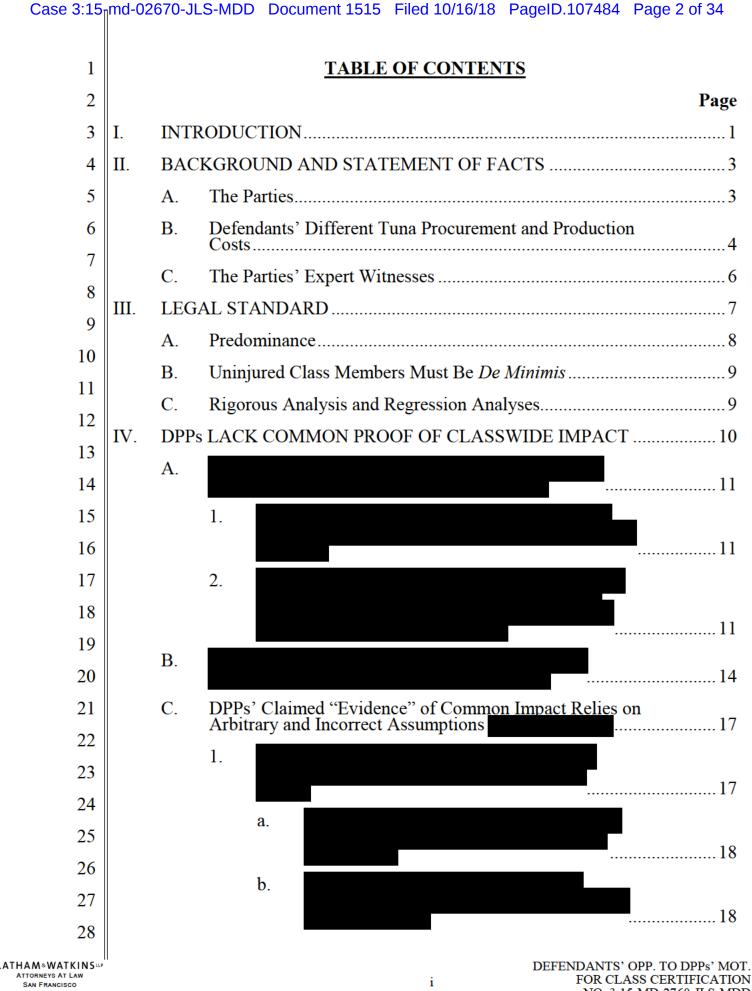
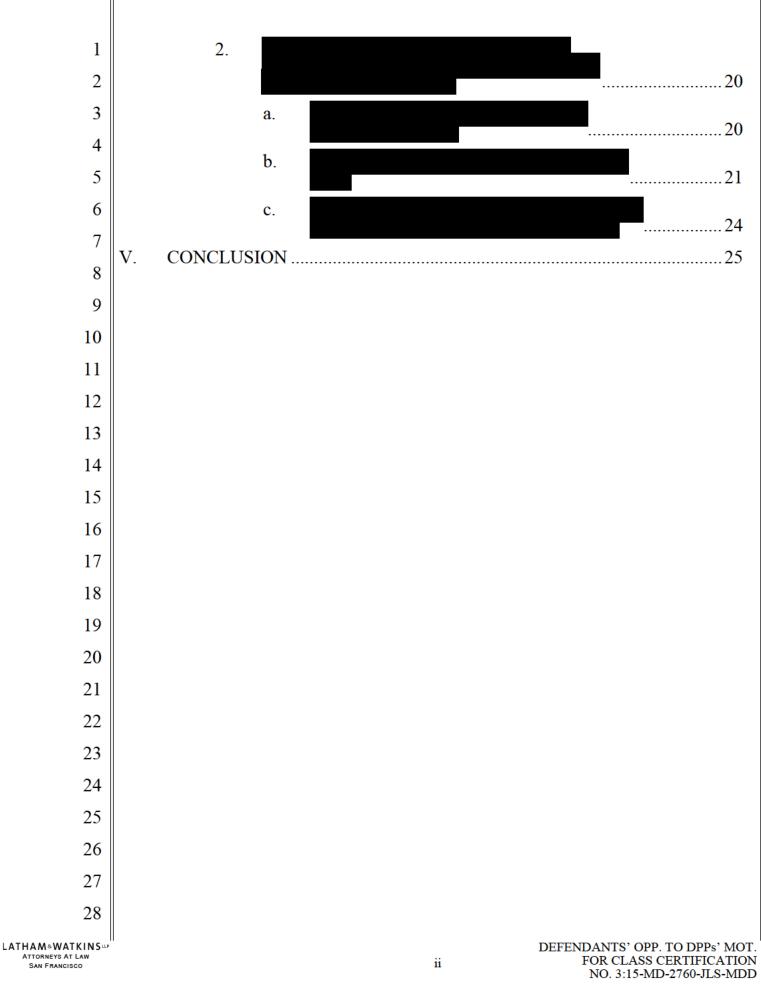
1 2 3 4 5 6 7 8 9 10	LATHAM & WATKINS LLP Alfred C. Pfeiffer (CA 120965) Christopher S. Yates (CA 161273) Belinda S Lee (CA 199635) Niall E. Lynch (CA 157959) Ashley M. Bauer (CA 231626) 505 Montgomery Street, Suite 2000 San Francisco, California 94111-6538 Telephone: 415-391-0600 Facsimile: 415-395-8095 al.pfeiffer@lw.com chris.yates@lw.com belinda.lee@lw.com niall.lynch@lw.com ashley.bauer@lw.com Attorneys for Defendants StarKist Co. and Dongwon Industries Co., Ltd.		
11			
12	UNITED STATES SOUTHERN DISTR		
13	IN RE: PACKAGED SEAFOOD		3:15-md-02670-JLS-MDD
14	PRODUCTS ANTITRUST LITIGATION	MDL No.	
15	This Document Relates to:		DANTS' OPPOSITION TO
16	The Direct Purchaser Plaintiff Class	DIRECT PLAINT	PURCHASER CLASS IFFS' MOTION FOR CLASS
17	Action Track		ICATION
18		J FILED U	JNDER SEAL
19		Hearing: Date:	December 20, 2018
20		Time: Court.:	9:00 a.m. Room 4D
21		Judge:	Hon. Janis L. Sammartino
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LATHAM®WATKINS LLP Attorneys At Law San Francisco			DEFENDANTS' OPP. TO DPPs' MOT. FOR CLASS CERTIFICATION



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6	<i>Amchem Prod., Inc. v. Windsor,</i> 521 U.S. 591 (1997)
7	<i>In re Asacol Antitrust Litig.</i> , No. 18-1065, 2018 WL 4958856 (1st Cir. Oct. 15, 2018)
8	In re Class 8 Transmission Indirect Purchaser Antitrust Litig.,
9	140 F. Supp. 3d 339 (D. Del. Oct. 21, 2015), vacated in part on other grounds, 679 Fed.Appx. 135 (3d Cir. 2017)
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12	<i>Comcast v. Behrend</i> , 569 U.S. 27 (2013)
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22	In re Hydrogen Peroxide Antitrust Litig.,
23	In re Hydrogen Peroxide Antitrust Litig., 552 F. 3d 305 (3d Cir. 2008), as amended (Jan. 16, 2009)
24	In re LIBOR-Based Fin. Instruments Antitrust Litig.,
25	299 F. Supp. 3d 430 (S.D.N.Y. 2018)
26	<i>In re Lidoderm Antitrust Litig.</i> , No. 14-md-02521-WHO, 2017 WL 679367 (N.D. Cal Feb, 21, 2017)
27	2017,
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	DEEENDANTS' ODD TO DDD"' MOT

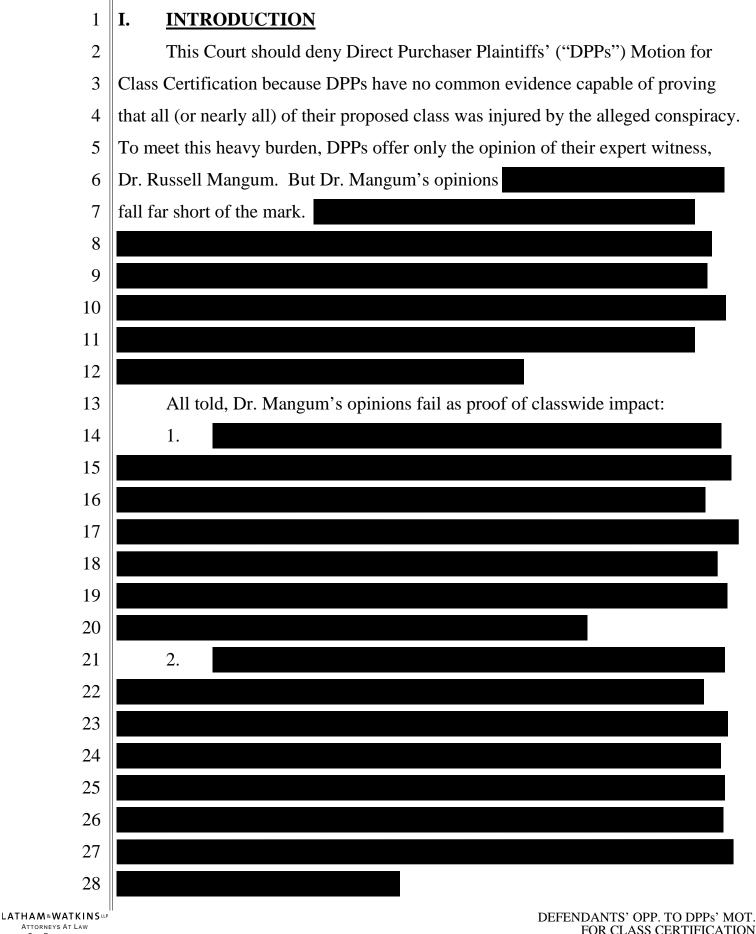
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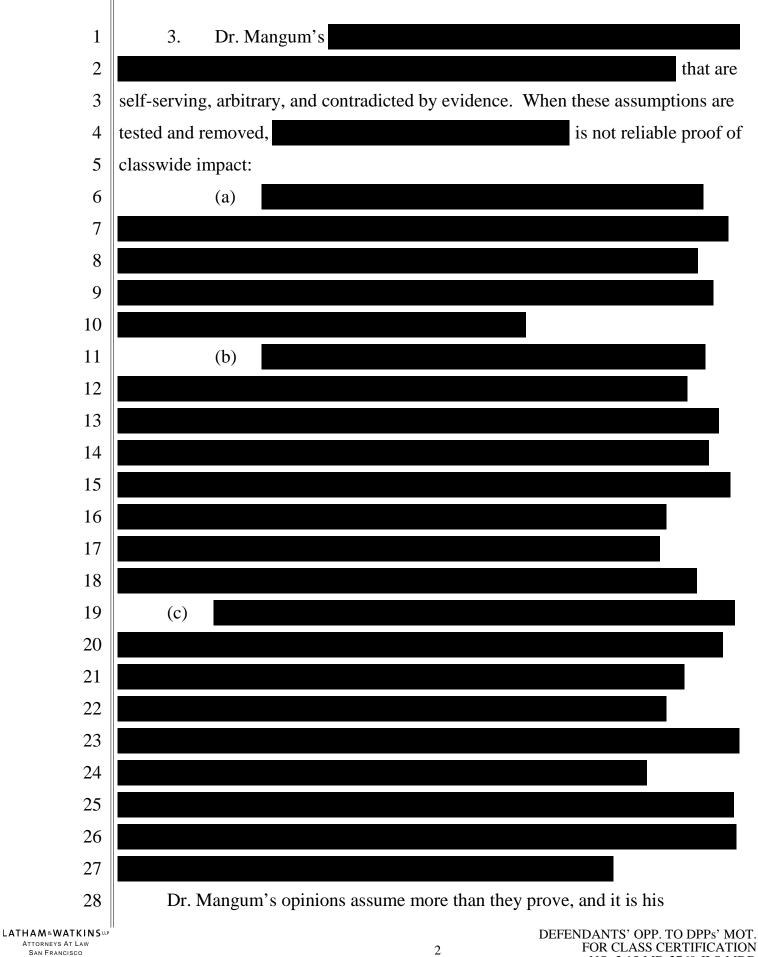
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1 2	<i>In re Lithium Ion Batteries Antitrust Litig.</i> , No. 13-MD-2420 YGR, 2017 WL 1391491 (N.D. Cal. Apr. 12, 2017)
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6	In re Optical Disk Drive Antitrust Litig., 303 F.R.D. 311 (N.D. Cal. 2014)
7 8	<i>In re Photochromic Lens Antitrust Litig.</i> , No. 8:10-CV-00984-T-27EA, 2014 WL 1338605 (M.D. Fla. Apr. 3, 2014)
9 10	Piggly Wiggly Clarksville, Inc. v. Interstate Brands Corp., 100 Fed. App'x 296 (5th Cir. 2004)10
11 12	In re Plastics Additives Antitrust Litigation, No. 03-CV-2038, 2010 WL 3431837 (E.D. Pa. Aug. 31, 2010)12, 16
12	In re Rail Freight Fuel Surcharge Antitrust Litig., 292 F. Supp. 3d 14 (D.D.C. 2017)
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15 16	<i>Reed v. Advocate Health Care</i> , 268 F.R.D. 573 (N.D. Ill. 2009)
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18 19	<i>Wal-Mart Stores, Inc. v. Dukes,</i> 564 U.S. 338 (2011)
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25	OTHER AUTHORITIES
26	ABA Section of Antitrust Law, Econometrics: Legal, Practical, and Technical Issues 355-56 (2d ed. 2014)10
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LATHAM & WATKINS LLP ATTORNEYS AT LAW SAN FRANCISCO	DEFENDANTS' OPP. TO DPPs' MOT. iv FOR CLASS CERTIFICATION



ATTORNEYS AT LAW SAN FRANCISCO

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assumptions—on the key issues that his methodology purports to prove—that
 render his opinion insufficient under Rule 23 and its predominance requirement.
 DPPs have no methodology capable of *proving* impact to all or nearly all of the
 proposed class, and their Motion for Class Certification should be denied.

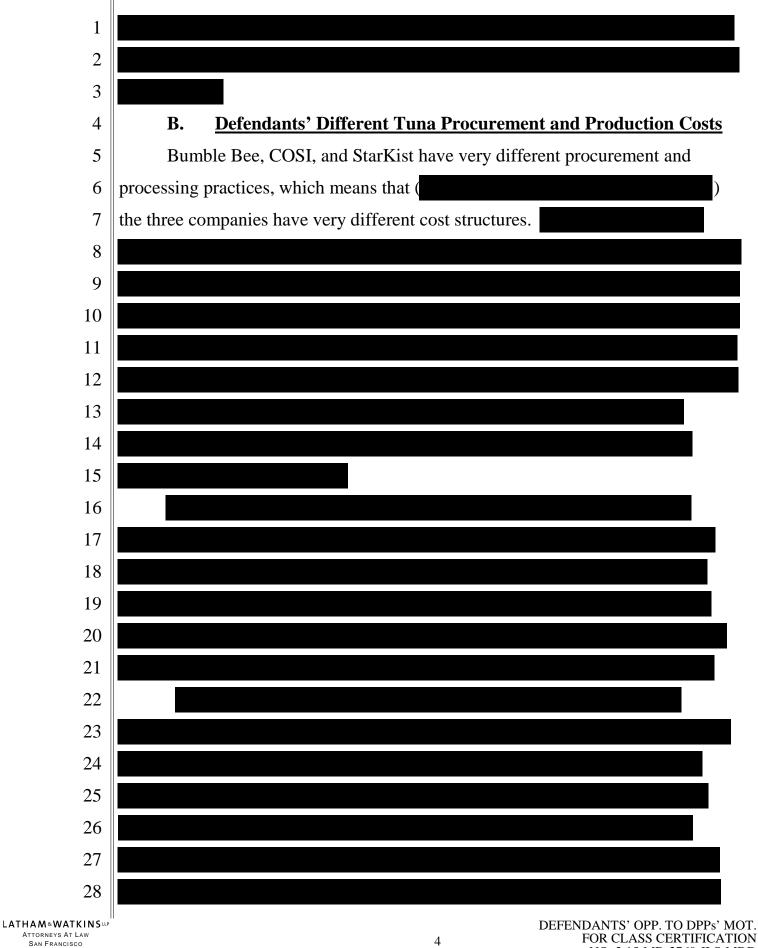
# II. BACKGROUND AND STATEMENT OF FACTS

A. <u>The Parties</u>

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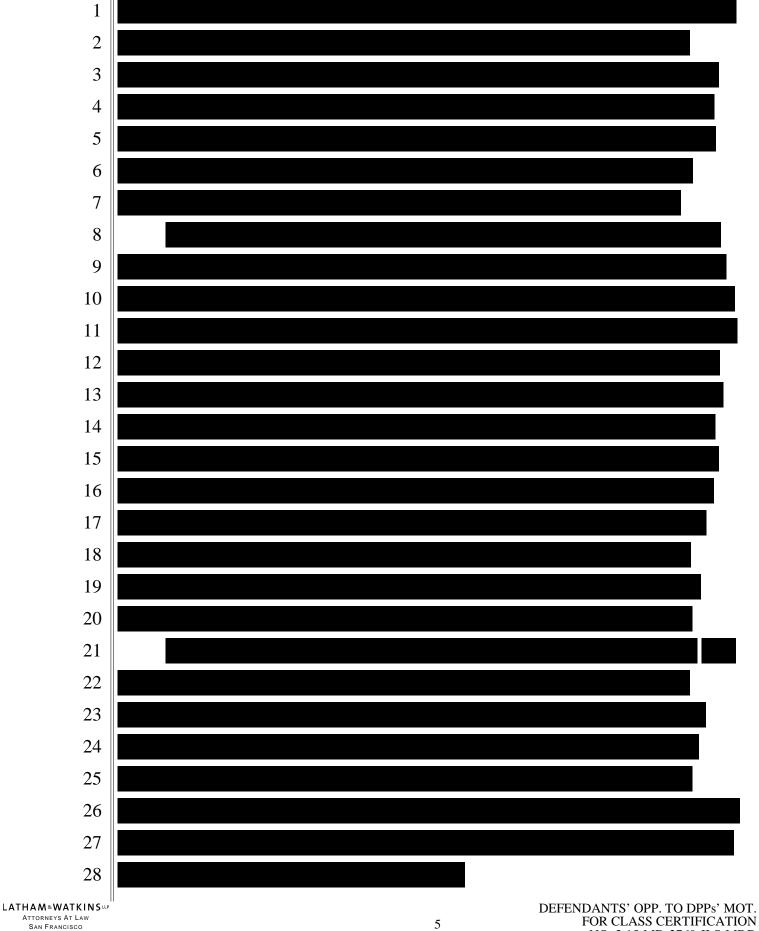
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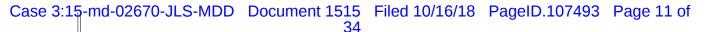
7 DPPs move to certify a class of persons and entities that "directly purchased 8 packaged tuna products . . . from any Defendant at any time between June 1, 2011 and July 1, 2015." (DPPs' Mot. for Class Certification, ECF No. 1140, at 1.) This 9 10 is a markedly shorter time period than was alleged in the operative complaint at the 11 time their Motion was filed. That Complaint (and the others before it) alleged a 12 conspiracy between Bumble Bee Foods LLC ("Bumble Bee"), Tri-Union Seafoods 13 LLC d/b/a/ Chicken of the Sea ("COSI"), StarKist Co. ("StarKist"), and their 14 parent companies (collectively, "Defendants") from at least July 1, 2004 through 15 May 8, 2017. (Third Consol. Direct Purchaser Class Compl., ECF No. 911 ("Third Consol. Compl.") ¶¶  $(1-2.)^1$ 16 17 (Corrected Decl. 18 of Russell W. Mangum, III, ECF No. 1192 ("Mangum Decl.") ¶ 8.) 19 Defendants Bumble Bee, COSI, and StarKist are suppliers of packaged tuna. 20 21 22 23 24 25 DPPs filed an amended complaint on October 5, 2017, just 11 days ago and 26 27 "Ex." refers to the Exhibits to the Declaration of Belinda S Lee in Support of 28Defendants' Opposition to DPPs' Motion for Class Certification, filed herewith. ATHAM®WATKINS DEFENDANTS' OPP. TO DPPs' MOT ATTORNEYS AT LAW FOR CLASS CERTIFICATION 3 SAN FRANCISCO NO. 3:15-MD-2760-JLS-MDD

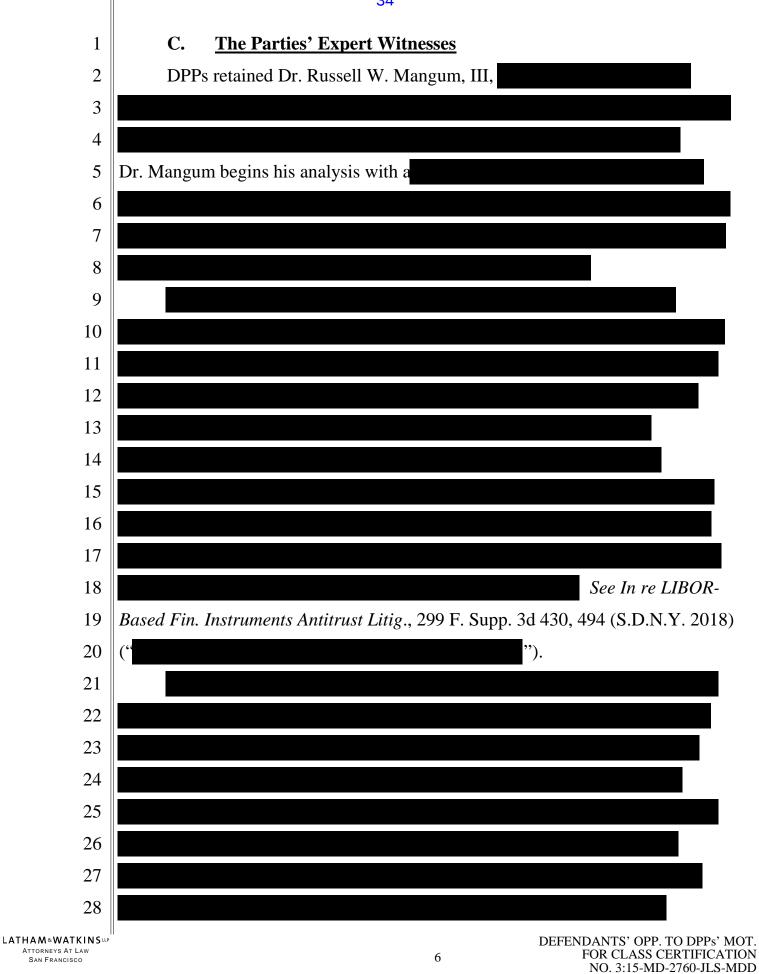


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Defendants retained Dr. John H. Johnson, IV, the President and CEO of Edgeworth Economics and former economics professor at Georgetown University and University of Illinois at Urbana-Champaign. (Ex. 5, Johnson Rep. ¶¶ 5-6.)

17 Dr. Johnson has testified in numerous cases involving class certification and

18 antitrust liability and damages, and has been accepted as an expert in economics,

19 econometrics, and statistics by numerous federal courts. (*Id.*  $\P$  6.)

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# III. <u>LEGAL STANDARD</u>

As the Supreme Court has stated: "Rule [23] imposes stringent requirements
for certification that in practice exclude most claims." *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 234 (2013). Plaintiffs must satisfy all four of Rule
23(a)'s subsections—numerosity, commonality, typicality, and adequacy—and at
least one subsection of Rule 23(b). *See Comcast v. Behrend*, 569 U.S. 27, 33
(2013). A plaintiff's failure to carry its burden under every prong of Rule 23(a)

LATHAM & WATKINS LLF Attorneys At Law San Francisco and at least one prong of Rule 23(b) precludes certification. *In re Lithium Ion Batteries Antitrust Litig.*, No. 13-MD-2420 YGR, 2017 WL 1391491, at \*2-3
 (N.D. Cal. Apr. 12, 2017) ("*Batteries*").

4

# A. <u>Predominance</u>

5 By proceeding under Rule 23(b)(3), DPPs must show that: (1) "questions of 6 law or fact common to class members predominate over any questions affecting 7 only individual members"; and (2) class litigation is "superior to other available 8 methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 9 23(b)(3). The Supreme Court has explained that a common issue "is capable of 10 classwide resolution" when its truth or falsity can be resolved "in one stroke." 11 Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350 (2011). Predominance "tests 12 whether proposed classes are sufficiently cohesive to warrant adjudication by 13 representation," and is similar to, but more demanding than the commonality analysis under Rule 23(a). Amchem Prod., Inc. v. Windsor, 521 U.S. 591, 623 14 15 (1997). As the D.C. Circuit observed, "class certification is far from automatic" in cases seeking to satisfy Rule 23(b) under the predominance requirement. In re 16 17 Rail Freight Fuel Surcharge Antitrust Litig., 725 F.3d 244, 252 (D.C. Cir. 2013) 18 ("Rail Freight I").

In price-fixing cases, Rule 23(b)(3) requires a showing that common
evidence will predominate on *every* element of a Sherman Act Section 1 claim:
"(1) whether there was a conspiracy to fix prices in violation of the antitrust laws;
(2) the fact of plaintiffs' antitrust injury, or 'impact' . . . and (3) the amount of
damages sustained as a result of the antitrust violations." *In re Optical Disk Drive Antitrust Litig.*, 303 F.R.D. 311, 318 (N.D. Cal. 2014) ("*ODD*").<sup>3</sup> Antitrust

25

26  $\begin{bmatrix} 3 \\ as guilty pleas or$ *per se*antitrust allegations, is not sufficient to certify a class.27 See a.g. In re Hydrogen Peroride Antitrust Litig. 552 E 3d 305, 308 n 2, 325 (3d

27 See, e.g., In re Hydrogen Peroxide Antitrust Litig., 552 F. 3d 305, 308 n.2, 325 (3d Cir. 2008), as amended (Jan. 16, 2009) (reversing grant of class certification where two defendants had pleaded guilty); ODD, 303 F.R.D. at 325 (denying certification after one defendant and four employees pleaded guilty).

plaintiffs have the burden of presenting a "method for proving impact on a class-

2 wide basis." In re High-Tech Emps. Antitrust Litig., 289 F.R.D. 555, 566 (N.D.

3 Cal. 2013) ("High Tech Emps.") (collecting cases). If a methodology cannot

4 determine classwide impact in one stroke, Rule 23 is not satisfied and certification

5 should be denied. Id.; In re Graphics Processing Units Antitrust Litig., 253 F.R.D.

6 478, 496 (N.D. Cal. 2008) ("GPU") (finding no predominance because the expert's
7 methodology could not determine impact to the class with a single regression).

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#### B. <u>Uninjured Class Members Must Be De Minimis</u>

9 DPPs' method for proving classwide impact must be capable of showing that the alleged conspiracy impacted "all (or nearly all)" of the proposed class. High-10 11 Tech Emps., 289 F.R.D. at 567. Certification is only proper when "the uninjured parties represent a de minimis portion of the class." See In re Lidoderm Antitrust 12 13 Litig., No. 14-md-02521-WHO, 2017 WL 679367, at \*11, 20 (N.D. Cal. Feb. 21, 2017) ("Lidoderm"); see also In re Asacol Antitrust Litig., No. 18-1065, 2018 WL 14 4958856, at \*6-10 (1st Cir. Oct. 15, 2018) ("Asacol") (reversing class certification 15 16 because district court had erred in holding that 10% uninjured class numbers was 17 de minimis); accord In re Rail Freight Fuel Surcharge Antitrust Litig., 292 F. 18 Supp. 3d 14, 135 (D.D.C. 2017) ("Rail Freight IV") ("The Court views the 'all or virtually all' and the 'de minimis' standards as two sides of the same coin.").4 19

20

# C. <u>Rigorous Analysis and Regression Analyses</u>

21 "Before certifying a class, the trial court must conduct a 'rigorous analysis'
22 to determine whether the party seeking certification has met the prerequisites of
23 Rule 23." *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 588 (9th Cir. 2012)
24 (citations omitted). This means courts must resolve "factual disputes necessary to
25 determine" whether Rule 23 is satisfied, including those "staged [by] a battle of the

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this standard, Defendants use this phrasing.

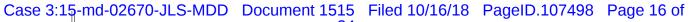
experts." *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 982-84 (9th Cir. 2011);
 *see also Comcast*, 529 U.S. at 35 (requiring "a determination that Rule 23 is
 satisfied, even when that requires inquiry into the merits of the claim").

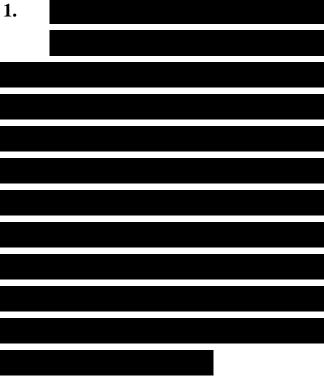
- 4 The Supreme Court's mandate of a "rigorous analysis" at the class
- 5 certification stage applies with particular force to the scrutiny of an expert's
- 6 regression models. "Rule 23 not only authorizes a hard look at the soundness of
- 7 statistical models that purport to show predominance—the rule commands it."
- 8 *Rail Freight I*, 72 F.3d at 255. As the Supreme Court explained, courts should not
- 9 simply rubber stamp regression models: "Under that logic, at the class-
- 10 certification stage *any* method of measurement is acceptable so long as it can be
- 11 applied classwide[.]" *Comcast*, 569 U.S. at 35-36 (emphasis in original); *see also*
- 12 Piggly Wiggly Clarksville, Inc. v. Interstate Brands Corp., 100 Fed. App'x 296,
- 13 299 (5th Cir. 2004) (multiple regression analysis is "not a magic formula"); GPU,
- 14 253 F.R.D. at 491 (certification is not "automatic every time counsel dazzles the
- 15 courtroom with graphs and tables."); ABA Section of Antitrust Law,
- 16 Econometrics: Legal, Practical, and Technical Issues 355-56 (2d ed. 2014)
- 17 ("[R]egression analysis will always yield a result. Whether a regression is useful
- 18 for assessing classwide impact is a different question.").<sup>5</sup>
- 19 IV. DPPs LACK COMMON PROOF OF CLASSWIDE IMPACT
  - DPPs have not satisfied Rule 23(b)(3) because their methodology for
- 21 evaluating and measuring impact to the proposed class:
- Although Rule 23(b)(3)'s predominance requirement is more stringent than the admissibility standards set forth by Federal Rule of Evidence 702 and *Daubert Nerrell Dow Pharm., Inc.*, 509 U.S. 579 (1993), Dr. Mangum's methodology and analyses are flawed and unreliable such that they would be inadmissible under those standards as well. *See, e.g., Batteries*, 2017 WL 1391491, at \*18 ("[W]hile the Court does not find [plaintiffs' expert] Dr. Noll's methodology to be unreliable, it does find that Dr. Noll's analysis ultimately does not satisfy DPPs' burden under Rule 23(b)'s predominance requirement.").

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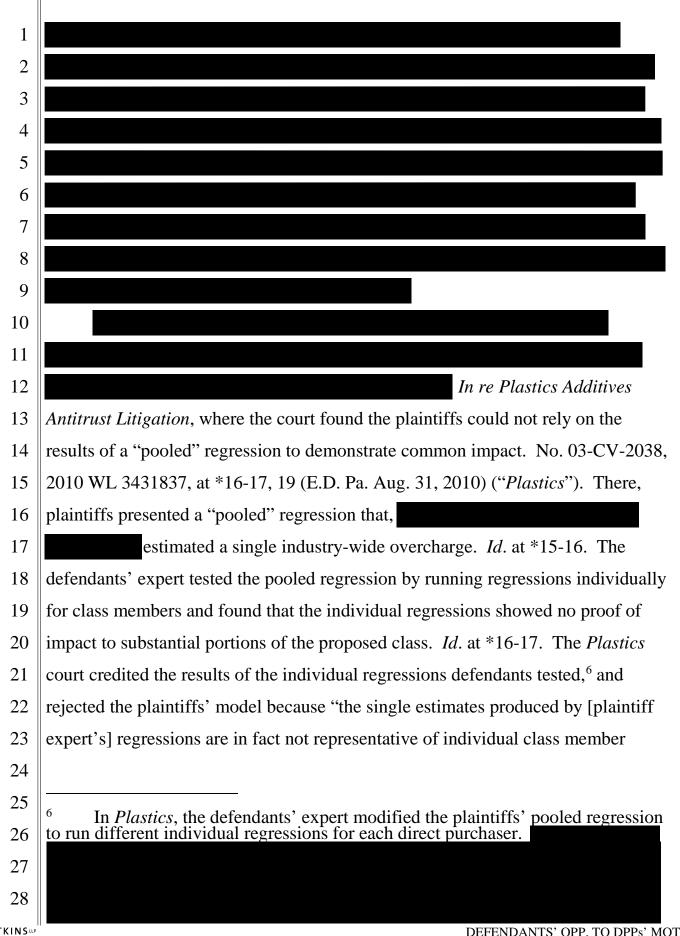


A.

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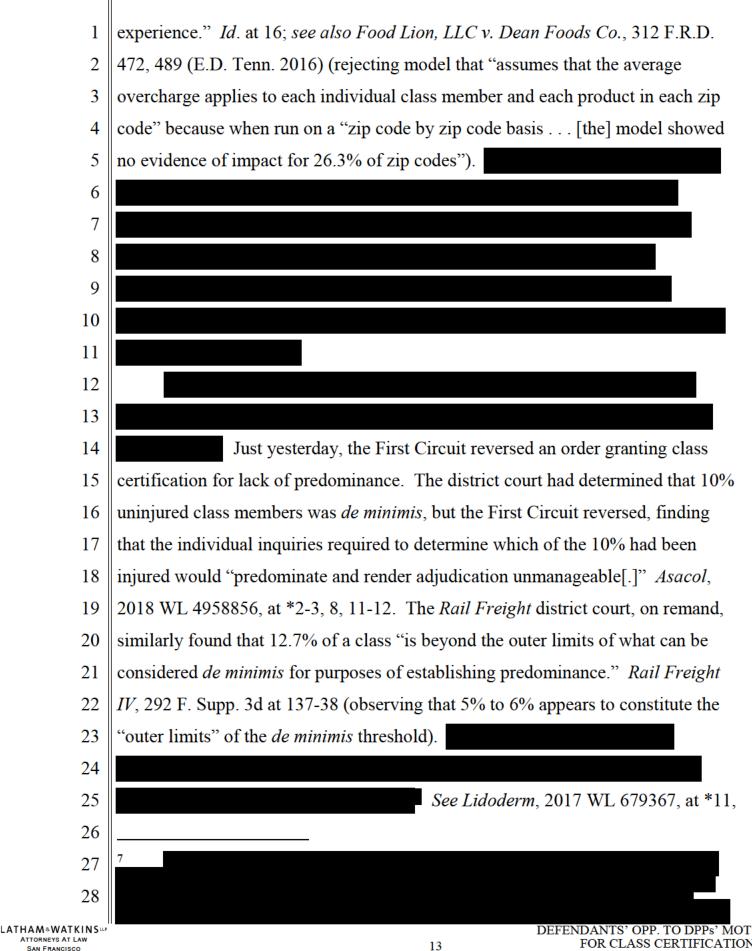
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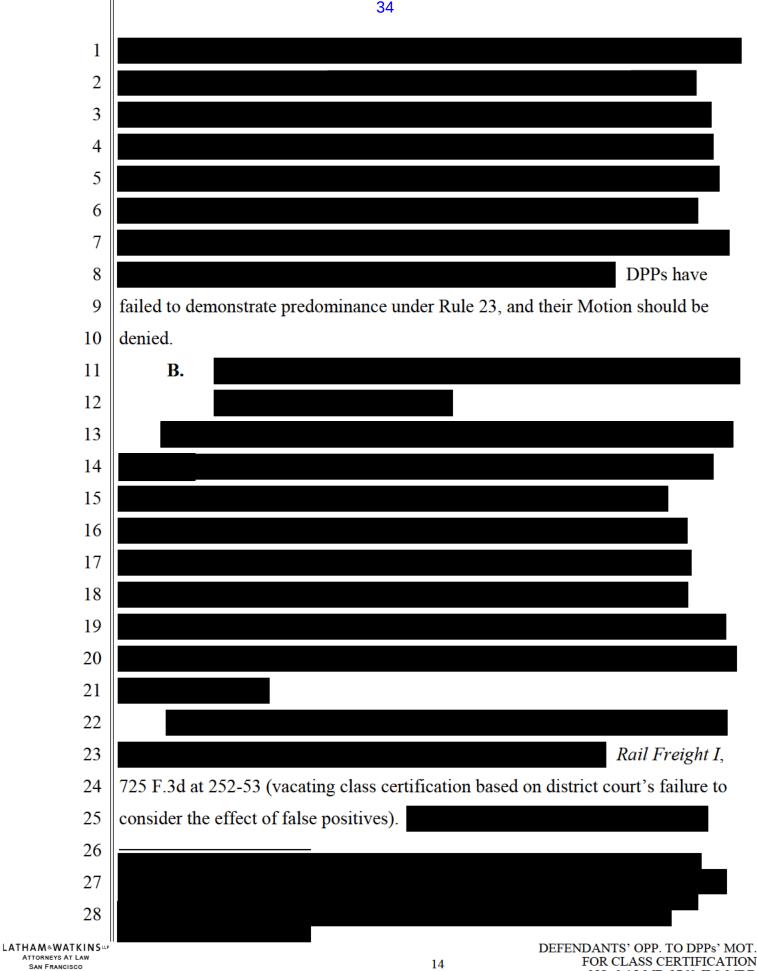
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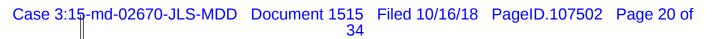
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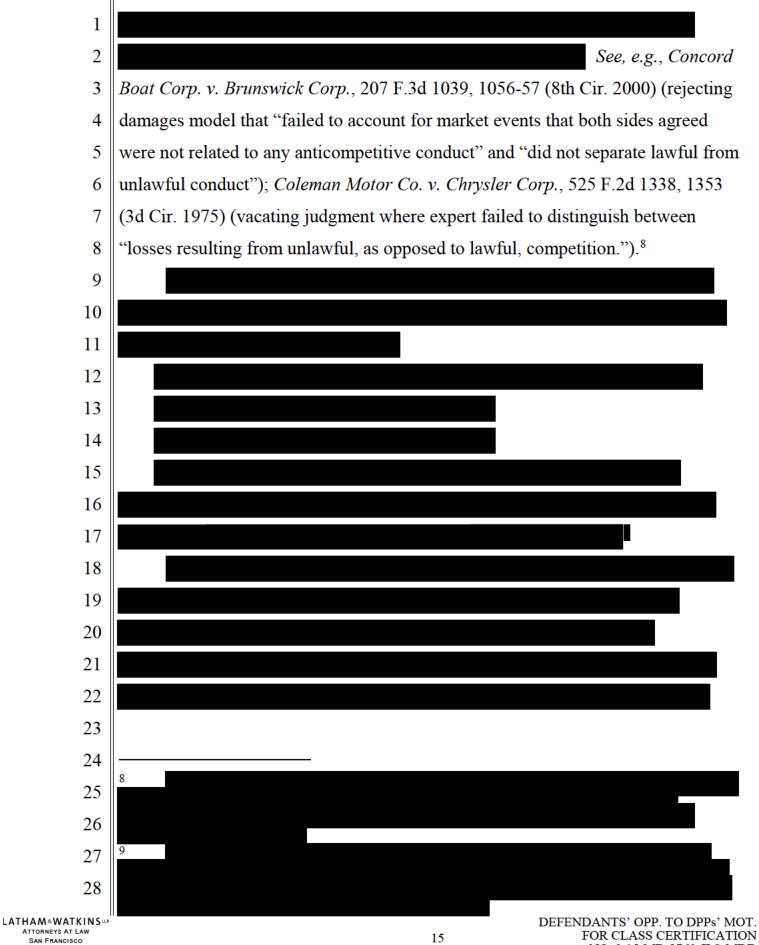


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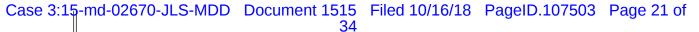
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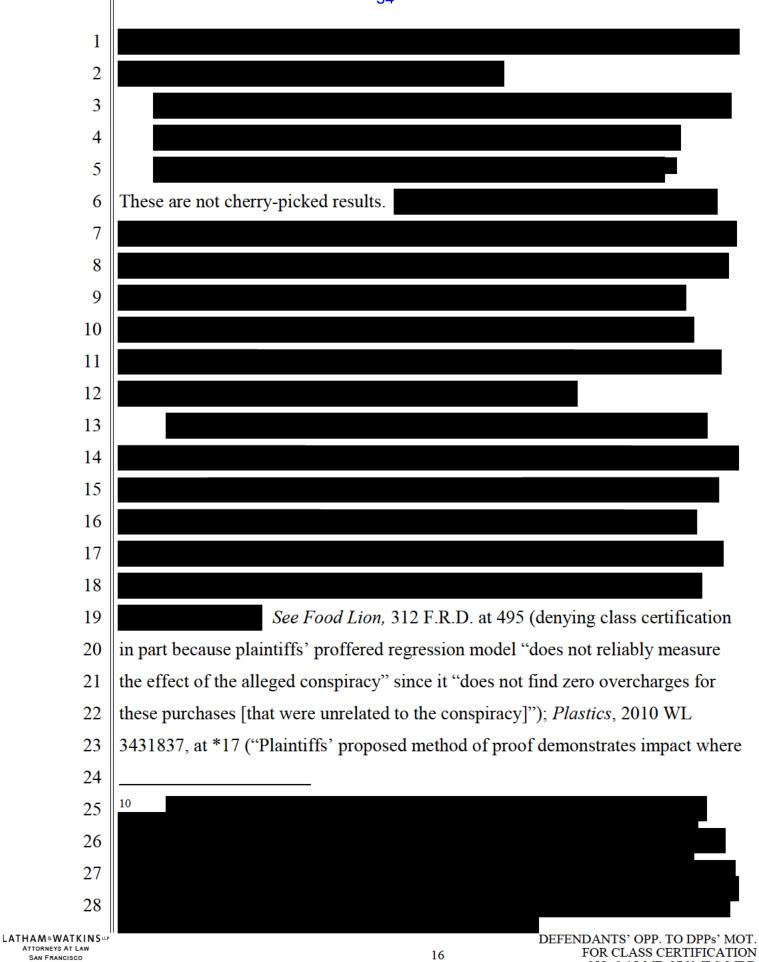




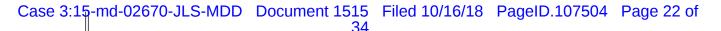


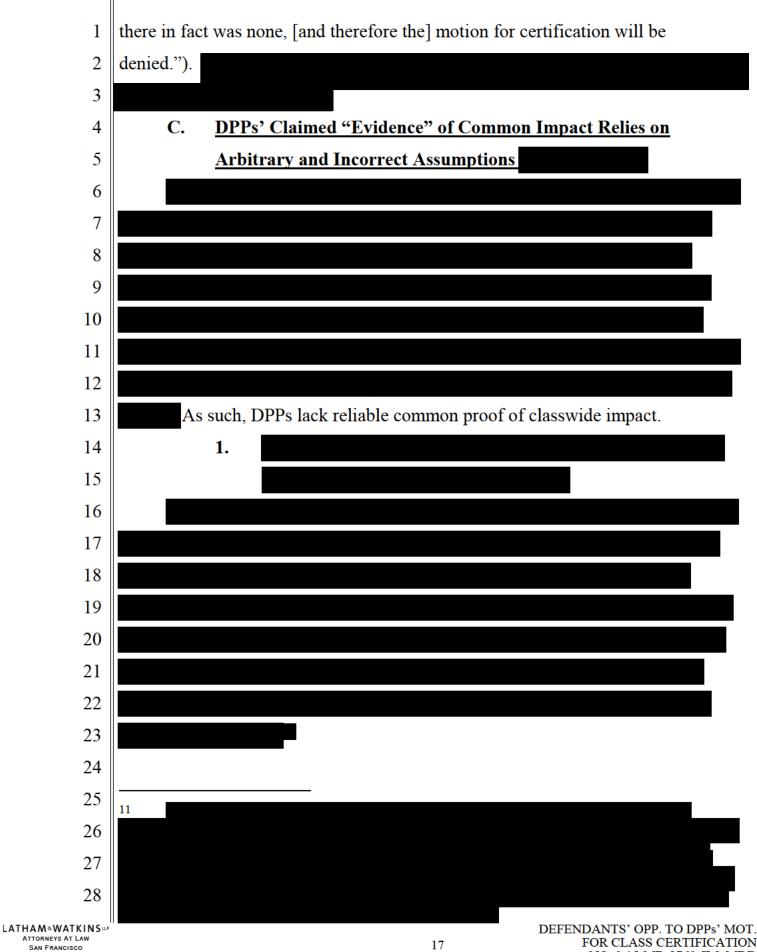
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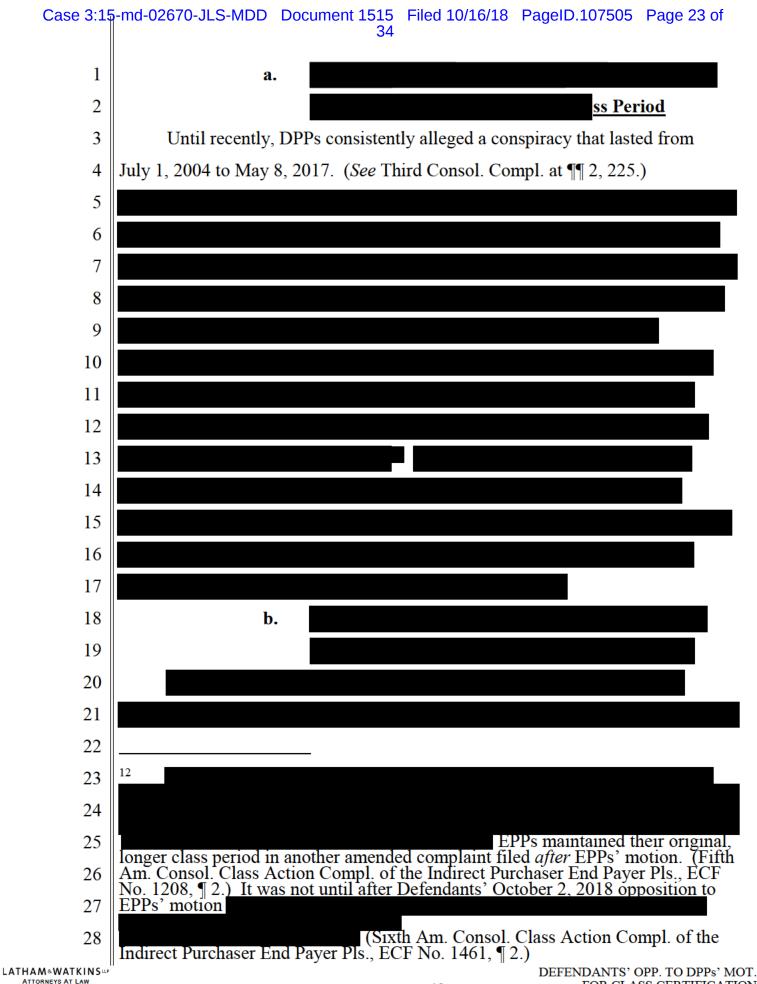


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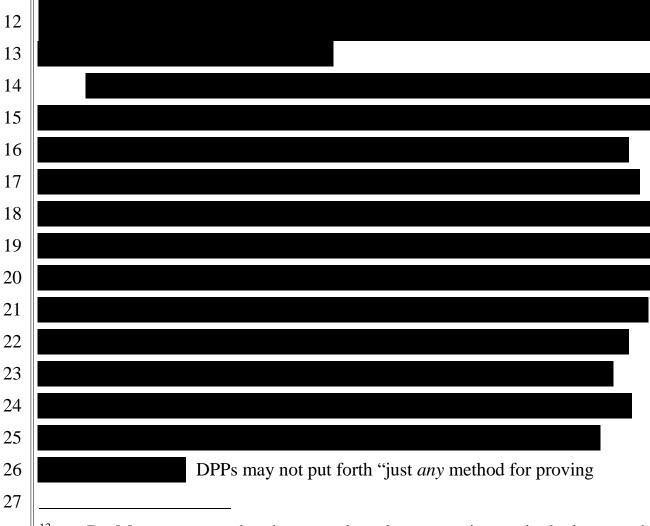


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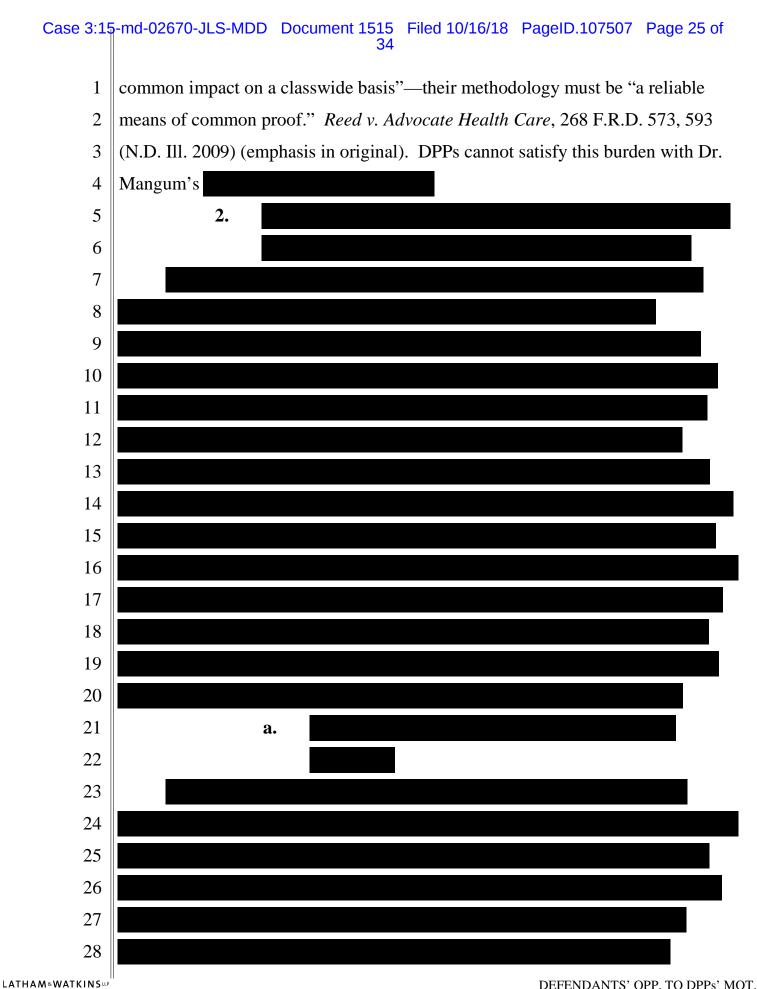
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28 <sup>13</sup> Dr. Mangum states that there may have been some impact in the last months of Benchmark 2, leading up to the beginning of the Class Period. (*Id.* ¶ 164.) DEFENDANTS' OPP. TO DPPs' MOT.

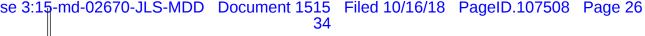
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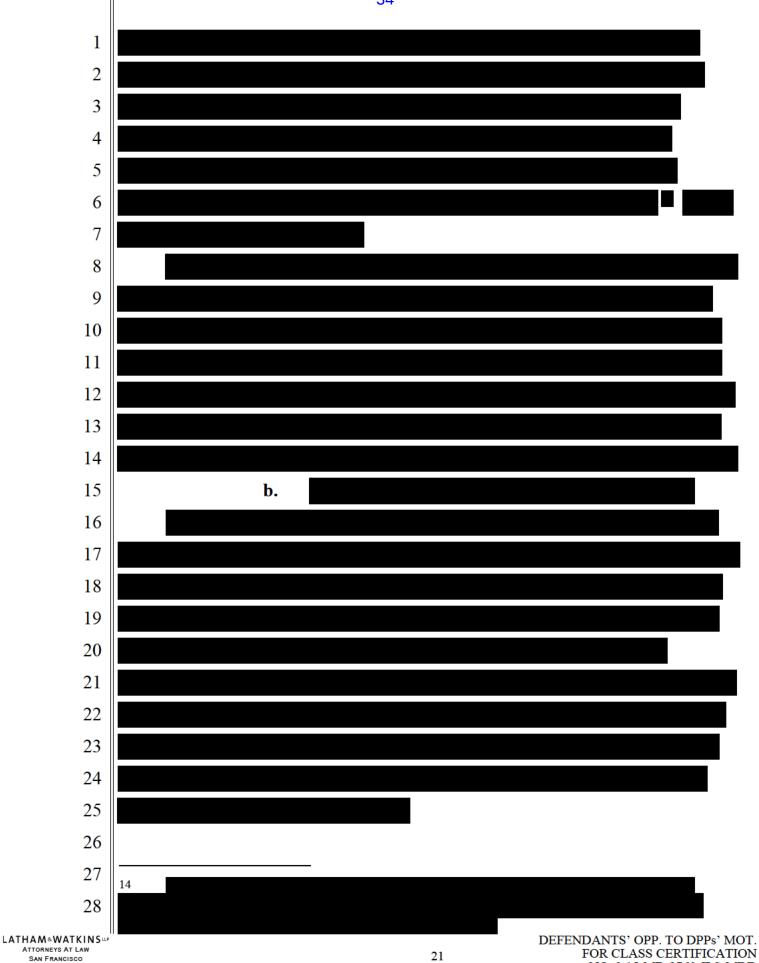


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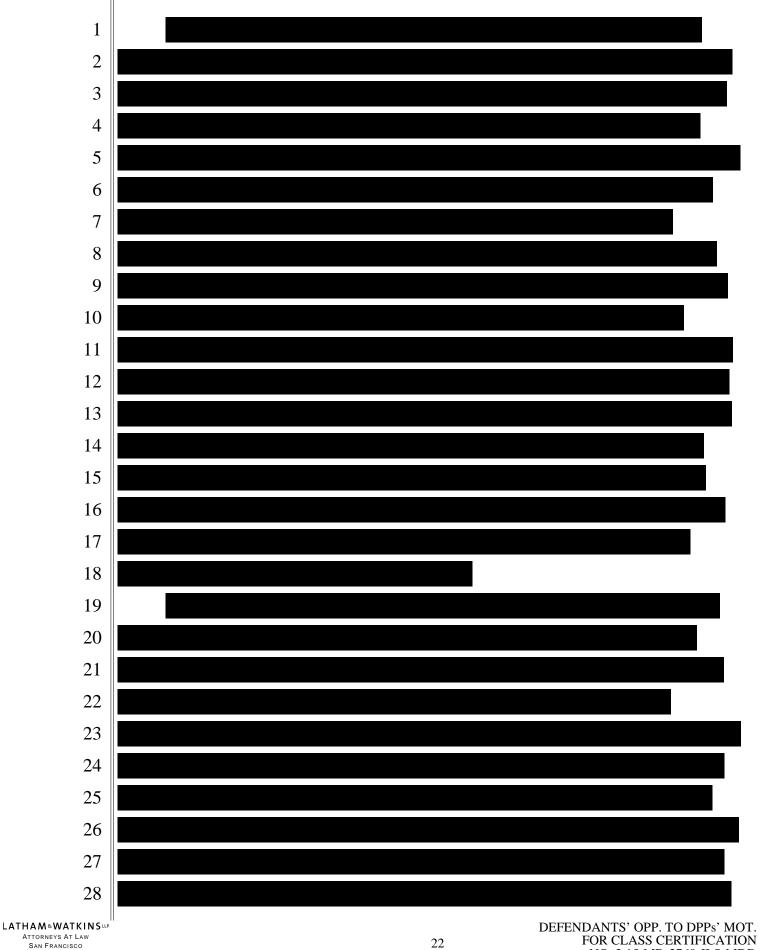
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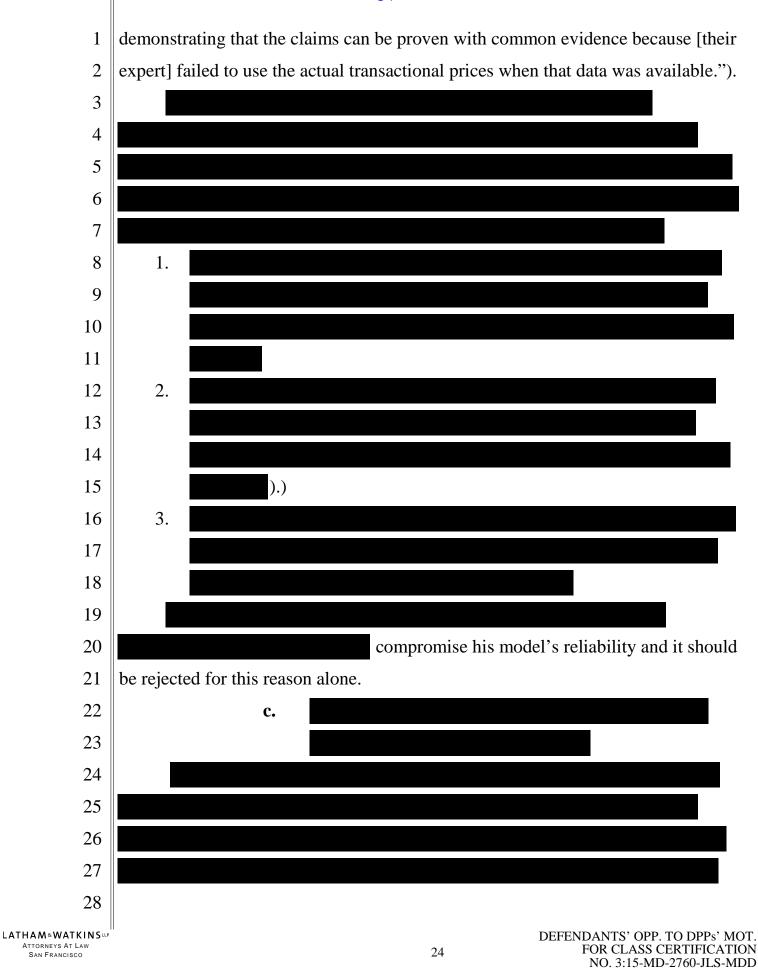
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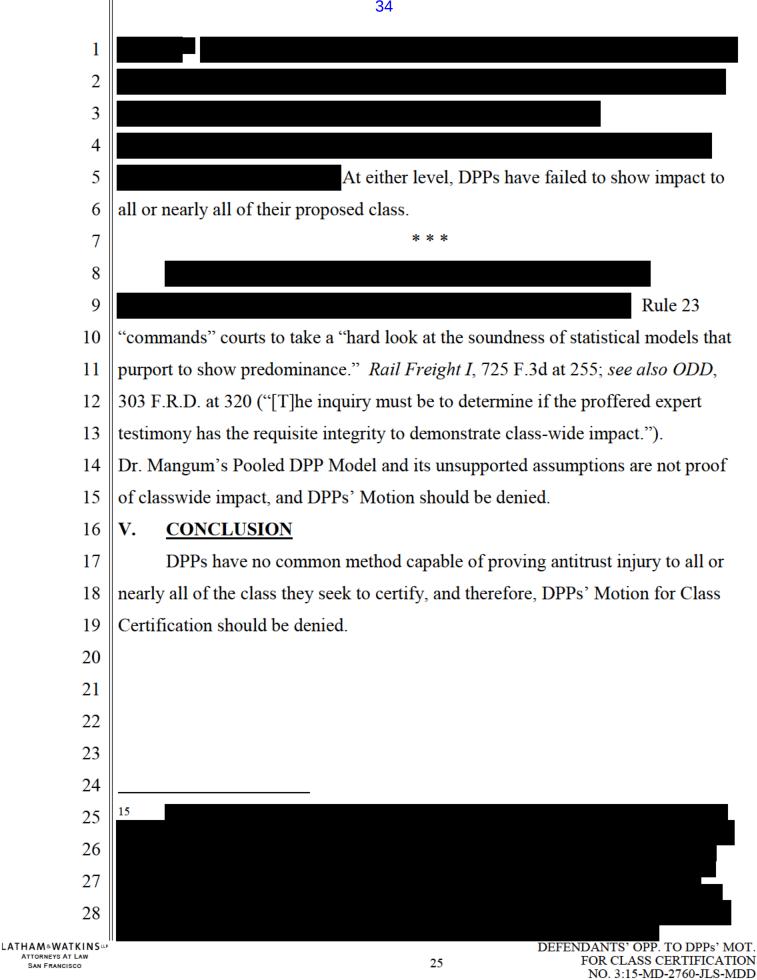
1 2 3 4 5 6 7 8 9 10 11 in Batteries, the court rejected a regression model that did not 12 13 incorporate actual cost data from all Defendants for all products. See, e.g., Batteries, 2017 WL 1391491, at \*17-18 ("Dr. Noll's analysis fails to provide a 14 15 firm foundation for class certification because he was unable to complete an 16 analysis based on the actual cost data for any products other than [one defendant's 17 products]."). The *Batteries* court acknowledged that, although it was "unclear 18 where to lay the blame" for the missing data, "the [c]ourt nevertheless cannot 19 ignore the large gaps in the evidence supporting the ability to demonstrate impact and damages on a class-wide basis." Id. at \*17-18 (denying direct purchaser 20 21 plaintiffs' motion because their regression was "based on incomplete and 22 admittedly insufficient data sets."); see also In re Class 8 Transmission Indirect 23 Purchaser Antitrust Litig., 140 F. Supp. 3d 339, 353 (D. Del. Oct. 21, 2015), 24 vacated in part on other grounds, 679 Fed.Appx. 135 (3d Cir. 2017) (denying 25 class certification when the expert's model excluded available data that was related 26 to the prices it was trying to predict); In re Photochromic Lens Antitrust Litig., No. 27 8:10-CV-00984-T-27EA, 2014 WL 1338605, at \*23 (M.D. Fla. Apr. 3, 2014) "([Direct purchaser plaintiffs] fail to provide a workable methodology for 28

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1	Dated: October 16, 2018	Respectfully submitted,
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1	Dated: October 16, 2018	By: <u>s/ John</u>	Roberti
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14		-	Chicken of the Sea International
15		and Thai U	nion Group PCL
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LATHAM®WATKINS Attorneys At Law San Francisco		27	DEFENDANTS' OPP. TO DPPs' MOT. FOR CLASS CERTIFICATION NO. 3:15-MD-2760-JLS-MDD

1	SIGNATURE ATTESTATION		
2	Under Section 2.f.4 of the Court's CM/ECF Administrative Policies, I hereby		
3	certify that authorization for filin	ng this document has been obtained from each of the	
4	other signatories shown above, a	and that all signatories have authorized placement of	
5	their electronic signature on this	s document.	
6			
7	October 16, 2018	<u>s/ Belinda S Lee</u> Belinda S Lee	
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9		Counsel for Defendants StarKist Co. and Dongwon Industries Co., Ltd.	
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1	CERTIFICATE OF SERVICE
2	I certify that on October 16, 2018, I filed the foregoing document with the
3	Clerk of the Court for the United States District Court, Southern District of
4	California, by using the Court's CM/ECF system, which will serve electronic
5	notification of this filing to all counsel of record. I further certify that on October
6	16, 2018, I caused counsel of record to be served with a true, correct, and un-redacted
7	copy of the foregoing document via e-mail.
8	
9	October 16, 2018 <u>s/ Belinda S Lee</u>
10	Belinda S Lee
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