No. 10-2514

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Steven Messner, Amit Berkowitz, Henry W. Lahmeyer, M.D., S.C.,
Painters District Council No. 30 Health & Welfare Fund,

Plaintiffs-Appellants

v.

NorthShore University HealthSystem,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
Case No. 07 C 4446
The Honorable Joan Humphrey Lefkow

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

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INTRODUCTION

ENH (now known as NorthShore University HealthSystem):

- Admits that the sole basis for the District Court's denial of class certification was the District Court's review of two contracts with one MCO out of thirty that were analyzed by Plaintiffs' expert. (Opp. at 13–15.)

- Admits that the District Court declined to perform an analysis under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), on ENH's expert's reports and testimony. (Opp. at 21.)

- Admits that price variations due to restructuring neither demonstrate the unequal exercise of market power nor show the absence of the exercise of ENH's market power. (A1368.)

- Fails to rebut the overwhelming evidence of its illegal use of market power to inflate prices for healthcare services charged to the class member MCOs with which it contracts for over 90% of its private business. (Pls.' Br. at 5–7; A1960.)

- Fails to dispute that Plaintiffs established through expert evidence that BCBSI, the MCO with perhaps the most bargaining power and with which ENH does the most business, has suffered damages in excess of $110 million through 2008 from ENH's anticompetitive conduct.[1] (A1189.)

- Fails to dispute that the District Court found that Plaintiffs satisfied each of the requirements of Rule 23(a) and that ENH's violation of antitrust law could be tried without resorting to individualized evidence. (A4–19.)

- Fails to defend the District Court's decision to reject Plaintiffs' response to ENH's unsolicited post-hearing submission. (A1473.)

Because the evidentiary record establishes ENH's widespread abuse of market power – market power which has expanded with another hospital takeover since the filing of this case and continues unchecked to this day – ENH only argues that the

[1] These damages include over $75 million in the market for hospital-based outpatient services (a market that was not at issue in the FTC proceedings) beginning immediately after the merger and over $35 million in the inpatient market beginning in 2004, following the FTC's review and after BCBSI's first post-merger renegotiation of its contracts. (A1189, 2568.)

District Court did not abuse its discretion in denying class certification. ENH ignores the evidence of common impact and focuses on whether price changes for a minority of services in the Payor A pair of contracts were uniform. But identical price increases for every service were not the *sine qua non* for Plaintiffs' showing of common impact. Prices for ENH's healthcare services may vary for reasons other than ENH's market power, such as changes in underlying costs or in the definition of the services, but the anticompetitive impact of ENH's market power was across the board.

The question at this stage is not whether Plaintiffs have proven common impact on the merits as to each class member, but rather whether the common questions will predominate and whether they can be shown with common proof.[2] Misled by ENH's expert, the District Court lost sight of this concept and focused instead on the irrelevant question of whether ENH's prices all changed at a uniform rate. Because all of the price changes that the District Court and ENH have identified are unrelated to whether common questions would predominate and to Plaintiffs' showing of common impact, the District Court's ruling should be reversed.

[2] As Plaintiffs discussed in their opening brief, the common questions relating to ENH's liability are sufficient to establish such predominance. (*See* Pls.' Br. at 26–28.)

ARGUMENT

I. The District Court Erred in Refusing to Decide Plaintiffs' Motion to Bar the Opinions of ENH's Expert, Dr. Noether, Under *Daubert*.

American Honda Motor Co. v. Allen, 600 F.3d 813 (7th Cir. 2010), controls whether the District Court should have conducted a *Daubert* analysis before deciding class certification. The District Court committed reversible error in not doing so, and ENH's cry of "no harm, no foul" is unavailing.

A. Dr. Noether's analysis was critical to the District Court's decision.

The District Court's reliance on Dr. Noether's opinion was decisive in its denial of Plaintiffs' class certification motion. The District Court's analysis was infected by Dr. Noether's presumption that if rates of price changes for identical services between these two contracts were not identical, Dr. Dranove's method was invalid.[3] Specifically, it explicitly applied Dr. Noether's opinion and reasoning that if any raw dollar changes in charges for some services between a single pair of contracts between ENH and an MCO did not increase in a lockstep uniform percentage, Dr. Dranove's method would fail.

While ENH claims that the District Court did its analysis independent from relying on Dr. Noether's opinion, it is clear that the District Court's analysis was adopted from Dr. Noether. The District Court's opinion is replete with references to Dr. Noether's report and testimony (*see* A28–30, 36–37, 46–47, 49–52, 54–56), which demonstrates that the District Court found her opinions to be critical to the

[3] ENH concedes that the "the focus of Dr. Noether's *supplemental* report" – "the supposed 'fact' of uniformity" – was the same issue that "was the basis of the District Court's decision denying class certification." (Opp. at 25.)

decision of the class certification motion. The District Court also copied Dr. Noether's specific comparison of price changes between the two Payor A contracts. (*See* A55–56.) Thus, it should have resolved Plaintiffs' *Daubert* motion to completely bar Dr. Noether's testimony and opinions before deciding the class issues.

B. Plaintiffs did not waive their *Daubert* challenge.

ENH does not dispute that Plaintiffs filed a *Daubert* motion or that the District Court declined to conduct a *Daubert* analysis. However, ENH contends that Plaintiffs waived their *Daubert* challenge by not continually contesting Dr. Noether's qualifications or her analysis and by not raising a specific *Daubert* objection as to Dr. Noether's supplemental report. These contentions are invalid.

Plaintiffs challenged Dr. Noether's qualifications.[4] In their *Daubert* motion, Plaintiffs repeatedly objected to Dr. Noether's lack of expertise and familiarity with the industry as it relates to this case. (A1264–65, 2640–41.) Plaintiffs renewed these objections at the class certification hearing. (A1288.) ENH's claim that Plaintiffs' motion criticized only "the 'helpfulness' of her testimony, not her qualifications to provide it" (Opp. at 23 n.3), is wrong. Plaintiffs contended that Dr. Noether lacked expertise as to MCOs and their customers, directly attacking her qualifications to render an opinion, not just whether that flawed opinion would be helpful. ENH's

[4] ENH's attempt to defend Dr. Noether's qualifications is unavailing. Although she appeared as an expert in the FTC proceeding, her role was limited. Instead of performing her own analysis of antitrust impact she merely selected a control group for another economist. (A413.) Moreover, her work in the proceeding came under sharp criticism from the FTC. (A413, A419.) The District Court similarly observed that Dr. Noether's report in this case contained "misleading information and analysis." (A37.)

reliance on *United States v. Hall*, 165 F.3d 1095 (7th Cir. 1999), is misplaced. *Hall* holds that a party may not present on appeal a *Daubert* challenge to a witness's qualifications if not raised below. Plaintiffs clearly did raise such a challenge, in addition to questioning the reliability of her methods and opinions. (A1260–72, 2636–48.)

Equally invalid is ENH's contention that Plaintiffs waived any *Daubert* challenge on appeal because Plaintiffs purportedly failed to assert a specific *Daubert* objection to Dr. Noether's supplemental report. Dr. Noether presented her additional opinions for the first time at the hearing. Plaintiffs immediately objected to these opinions, reasserting their *Daubert* motion to *completely bar* the testimony and opinions. (A1288, 1350–51, 1377–78.) Plaintiffs did not file a post-hearing response because the District Court stated that it would not allow more briefing. (A1396–97.) When Defendant violated this instruction and filed the supplemental report of Dr. Noether, Plaintiffs quickly filed a preliminary objection and stated that they would file their response upon review of the new report. This objection referred back to, and quoted directly from, Plaintiffs' original *Daubert* motion in challenging the reliability of Dr. Noether's conclusions in her supplemental report. (A1440.)[5] The District Court nevertheless accepted Dr. Noether's supplemental report and barred Plaintiffs from filing any further objections. Plaintiffs then sought leave to

[5] That Plaintiffs' March 8, 2010 challenge to the supplemental report was not presented specifically as a new *Daubert* motion is irrelevant for waiver purposes. *See, e.g.*, *Nimely v. City of New York*, 414 F.3d 381, 397, n.12 (2d Cir. 2005) (rejecting the contention "that Nimely's Rule 702 and *Daubert* arguments are unpreserved for appeal").

file Dr. Dranove's response, which the District Court also rejected. (A1473.) ENH's contention that Plaintiffs did not object on *Daubert* grounds in their motion for leave to submit a rebuttal expert report is wrong.

C. *American Honda* applies equally to class certification denials.

This Court, in *American Honda*, held that "when an expert's report or testimony is critical to class certification, . . . a district court must conclusively rule on any challenge to the expert's qualifications or submissions prior to ruling on a class certification motion." 600 F.3d at 815–16. The Court should reject ENH's argument that *American Honda* only applies to denials of class certification and plaintiffs' expert testimony.[6]

ENH's argument is without merit. ENH cites cases holding that Plaintiffs have the burden of persuasion on a Rule 23 motion and asserts from that proposition that only plaintiffs' experts should be subject to *American Honda*. ENH's argument is akin to arguing that because plaintiffs have the burden of proof at trial, only they and not defendants should be subject to the Federal Rules of Evidence. ENH does not cite any support for its suggestion, and the courts have rejected the notion that Rule 702 and *Daubert* should be applied differently to plaintiffs' and defendants' experts. *See, e.g.*, *Martin v. Shell Oil Co.*, 180 F. Supp. 2d 313, 321 (D. Conn. 2002)

[6] In its Rule 23(f) opposition, ENH directly contradicted this position: "After [*American Honda*], the rule is now clearly established that expert issues must be resolved to the extent they are 'critical' to class certification. Under this Court's existing precedents, this is no less true when certification is denied (as here) than when it is granted (as in *American Honda*)." (ENH's Answer in Opposition to Petition for Leave to Appeal at 2 (citation omitted).)

("The court notes that *Daubert* and Rule 702 do not contemplate any distinction between experts based on party status or conduct.").

Moreover, ENH's attempt to seek support for their argument in *American Honda*, *In re Initial Public Offering Securities Litigation* ("*IPO*"), 471 F.3d 24 (2d Cir. 2006), *West v. Prudential Securities, Inc.*, 282 F.3d 935 (7th Cir. 2002), and *Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672 (7th Cir. 2001), is unavailing. These cases, which direct district courts to weigh *all* relevant and admissible evidence relating to class certification issues, not just that submitted by plaintiffs, compel a result directly contrary to the one advocated by ENH. *See American Honda*, 600 F.3d at 817 ("[A] district court must make the necessary factual and legal inquiries and decide all contested issues prior to certification."); *West*, 282 F.3d at 938 ("Tough questions must be faced and squarely decided, if necessary by holding evidentiary hearings and choosing between competing perspectives."); *Szabo*, 249 F.3d at 676 (concluding that "a judge should make whatever factual and legal inquiries are necessary under Rule 23" and, to that end, "the judge would receive evidence . . . and resolve the disputes before deciding whether to certify the class"); *IPO*, 471 F.3d at 42 ("A district judge is to assess *all of the relevant evidence* admitted at the class certification stage and determine whether each Rule 23 requirement has been met, just as the judge would resolve a dispute about any other threshold prerequisite for continuing a lawsuit.") (emphasis added). Nothing in these cases supports ENH's view that only the plaintiffs' evidence and experts

should be scrutinized and that defendants' evidence and experts should be held to a lesser standard.

D. The District Court's failure to conduct a *Daubert* analysis as to Dr. Noether was not harmless error.

This Court has stated that "[a]n error (other than a constitutional error) is not harmless if it results in actual prejudice because it had substantial and injurious effect or influence in determining the jury's verdict." *Lemons v. Skidmore*, 985 F.2d 354, 359 (7th Cir. 1993) (quotations and citations omitted). Defendant's claim that the District Court's failure to conduct a *Daubert* analysis was harmless is wrong. Dr. Noether's analysis was based on a fundamental misrepresentation of Dr. Dranove's methodology – the notion that Dr. Dranove required that all prices for services change at exactly the same percentage across all contracts. Plaintiffs sought to bar the use of Dr. Noether's reports and her testimony. The District Court did not conduct a *Daubert* analysis and improperly allowed Dr. Noether to testify. Dr. Noether's opinion permeated and infected the District Court's opinion and led directly to the denial of class certification. The District Court subsequently adopted an opinion Dr. Noether proposed and used it as the basis to deny class certification. There can be no doubt that the failure to conduct a *Daubert* analysis harmed Plaintiffs.

II. Plaintiffs Have Demonstrated Rule 23(b)(3) Predominance for the Class.

A. Plaintiffs have satisfied the legal standard for predominance.

ENH asserts that the District Court properly exercised its discretion to find that Plaintiffs had satisfied Rule 23(b)(3) predominance. The District Court required

proof of injury to each individual member of the class at the class certification stage. By imposing this burden, the District Court committed legal error.

The District Court erred when it required proof of a merits question – injury – at the class certification stage. Rather than determine whether common questions would predominate, one of which is whether Plaintiffs had a method of proving injury through common proof, the District Court focused on whether Plaintiffs' common method of proving injury would ultimately succeed on the merits as to each and every class member. While some courts that adopted this Court's decision in *Szabo* have confused these issues, this Court recently clarified the distinction.

In *Schleicher v. Wendt*, --- F.3d ---, No. 09-2154, 2010 U.S. App. LEXIS 17367 (7th Cir. Aug. 20, 2010), a securities fraud class action, this Court made clear that class certification does not require that injury be proven as to each class member at the class certification stage and it is appropriate to certify classes where identifiable groups may not be able to prove injury when the merits are decided. In *Schleicher*, the defendant argued that injury needed to be shown before the class could be certified. *Id.* at *5–6. As this Court explained, requiring individual proof of injury is improper at class certification:

> Although we concluded in *Szabo* [] that a court may take a peek at the merits before certifying a class, *Szabo* insisted that this peek be limited to those aspects of the merits that affect the decisions essential under Rule 23. If something about 'the merits' also shows that individual questions predominate over common ones, then certification may be inappropriate. . . . Defendants have approached this case as if class certification is proper only when the class is sure to prevail on the merits. . . . Under the current rule, certification is largely independent of the merits (save for the situation covered in *Szabo*), and a certified class can go down in flames on the merits. The possibility that

> individual hearings will be required for some plaintiffs to establish damages does not preclude certification. *See Pella Corp. v. Saltzman*, 606 F.3d 391 (7th Cir. 2010); *Arreola v. Godinez*, 546 F.3d 788 (7th Cir. 2008).

Schleicher, 2010 U.S. App. LEXIS 17367, at *13–14. This Court emphasized that even deciding whether a portion of the class cannot show injury should be reserved for the merits and should not to be decided at the class certification stage:

> After a class has been certified, and other elements of the claim have been established, the court will need to pin down *when* the stock's price was affected by any fraud. That decision, like the other issues, can be made on a class-wide basis, because it affects investors in common. It gets the cart before the horse to insist that it be made before any class can be certified.

Id. at *19. Here, there has been no showing that individual questions are even present, let alone predominate, on the issue of common impact. As in *Schleicher*, this Court should reject ENH's similar argument.

B. There was overwhelming evidence that Plaintiffs could demonstrate injury through common proof.

ENH cannot trivialize the FTC findings that ENH caused injury with respect to both inpatient and outpatient procedures based on actual post-merger price increases. (A433.) While the FTC proceeding focused on inpatient procedures as the relevant market, it noted that outpatient prices were also affected. (*Id.*)

In addition, Plaintiffs presented further evidence of common impact: (1) the common rates of price increases in the MCO contracts; (2) documents and testimony regarding ENH's contract renegotiations with MCOs demonstrating a preference to institute a single rate of price increase (A1145–46, 1157–59, 2524–25, 2536–38); and (3) the history of hospital merger cases over the last 15 years, which demonstrated

that all inpatient services are consistently treated as one market because "the exercise of market power tends to be uniform across all inpatient services." (A1323.)

ENH and the District Court mischaracterize Dr. Dranove's analysis of common impact in the MCO contracts as being "dependent on uniform price increases." (Opp. at 15.) Dr. Dranove never stated that price increases needed to be uniform in order to support a finding of common impact. (*See* A1451 ("As I explained in my earlier reports and reemphasized above, one does not need to find uniform pricing to conclude that the ENH merger had common impact.").) His analysis acknowledged some variations in price increases, but he explained that these neither reflect differential exercise of market power nor the absence of the exercise of market power. (A1329–30.)

Dr. Dranove made clear in his reports and testimony that he considered variations in pricing, or "restructuring," as part of his analysis.[7] (A1162–66, 1318–22, 1451–62, 2541–45, 2711–22.) Section III.3 of his Reply Report is devoted to explaining restructuring and why variable price changes due to restructuring do not preclude his analysis of common impact. (A1162–66, 2541–45.) The linchpin of his analysis is ENH's class-wide exercise of market power. His observations of common rates of price increases in contracts are evidence of class-wide impact. Dr. Dranove

[7] ENH falsely claims that Dr. Dranove's only focus for this analysis was "escalator clauses within contracts." (Opp. at 24.) Dr. Dranove considered price changes both within and across contracts at the time of renegotiation. (*See* A1342 ("[T]he appendix contains an examination of both price changes within contracts and price changes for renewals of contracts."), A1386 ("I did, in fact, look at both within contract changes and changes across contracts.").) Dr. Noether concedes that Dr. Dranove's price change analysis includes changes across contracts. (A1419.)

also acknowledged price variability that was attributable to "restructuring or bringing about prices in line with costs." (A1324.) But he explained that differences in price changes due to restructuring are "not evidence of differential exploitation of market power" and do "not undermine common impact." (A1162.) ENH does not claim the contrary.

Dr. Dranove opined that ENH exercised its market power across all services. Prices for restructured services were inflated by the same exercise of market power. (A1164–65, 2543–44.) If prices for any services were not impacted by ENH's abuse of market power, then ENH would have been discriminating among services. But Dr. Noether admitted that ENH did not engage in that practice. (A1368.)

Dr. Dranove's common impact methodology analyzes each plan for each MCO separately as well as inpatient services separately from outpatient services. (*See* A2610–18 (breaking down and analyzing each MCO's inpatient and outpatient services separately for each plan).) Thus, the FTC's observation that the "potential for a merger in a bargaining market to have disparate effects on different customers potentially creates sticky and unsettled issues" (Opp. at 45 (*quoting* A439)) does not undercut the reliability of Plaintiffs' proposed methodology. The FTC was discussing the possibility that, because of the bilateral negotiation process, some MCOs might be impacted more than others. (*See* A438 ("[B]ilateral negotiations between MCOs and hospitals determine prices that often are unique to the particular negotiation.").) Plaintiffs' proposed methodology analyzes each MCO

independently, so bilateral negotiations are considered in Plaintiffs' showing of common impact.

C. ENH's chart on page 14 falsely implies prices were decreasing.

ENH's chart on page 14 of its opposition brief is *dehors* the record and a creation for this appeal. It mischaracterizes the record in an attempt to defend the District Court's finding that common impact was not shown because of variable price changes in the Payor A contracts. The price change figures for the first seven cardiac services listed, all of which pertain to Payor A's HMO contracts, not its PPO contracts, ignore the clear evidence that those services were separated and repriced.[8] ENH then mixes PPO with HMO contracts in the same chart, implying these unrelated inpatient and outpatient PPO rates demonstrate price decreases and that Payor A did not suffer any impact as to those as well.

The final two entries in ENH's chart – PPO rates for inpatient and outpatient services – are misleading and comprise a new argument not made below. While there may have been a nominal decrease in the percent of charges Payor A was required to reimburse for these services, ENH's anticompetitive increases in prices *exceeded* any decrease in reimbursement rate and caused antitrust impact. (*See* A422 ("A hospital with a higher chargemaster can have a lower discount rate and

[8] ENH's claim that Dr. Dranove reported that these price changes were uniform (see Opp. at 36) is based on a misunderstanding of the purpose of Dr. Dranove's chart. The purpose was to demonstrate common price increases excluding restructuring. Dr. Dranove was aware of the Payor A contracts in his report, but he did not select them as examples of common price increases because, while the prices for a majority of services did increase at a uniform rate, others did not appear to do so as a result of restructuring. (*See* A1230.)

still charge higher prices.").) Indeed, as the FTC found, ENH instituted aggressive increases in its chargemaster four times in 2002 and 2003 at rates that outpaced the Payor A PPO rate decreases. (A201, 392, 1595.)

ENH ignores the record evidence of widespread uniformity of increases in the Payor A HMO contracts.[9] Inpatient prices for the non-restructured services (which comprised the majority of all services) all increased at the same rate of approximately 6.1%. (A1387, 1459, 2719.) The chart below (which Plaintiffs presented to the District Court) reflects these consistent price increases:

Service	% Change 2000-2002
Inpatient	6.1%
ICU	6.1%
Vaginal delivery	6.1%
Caesarian section	6.1%
Boarder baby	6.2%
Psychiatric/substance abuse	6.0%
Telemetry/PCU	6.1%
Skilled nursing	6.1%

(A2719 (*citing* A2725, 2728).) These services represent "the vast majority" of inpatient services under the Payor A HMO plan (A1460, 2720), and the fact that

[9] The contracts actually use the term "non-PPO," but the discussion in the District Court below used the term HMO.

they all change at uniform rates confirms Dr. Dranove's finding of common impact.[10]

The District Court relied upon a minority set of less common cardiac procedures in finding lack of predominance. These are the first seven services cited by ENH in its chart. However, payments for those services decreased because charges for physician services, which had been included in those services before, were now to be reimbursed separately. (*Compare* A2725 *with* A2728.) Thus, it is to be expected that the prices for cardiac services would decrease in 2002, since those prices no longer include payment for the accompanying professional services.[11] ENH does not make any substantive response to the fact of this restructuring. Indeed, ENH has never presented evidence of a variable price change that disproved common impact.

D. ENH's attempt to identify "no-impact" class members should be rejected.

ENH points to the self-serving affidavit of Joseph Arango as support that BCBSI was not injured by ENH's anticompetitive conduct. Because Mr. Arango did not conduct any formal analysis in reaching his conclusion (A2505–2510), the District Court determined that Mr. Arango's affidavit was not persuasive. (*See* A7 ("[T]he court cannot say with certainty that BCBSI did not suffer injury, as it will not consider the Arango declaration to be conclusive evidence of this fact at this time.").)

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[10] The HMO contracts required Payor A to pay the same percentage of prices for the majority of outpatient services listed in the hospital's "chargemaster." Because these list prices were raised during the period, Payor A still experienced a price hike.

[11] Moreover, as Dr. Dranove noted, the 2002 change in the pricing for cardiac services coincided with an intervening restructuring of many of the DRG codes for cardiac services. (A1459–60.)

By contrast, Dr. Dranove conducted a thorough econometric analysis of BCBSI's damages and confirmed that BCBSI was damaged in excess of $110 million through the end of 2008. (A1167–93, 2546–72.) Although Dr. Dranove only found overcharges in outpatient services[12] in the 2000 BCBSI/ENH contract, he found overcharges for both inpatient and outpatient services in the succeeding contracts. (A1189.) ENH also overcharged for inpatient services for every year since 2004, when overcharges for inpatient services jumped to 10 percent or more. (*Id.*) The analyses conducted by the FTC economists do not detract from Dr. Dranove's analysis. Those analyses did not find the same inpatient overcharges Dr. Dranove found because the FTC only studied the time period before 2002. (A381, 405–06.) As to outpatient services, on which the FTC did not focus, ENH's own expert admitted that there was evidence of overcharges before the FTC. (A1149, 2528.)

Moreover, Plaintiffs' class definition is tailored to include only those payors who were impacted by ENH's anticompetitive price increases. It excludes several categories of payors, including those "who solely paid fixed amount co-pays [and] uninsureds who did not pay their bill." (A59.) ENH's half-hearted argument in their opposition that there are payors who suffered no impact (Opp. at 46) was copied and pasted directly from ENH's class certification opposition brief below. (A680.) As the District Court noted, Plaintiffs have already explained that these issues are

[12] For outpatient services, BCBSI was overcharged for every year since 2000, the year of the merger. (A1174, 1189.) These overcharges total more than $75 million through 2008. (A1189.)

irrelevant and relate to damages allocation, not impact (A44–45), and these issues did not factor into the District Court's decision.

CONCLUSION

For the foregoing reasons as well as those in Plaintiffs' opening brief, this Court should reverse the District Court's denial of class certification.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify, in accordance with Fed. R. App. P. 32(a)(7)(C), that this brief conforms to the type-volume limitations of Fed. R. App. P. 32(a)(7)(B). This brief contains 4,470 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of September, 2010, ***Reply Brief of Plaintiffs-Appellants*** was served by causing a true and correct copy of same to be delivered via e-mail, personal delivery, and overnight mail to the below listed counsel:

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CIRCUIT RULE 31(e) CERTIFICATION

The undersigned hereby certifies that I have filed electronically, pursuant to Circuit Rule 31(e), a version of the brief in non-scanned PDF format.

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