintiffs' inability to show uniform price increases across contracts, the class proposed here was not certifiable because it captures "a great many persons who have suffered no injury at the hands of the defendant." *Kohen*, 571 F.3d at 677.

D. Plaintiffs' argument that predominance can be shown on the basis of common *liability* issues, without common impact, is foreclosed by their litigation strategy below.

Finally, Plaintiffs contend that "liability" is a common issue, and warrants certification even if impact is not common. Br. 26-27; *see also* AAI Br. 6-7. The threshold problem is that Plaintiffs did not make this argument below. They argued that common issues together "greatly predominate," but never that certification would be proper even without a common method for showing classwide impact. *See* A125-31; A2447, A2450. Accordingly, the district court never had the opportunity to decide whether to consider

a partial certification (*cf. Carnegie*, 376 F.3d at 661), much less whether to grant a full certification—as Plaintiffs now request—despite the lack of commonality on a critical element of Plaintiffs' claims. The argument may not be asserted for the first time on appeal. *See* cases cited above at page 27.

The argument is also wrong. For one, "liability" is not a common issue at all. Because this is a private antitrust action pursuant to Section 4 of the Clayton Act, one necessary element of "liability" is antitrust impact, *see* 15 U.S.C. § 15; *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1054-55 (8th Cir. 2000)—which, as we have seen, cannot be established by common proof under the facts of this case.

In addition, even if establishing the alleged antitrust *violation* were a common question—and ENH does *not* concede that it is, given the breadth of Plaintiffs' proposed class and the fact that Plaintiffs challenge not only the merger, but ENH's conduct in the ten years since, with respect to every inpatient and outpatient service, at three different hospitals—Plaintiffs' failure to show predominance with respect to antitrust impact still precludes certification. "In antitrust cases, impact often is critically important for the purpose of evaluating Rule 23(b)(3)'s predominance requirement because it is an element of the claim that may call for individual, as opposed to common proof." *In Re Hydrogen Peroxide*, 552 F.3d at 311 (cited by Plaintiffs in the district court at A2450). Accordingly, as at least four circuits have expressly recognized, if antitrust impact cannot be established with common evidence, certification should be denied.

The Fifth Circuit, for example, so held in *Bell Atlantic Corp. v. AT&T Corp.*, 339 F.3d 294 (5th Cir. 2003). The court acknowledged that proof of the alleged antitrust vio-

lation would be identical for all class members, but explained, "plaintiffs' task … is not limited to establishing the elements of a completed offense." Rather, establishing civil liability for an antitrust violation requires proving impact—that is, "causation," or "fact of damage," "a causal connection between the specific antitrust violation at issue and an injury to the business or property of the antitrust plaintiff." *Id.* at 302. "This requirement," the court continued, "is in no way lessened by reason of being raised in the context of a class action…. Accordingly, *we have repeatedly held that where fact of damage cannot be established for every class member through proof common to the class, the need to establish antitrust liability for individual class members defeats Rule 23(b)(3) predominance*." *Id.* at 302-03 (emphasis added) (citing cases); *accord In re Hydrogen Peroxide*, 552 F.3d at 311-12 ("the task for plaintiffs at class certification is to demonstrate that the element of antitrust impact is capable of proof at trial through evidence that is common to the class rather than individual to its members"); *In re New Motor Vehicles Canadian Export Antitrust Litig.*, 522 F.3d 6, 19 n.18 (1st Cir. 2008) ("For a class action to be appropriate, 'plaintiffs need to demonstrate that common issues prevail as to [both] the existence of a conspiracy and the fact of injury.'") (alteration made by the court) (quoting *Blades v. Monsanto Co.*, 400 F.3d 562, 566 (8th Cir. 2005)); *see also Reed*, 2009 WL 3146999, at *6 (quoting *Bell Atlantic* standard); A20 (same).

Particularly given Plaintiffs' implicit concession in the district court that predominance hinged on the antitrust impact element—which leaves this Court without the benefit of any lower court analysis on this issue—this Court should reject the invitation to rule contrary to settled law and thereby create a circuit split. Post-hoc attempts

by Plaintiffs and their *amici* to introduce new arguments cannot undermine the correctness of the district court's finding that the plaintiffs failed to meet their burden.[5]

CONCLUSION

When the district court asked Dr. Dranove whether his methodology for establishing classwide impact using common proof depended on ENH's having increased prices across all services at a uniform rate, Dr. Dranove said, "That's exactly correct." A1324. And when the district court asked Plaintiffs' counsel how it should resolve the parties' dispute, Plaintiffs' counsel said, "I think you're just going to have to look at the numbers yourself." A1410-11. So the district court looked at the numbers, and it found that Plaintiffs' assumptions were wrong. A56-57. Plaintiffs' proposed methodology thus collapsed under the weight of its own false assumptions. And the district court's order should be affirmed.

Respectfully submitted,

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[5] Amicus AAI also argues that the district court erroneously focused its predominance inquiry on the impact element, rather than the case as a whole. AAI Br. 6-7, 18-19. Plaintiffs did not raise this issue below, nor do they argue it now. Accordingly, ENH declines to address it. *See, e.g.*, *Solis v. Summit Contractors, Inc.*, 558 F.3d 815, 826 n.6 (8th Cir. 2009) (declining to consider argument raised by *amici* and not by parties).

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), as it contains 13,974 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6), as qualified by Circuit Rule 32(b), as it has been prepared in a 12-point, proportionally spaced typeface, Times New Roman, by using Microsoft Word 2003.

DATED: SEPTEMBER 1, 2010

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SCOTT C. WALTON

CERTIFICATE OF COMPLIANCE WITH CIRCUIT RULE 31(e)

In accordance with Circuit Rule 31(e), the undersigned counsel certifies that I have uploaded to the Clerk of the Court a digital version of the foregoing brief, and that one copy of that digital version has been furnished to Appellants' counsel.

DATED: SEPTEMBER 1, 2010

_____

SCOTT C. WALTON

CERTIFICATE OF SERVICE

I, Scott C. Walton, an attorney, certify that September 1, 2010, I caused to be served two true and correct copies of the foregoing OPPOSITION BRIEF, and one digital version of same, to be served by messenger and electronic mail to the following:

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I further certify that I have this day caused this day to be delivered to the Clerk of the Court an original and 15 copies of the foregoing brief by messenger, and a digital version by upload through the Court's website.

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