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No. 12–7085

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

In re: Rail Freight Fuel Surcharge Antitrust Litigation - MDL No. 1869

BNSF Railway Company, et al.,
Petitioners

On Petition for Permission to Appeal
Pursuant to Federal Rule of Civil Procedure 23(f)

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Parties. The parties to these consolidated direct purchaser cases are:

a. Defendant-Petitioners:

i. BNSF Railway Company

ii. CSX Transportation, Inc.

iii. Norfolk Southern Railway Company

iv. Union Pacific Railroad Company

b. Plaintiffs-Class Representatives:

i. Carter Distributing Company

ii. Dakota Granite Company

iii. Donnelly Commodities Incorporated

iv. Dust Pro, Inc.

v. Nyrstar Taylor Chemicals, Inc.

vi. Olin Corporation

vii. Strates Shows, Inc.

viii. US Magnesium LLC

Ruling under Review. Petitioners seek review of the June 21, 2012 Order of the District Court for the District of Columbia (Honorable Paul L. Friedman), granting plaintiffs' motion for class certification under Rule 23(b)(3) of the Federal

Rules of Civil Procedure. JA__(R.541) The district court's memorandum opinion is reported at 2012 U.S. Dist. LEXIS 97178, and 2012 WL 2366165.

Related Cases. A case brought by different plaintiffs, but included within this consolidated MDL proceeding, was previously before this Court on unrelated legal issues. *Fayus Enters. v. BNSF Ry. Co.*, 602 F.3d 444 (D.C. Cir.) (affirming dismissal of the indirect purchasers' state law claims), *cert. denied*, 131 S. Ct. 822 (2010).

When petitioners sought leave to appeal the district court's class certification order pursuant to Fed. R. Civ. P. 23(f), this Court referred the petition to a merits panel and directed the parties to address whether the "petition should be granted" and whether "the district court properly granted plaintiffs' motion for class certification under Fed. R. Civ. P. 23." *In re: Rail Freight Fuel Surcharge Antitrust Litigation - MDL No. 1869*, No. 12-8008 (Aug. 28, 2012). This Court, on its own motion, subsequently re-assigned the petition to general Docket Number 12-7085, and terminated miscellaneous case No. 12-8008.

No related cases are pending in this Court or any other court.

CORPORATE DISCLOSURE STATEMENT

BNSF Railway Company is a wholly-owned subsidiary of its parent, Burlington Northern Santa Fe, LLC ("BNSF LLC"). BNSF LLC is an indirect, wholly-owned subsidiary of Berkshire Hathaway Inc., a publicly-held corporation.

CSX Transportation, Inc. is a corporation engaged in the railroad business, which is wholly owned by the publicly traded corporation CSX Corporation. There is no parent company nor are there publicly held companies which have a 10% or greater interest in CSX Corporation.

Norfolk Southern Railway Company is a wholly-owned subsidiary of Norfolk Southern Corporation, a corporation whose stock is publicly traded. No entity owns more than 10% of the stock of Norfolk Southern Corporation.

Union Pacific Corporation, a publicly traded Utah corporation, owns 62.6% of Union Pacific Railroad Company, a Delaware corporation. Southern Pacific Rail Corporation, a Utah corporation and a wholly-owned subsidiary of Union Pacific Corporation, owns the remaining 37.4% of Union Pacific Railroad Company.

Union Pacific Corporation is a publicly held company. No publicly-owned company owns 10% or more of Union Pacific Corporation.

Union Pacific Railroad Company is a Class I railroad operating in the United States.

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GLOSSARY

AIILF	An index of rail cost factors that the Association of American Railroads made available in December 2003
BNSF	BNSF Railway Company
CSXT	CSX Transportation, Inc.
NS	Norfolk Southern Railway Company
UP	Union Pacific Railroad Company

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The district court has jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1337. Defendants appeal the district court's June 21, 2012 decision on class certification. On July 5, defendants timely filed a Petition to Appeal under Federal Rule of Civil Procedure 23(f). By order dated August 28, 2012, this Court referred the Petition to a merits panel. This Court has jurisdiction pursuant to 28 U.S.C. §1292(e) and Rule 23(f).

ISSUES PRESENTED

Whether interlocutory review is appropriate to resolve one or more of the following class certification issues:

(1) Whether the district court erroneously certified a class on the ground that common evidence can establish "widespread" injury and damages, notwithstanding the fact that the class contains members who suffered no injury and individualized assessments of shipper circumstances are necessary to determine whether particular class members were injured and by how much; and

(2) Whether the district court erred in reviewing plaintiffs' expert analysis under a mere "plausibility" standard, without subjecting it to the rigorous analysis necessary to ensure that the requirements of Rule 23 are met, and in certifying a

class even though their expert's model is unable to distinguish between effects from lawful causes and allegedly unlawful causes.

STATEMENT OF THE CASE

This is an antitrust case alleging that the four largest U.S. freight railroads conspired to impose "rate-based" fuel surcharges on their customers. A rate-based fuel surcharge is a surcharge that is calculated as a percentage of the base transportation rate, rather than on mileage or some other basis. The district court certified a class of approximately [ ] shippers claiming [ ] billion in damages, after trebling.

The central dispute at this stage concerns whether injury and damages from the alleged conspiracy can be established on a class-wide basis with common admissible evidence—or, instead, will require individualized examination of customer circumstances. In some antitrust class actions, the uniform nature of the product and market are such that the alleged conspiracy, if it happened, would have raised the entire price of the product above an ascertainable competitive level. In such a case, injury and damages can be determined formulaically based on the difference between the price a class member paid and the competitive price.

The picture here is vastly more complicated. Many diverse market dynamics affect the extent to which any shipper would have paid fuel surcharges

and the price they would have paid in a competitive market. For example, a large proportion of the class, including all eight named plaintiffs, paid rate-based fuel surcharges before the alleged conspiracy began, and the use of fuel surcharges was increasing rapidly. For many shippers, including those in one of the largest categories of rail traffic (intermodal traffic), the surcharges paid during the alleged conspiracy were based on the same formulas that were in place before the alleged conspiracy. For other shippers, the formulas were different, but the new, allegedly collusive, formulas produced surcharges that were, on average, lower than the prior formulas. Those phenomena illustrate that for any class member the "but for" or "competitive" benchmark price may include a fuel surcharge equal to or greater than the allegedly collusive fuel surcharge.

In addition, many shippers negotiate with rail carriers based on overall freight rates and services and may have received off-setting concessions that foreclose a showing of harm. And many shippers are served by only one railroad and are protected by a regulatory system that recognizes that they may lack effective competition for their business. Absent a highly individualized showing that they benefit from indirect rail competition, these shippers cannot show that any alleged conspiracy reduced competition for their traffic and thereby caused them antitrust injury.

As a result of these individualized factors, any alleged conspiracy to impose a fuel surcharge would not have *any* impact on a significant number of class members, and identifying them requires inquiry as to each shipper. The district court nevertheless certified the class based on a finding that plaintiffs had proffered an expert who provided a "plausible" statistical theory that, with other common evidence, could establish "widespread" harm. Individual exceptions, the district court found, were rare "anomalies" and thus the class would not contain a "great many" uninjured shippers. Defendants submit that finding is clearly erroneous, because undisputed evidence shows that the exceptions are far from rare. But the more important legal point is that the district court misunderstood the significance of this evidence for determining whether common issues predominate, as they must, under Fed. R. Civ. P. 23(b)(3).

First, the district court rejected the standard, adopted by at least four circuits, that requires plaintiffs to demonstrate that injury to all or virtually all class members may be proven through common evidence. Instead, the district court required plaintiffs to demonstrate only "widespread harm" within the class, a standard inconsistent with *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011). There, notwithstanding statistical proof purporting to show widespread harm from a "culture of discrimination," the Court rejected a proposed class action that would have allowed recovery by some class members who had no valid claim. It held

that "[c]ommonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury,'" which means that the injury question is "capable of classwide resolution" with common evidence—"in one stroke." *Id.* The Court also clarified that a class may not be certified purely on the basis of *plaintiffs'* proposed evidence, without considering the individualized evidence or defenses that defendants are entitled to present. *Id.* at 2561. *Wal-Mart* makes clear that the proper inquiry is not whether harm is widespread, but whether injury can be demonstrated through class-wide common proof (on both sides) or instead requires individualized inquiry.

Second, the district court reviewed plaintiffs' expert's analysis under a mere "plausibility" standard, which is contrary to the decisions of at least two Courts of Appeals that require full evidentiary scrutiny, and with *Wal-Mart*, 131 S. Ct. at 2552, which requires "rigorous analysis" to ensure the requirements of Rule 23 are satisfied.

These two key issues are important and recurring questions on which, as the district court recognized, this Court "has not yet had occasion to provide much guidance." (Op. 27.) This Petition presents the Court with an opportunity to clarify the law in this circuit and to apply the proper standards to reverse the plainly inappropriate certification of a multi-billion dollar class action that falls far short of the requirements of Rule 23.

STATEMENT OF THE FACTS

The underlying facts concerning the railroad industry and the timing of defendants' adoption and usage of fuel surcharges are largely undisputed.

The Railroad Industry

This is an action against four major freight railroads that often are not in a position to compete with one another. Trains can only go where a railroad's tracks (or track rights) are located, and defendants' tracks do not reach the same locations. BNSF Railway Company ("BNSF") and Union Pacific ("UP") have tracks west of Chicago and the Mississippi River, while CSXT and Norfolk Southern ("NS") have tracks in the East. (1stRausserRep., Figure2.)

Large geographic areas are served by only one defendant. Much of Nevada and Utah are served only by UP, while Montana, North Dakota, and South Dakota are served almost exclusively by BNSF. (Rausser.Rep. 13.) Defendants' expert, Dr. Robert Willig, estimates that between one-third and two-thirds of rail revenue comes from counties served by only one railroad. (Revised.Willig.Rep. 75-76.) But even when two railroads have tracks in a geographic area, often only one railroad has access to any particular shipper's facilities. NS estimates, for example, that more than [   ] of its traffic cannot be directly served by CSXT. (Lawson.Decl. ¶3.) Indeed, all eight named plaintiffs are "sole-served shippers"

who were served by only a single railroad during the class period. *Infra*, at 48, n.10.

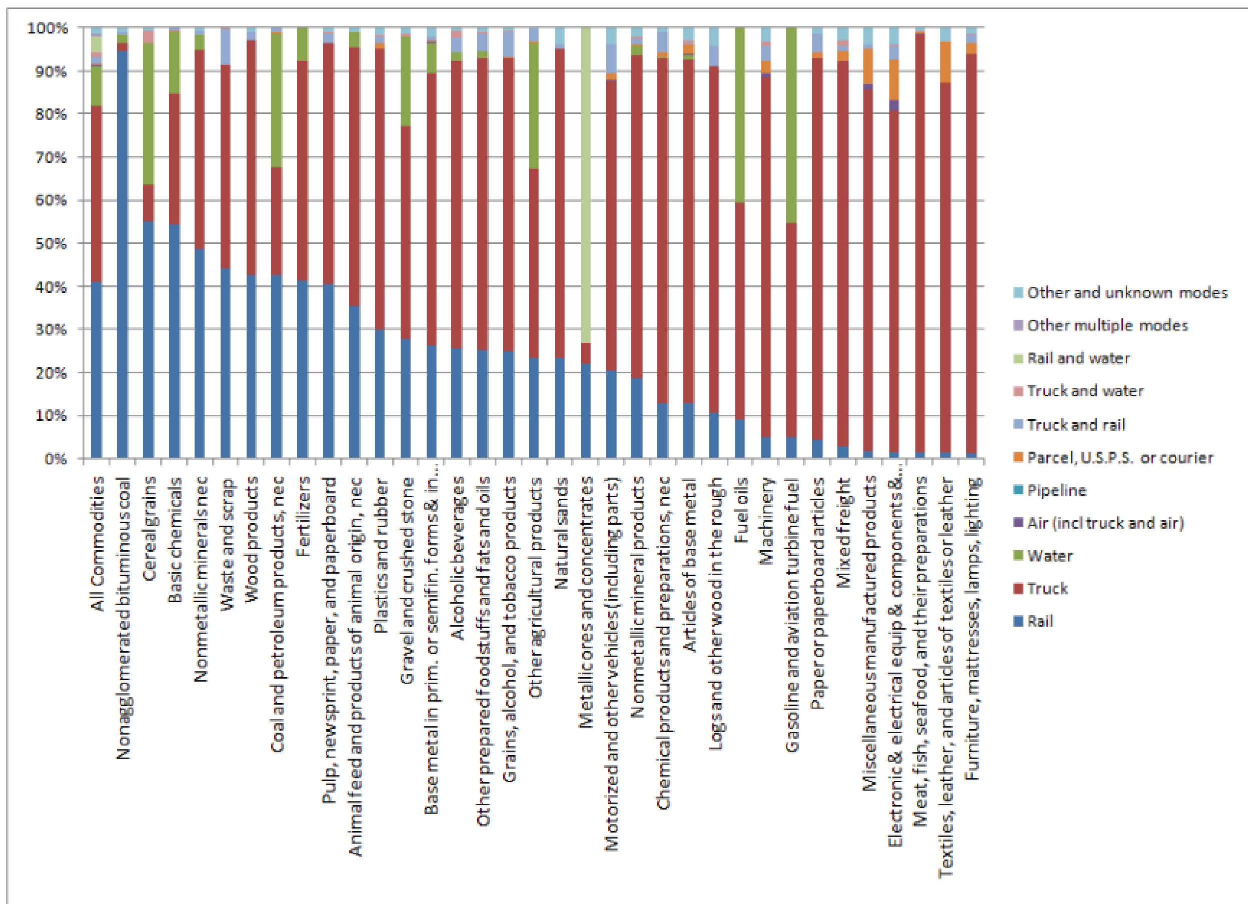
Many shipments require service on more than one railroad, such as shipments moving east or west across the boundary separating the eastern and western railroads. Roughly one-third of defendants' shipments are comprised of such "interline" shipments. (1stRausser.Rep. 39)

Railroads must cooperate on the interconnection logistics of interline shipments and, because shippers generally want a single price and contract for the entire movement, the railroads must discuss price and the other contract terms. To facilitate this, federal law provides that a conspiracy "may not be inferred from evidence that two or more rail carriers acted together with respect to an interline rate or related matter and that a party to such action took similar action with respect to a rate or related matter on another route or traffic." 49 U.S.C. § 10706(a)(3)(B)(ii).

For many shipments, it takes a combination of railroads and other "modes" of transportation to move the shipment from the origin to its destination. For example, many products are shipped in containers or trailers that are transferred between rail flat cars and trucks or steamships as part of a continuous movement from the place of origin to the destination. Traffic shipped by rail and another mode of transport generally is referred to as "intermodal" traffic. Non-intermodal

traffic generally is referred to as "carload" traffic (although some railroads also exclude coal and agricultural shipments from their definition of "carload" traffic).

The competition railroads face varies by commodity as well as geography. Many commodities can be transported efficiently by truck, barge or pipeline. The following chart, provided by plaintiffs' expert, illustrates the varying competitive options enjoyed by shippers:



(1stRausser.Rep. 17(Figure4).) This variation leads to "differential pricing," or price discrimination, which the Surface Transportation Board ("STB") and the courts have recognized is necessary to support efficient rail service.

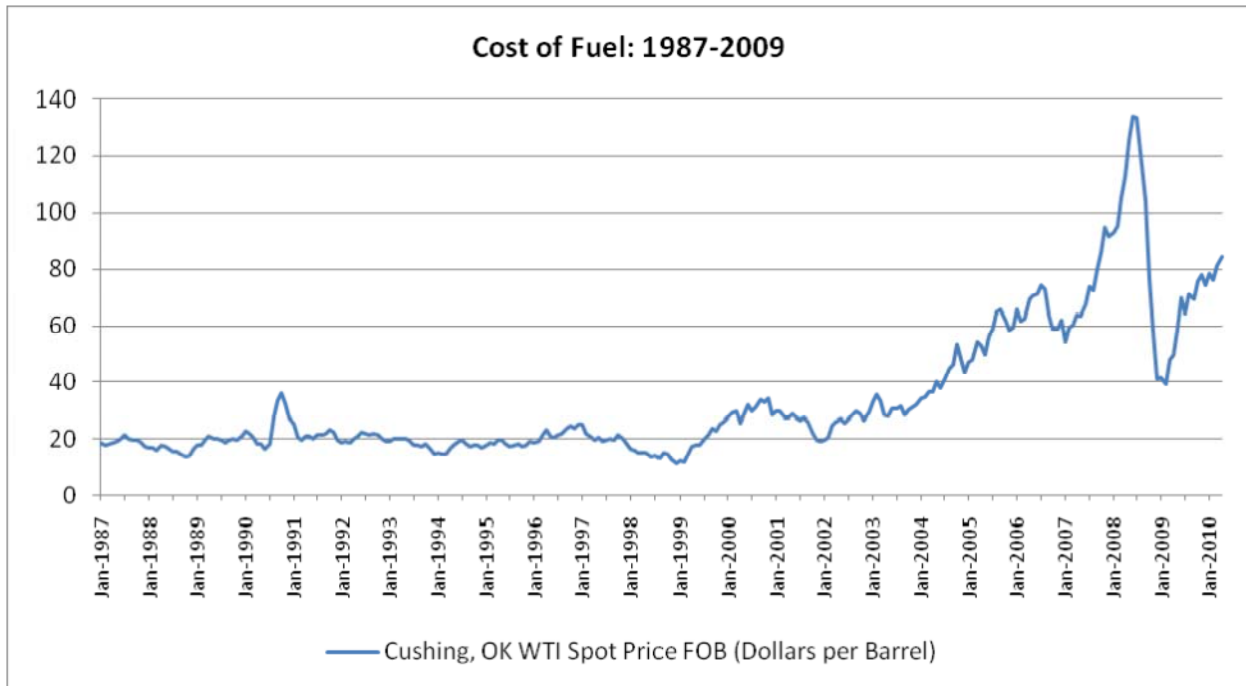
(1stRausser.Rep. 19); *see generally, Coal Rate Guidelines, Nationwide*, 1 I.C.C.2d 520 (1985), *aff'd sub nom.* 812 F.2d 1444 (3d Cir. 1987).

Although freight rail rates historically were regulated by the Interstate Commerce Commission ("ICC"), Congress passed the Staggers Rail Act in 1980 to deregulate much of the industry and permit rates to be determined by private contract. Congress, however, provided a regulatory option for shippers who are dissatisfied with the rates offered by a railroad and face an "absence of effective competition." They may challenge their rates before the STB. 49 U.S.C. § 10707(a); *id.* § 11701(a). The STB (and the ICC before it) "exempted" certain commodities from rate regulation, and a shipper that voluntarily entered a contract for shipping a commodity cannot later challenge that contract before the STB. The class in this case thus includes sole-served shippers who shipped "exempt" commodities or voluntarily signed contracts with defendants for freight rail service (instead of petitioning the STB to set rates) as well as shippers who are served by more than one railroad. (Op. 6.)

Market Conditions Before And During The Class Period

Plaintiffs allege a class period beginning in July 2003 and continuing through 2008. During that period, there was a historic increase in the price, and price volatility, of transportation fuel. After fluctuating very little for many years

around $20 a barrel, crude oil prices began a volatile upward march in early 1999 that reached $133 a barrel before the 2008 financial crisis:



Source: http://tonto.eia.doe.gov/dnav/pet/hist/rwtcM.htm.

Many costs other than fuel also were increasing significantly in this period. (Rausser.Reply.Rep. 38.) Furthermore, a strong economy led to increasing demand and concerns about "surging freight demand and tight capacity." (CAC ¶53.) In 2003, an independent committee reported "a pattern of unprecedented tight capacity in certain parts of the freight transportation system…." (Prystowsky.Decl.Ex. 28 at 3.) By 2006, the National Industrial Transportation League and the GAO reported that demand for rail transportation exceeded capacity, particularly on certain highly congested corridors. (Prystowsky.Decl.Exs. 3, 13, 29.) The STB acknowledged this fact. *See, e.g., N.*

Am. Freight Car Ass'n v. BNSF Ry., STB Docket. No. 42060, 2007 WL 201203, at *4 (Jan. 26, 2007) ("Traffic is up and capacity is tight"), *aff'd*, 529 F.3d 1166 (D.C. Cir. 2008).

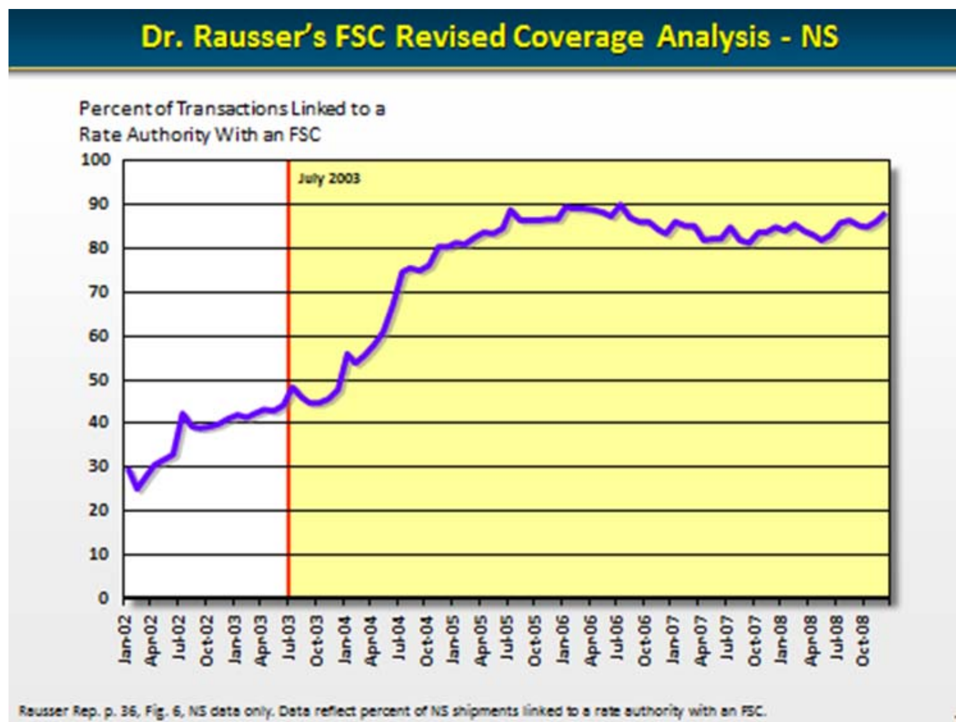
Contract Negotiations and Use of Fuel Surcharges Before and During The Class Period

Rate-based fuel surcharges, which have been applied in times of fuel price volatility, have a "long history" in the rail industry, dating back to ICC decisions in the 1970s permitting their use. *See Rail Fuel Surcharges*, Ex Parte No. 661, 2007 WL 201205, at *7(S.T.B . Jan. 26, 2007). Fuel surcharges allocate the risk of changes in fuel prices between the shipper and the railroad, and enable rapid price adjustment with minimal administrative burden for railroads and shippers alike. There is a "strike" or "trigger" price for fuel below which there is no surcharge (*i.e.*, the railroad retains the risk); but once fuel prices exceed that price, a surcharge is applied according to a preset formula. A shipper's net price is the sum of the base rate and the surcharge, if any.

In negotiating contracts for freight rail service, many shippers focus on the total value of the overall price and service package and frequently negotiate trade-offs among base rates, fuel surcharges, and other terms of service. Some customers, like [ ], *requested* rate-based surcharge provisions as part of a complex negotiated package that included rate terms but also service and infrastructure commitments. (Pagan.Decl. ¶¶5-10.) Many others negotiated a

reduction in the railroad's proposed increase in base rates in exchange for agreeing to rate-based fuel surcharges. (Op. 106-09; *see* Listwak.Decl. ¶¶15, 19-23; Schaaf.Decl. ¶18; McNulty.Decl. ¶10.) And some negotiated an absolute reduction in their total, or "all-in," rates. (Rausser.Reply.Rep. 71-72 (finding that at least [ ] of shippers with at least $75,000 in annual shipments who had a fuel surcharge in 2006 paid lower all-in rates than they paid in 2002).)

By the early 2000s, fuel surcharge provisions were increasingly common in freight rail contracts. Plaintiffs' expert, Dr. Gordon Rausser, studied NS's shipments and found that the proportion with a surcharge provision was rising dramatically, growing from 30% in early 2002 to more than 40% by early 2003.



(Def.Class.Cert.Opp.Slide Isaacson.7).)

Analyzing data compiled by defendants' expert, Dr. Rausser found that surcharge coverage for the other defendants also was growing and that surcharges were paid on approximately 30-40 percent of shipments by March 2003, four months before the beginning of the class period. (Rausser.Reply.Rep. 34(Figure 5).)

All eight of the named plaintiffs paid rate-based surcharges before the alleged conspiracy began. (1stWillig.Rep. ¶¶73, 77.) Five of the named plaintiffs paid rate-based surcharges on at least 87% of their traffic before the class period. (1stWillig.Rep. 38(Figure3)). (Two, Donnelly Commodities and Strates Shows, were already at 100%.) In addition, defendants' fuel surcharge formulas for *intermodal* traffic (which Dr. Rausser found accounts for 24-42% of the traffic at issue in this lawsuit) *did not change in any material adverse way* during or immediately before the class period.[1] (Defs.Class.Cert.Slides at 22.)

There were, however, some changes in the published fuel surcharge formulas for *carload* traffic. In 2000—three years before any alleged

[1] BNSF did not change its public intermodal surcharge at all during the class period. (Duggan.Decl. ¶9.) NS had different non-public fuel surcharges for domestic and international intermodal traffic that existed long before the class period, and the only change during the class period was to align the international intermodal fuel surcharge with the domestic one. (Bolander.Decl. ¶¶8-12.) During the class period, UP made minor changes that actually lowered its public intermodal surcharge formulas. (Defs.Class.Cert.Slides at 22.)

conspiracy—BNSF, NS and CSXT all adopted rate-based carload fuel surcharge formulas triggered when West Texas Intermediate ("WTI") crude oil rose above $28 a barrel. BNSF switched in July 2001 to a carload formula triggered when highway diesel fuel ("HDF") prices exceed $1.30 a gallon. In November, 2002, UP adopted a WTI-based carload formula identical to the NS and CSXT formulas. (1stWillig.Rep. 47.) Plaintiffs concede that all of these fuel surcharge formulas were independently and lawfully adopted. (1stRausser.Rep. 42.)

In March 2003, CSXT announced that it would lower its WTI threshold to $23 a barrel effective June 2003. In June 2003, BNSF lowered its carload HDF threshold to $1.25 a gallon, and UP switched to an HDF carload formula triggered at $1.35 a gallon. (1stWillig.Rep. 47.) NS moved to a $23 WTI trigger in its public carload fuel surcharge in March 2004, before increasing the trigger to $64 WTI in 2006, and eliminating its public fuel surcharge altogether in 2007.[2] (*Id.*)

Although plaintiffs' antitrust claim focuses on the 2003 changes in the carload fuel surcharges, these changes did not always—or even typically—raise

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[2] The new lower thresholds, by themselves, ultimately had no effect on the surcharges actually paid by shippers during the class period. For example, the NS/CSXT surcharge was 2% when WTI was $28 under both the old and new formulas. The changes created a new tier (with smaller surcharges) applicable when crude oil was between $23 and $28. (1stWillig.Rep. 47.) However, since crude oil was always above that range during the class period (*supra* at 10), the lower threshold had no effect on prices actually paid. The same is true of BNSF's lower trigger for its HDF-based formula. (1st.Rausser.Rep. 55.)

Material Under Seal Deleted

surcharges. Dr. Willig depicted the impact of the old and new public carload formulas under class-period fuel prices:

(Revised.Willig.Rep. 47).[3]

[3] These charts reflect only the fuel surcharge percentages that would have been applicable under the public carload fuel surcharge formulas in place before and at the start of the alleged conspiracy. They do not reflect the different public fuel surcharge NS adopted in 2006, the fact that NS ceased using a public fuel surcharge altogether in 2007, or the fact that three defendants shifted to mileage-based public fuel surcharges in 2006 (BNSF) and 2007 (CSXT and UP). Nor do they reflect the *actual* revenue percentages because, as plaintiffs concede, there were a variety of fuel surcharge formulas in use by the individual defendants for particular shippers and types of shipments. (Rausser.Reply.Rep. 53.)

These charts are not disputed by plaintiffs or the district court. They reflect the fact that there was no material change in BNSF's public carload formula; UP's change was generally *beneficial* to shippers; and the CSXT and later NS changes in their public carload fuel surcharges produced fuel surcharges that were higher or lower at various times than would have been produced under their earlier formulas.

Dr. Willig compared the actual surcharges paid, both intermodal and carload, in the class period by shippers under older "legacy" contracts not in the class with those paid under new class-period contracts. He confirmed that the surcharges used during the class period, as actually negotiated and reflected in transactional data, were consistently lower on average. (1stWillig.Rep. 50.) There is no contrary analysis in the record.

PROCEEDINGS AND DECISION BELOW

In January 2007, the STB ruled that rate-based surcharges would no longer be permitted, prospectively, on regulated rail traffic because they do not necessarily track actual fuel costs of individual movements. *Rail Fuel Surcharges*, 2007 WL 201205. Shippers of unregulated traffic subsequently filed this antitrust action, focusing on the so-called "AIILF" index that the Association of American Railroads made available in December 2003. AIILF revised an existing index of rail cost factors to exclude fuel costs. Plaintiffs alleged that defendants conspired to create and use AIILF because the earlier index, which *included* fuel, had been "a significant hurdle" to the use of separate fuel surcharges. (CAC ¶¶4-5.) Plaintiffs

survived a motion to dismiss and took massive discovery. *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 587 F. Supp. 2d 27 (D.D.C. 2008).

Documents produced in discovery showed that rate-based surcharges already were in widespread and rapidly growing use by early 2003, before the creation of AIILF, and that AIILF was rarely used during the class period. (*E.g.*, Adams.Decl. ¶¶4, 6.) But plaintiffs also received documents reflecting discussions about interline traffic, including bilateral interline "alliance" meetings at which fuel surcharges were discussed. Plaintiffs latched upon this evidence to build a new story of collusion, despite the statutory prohibition on inferring conspiracy from communications about such interline pricing. 49 U.S.C. §§ 10703, 10706(a)(3)(B)(ii).

Plaintiffs sought certification of a class of direct purchasers of unregulated rail freight who paid a rate-based, stand-alone fuel surcharge between July 1, 2003 and December 31, 2008. The proposed class excluded shippers who paid surcharges *only* under pre-July 1, 2003 contracts, but it included many shippers who had agreed to rate-based fuel surcharges before the class period, and later renewed existing contracts or entered new contracts with identical rate-based surcharges during the class period.

In addition to relying on generalized arguments that defendants allegedly conspired to impose "coordinated Fuel Surcharge programs" and intended those

programs to be "applied across-the board" without "discounting," plaintiffs proffered two models by Dr. Rausser that, they argued, "confirm[] that injury-in-fact can be established at trial with common evidence and economic analysis." (Op. 61.) One, titled a "common factors" model, identified certain variables and claimed, based on a regression analysis, that they explain 70-89% of the observed variation in freight rates on three routes in 2006. (1stRausser.Rep. 92.) Fuel prices are not even a variable in that model. (*Id.*) The second was a damages model that examined rail rates from January 2000 to June 2003 (when fuel prices were relatively low) and observed that the rates shippers actually paid during the class period (when fuel prices had skyrocketed) were higher than those predicted by the 2000-2003 experience. (1stRausser.Rep. 119; Rausser.Reply.Rep. 94.) However, Dr. Rausser disavowed using either model as a method of determining individual injury or causation. (Rausser.Second.Dep. 142-43, 213.)

On June 21, 2012, the district court granted class certification. The court recognized that an inability to prove the fact of injury with common evidence precludes certification. (Op. 59.) It nevertheless held that an "'inability to show injury as to a few does not defeat class certification where the plaintiffs can show widespread injury to the class.'" (Op. 68.) In the district court's view, "[o]nly when it is apparent that 'a great many persons' have not been impacted should a court deny class certification." (*Id.*)

Rejecting defendants' evidence that an analysis of injury needed to account for individual circumstances, the district court ruled that plaintiffs could plausibly show by common evidence that there was *widespread* injury to the class. (Op. 86.) The court acknowledged that rate-based fuel surcharges existed prior to the alleged conspiracy, but (despite the evidence indicating that surcharge coverage exceeded 40% of the class) suggested that they were "applied only sporadically." (*Id.*) The court recognized that there can be no antitrust injury where there was no competition in the first place, but then found (despite numerous findings of the STB and this Court to the contrary) that even "sole-served shippers" served by only one railroad enjoy the benefits of rail competition. (Op. 72-74.)

The district court also substantially lightened plaintiffs' burden by suggesting that they could show class-wide injury without proof that the alleged conspiracy actually raised prices above what they would have been absent a conspiracy—the *sine qua non* of antitrust impact. The court held that injury could be established through proof that the allegedly conspiratorial surcharges were "a different breed"—that they "were more aggressive and yielded more revenue than earlier programs," and "also were standardized and uniformly applied across all or virtually all shippers." (Op. 87-88.) The court did not acknowledge, let alone discuss, the evidence (which was undisputed) that for much of the class the

surcharge formulas were unchanged, or changed in ways that either had no practical price effect or actually lowered prices.

The court also recognized the evidence of individual negotiation over base rates or other terms of service, but asserted that such negotiations could be ignored—either because the evidence seems (with "rare" exceptions) to indicate negotiation over "reduced *increases*" in base rates rather than outright reductions, or because a widespread injury could be inferred merely from common proof that the alleged conspiracy would have "affected the starting point for negotiations." (Op. 105-06, 110, 116.)

Finally, the district court held that it was enough for certification if plaintiffs can offer an economic model of injury and damages that is "plausible" and "susceptible to proof at trial through available evidence common to the class." (Op. 134.) The court did not address defendants' argument that certification must be denied because plaintiffs "fail[ed] to account for the individual issues that will be litigated in Defendants' case," including voluminous individualized evidence that defendants are entitled "[a]s a matter of due process" to present. (Class.Cert.Opp. 77.)

Defendants timely filed a Petition to Appeal the district court decision. This Court assigned the Petition to a merits panel.

STANDARD OF REVIEW

The district court's certification decision is reviewed for "abuse of discretion or legal error." *Richards v. Delta Air Lines, Inc.*, 453 F.3d 525, 530 (D.C. Cir. 2006). Its factual findings are reviewed to determine if they are "clearly erroneous." Fed. R. Civ. P. 52(a)(6). Although "certain aspects of a district court's determinations under Rule 23" are therefore "entitled to a measure of deference," this Court has emphasized that it "unquestionably [remains] the role of an appellate court to ensure that class certification determinations are made pursuant to appropriate legal standards." *Walsh v. Ford Motor Co.*, 807 F.2d 1000, 1006 (D.C. Cir. 1986).

SUMMARY OF ARGUMENT

The district court certified an extraordinary class of approximately [ ] shippers claiming more than [ ] in damages, after trebling, as a result of an alleged conspiracy to impose fuel surcharges on unregulated rail freight traffic. The decision is based on the erroneous resolution of at least two issues of class action law on which the circuits are divided, and it is inconsistent with the Supreme Court's watershed decision in *Wal-Mart*. It therefore merits interlocutory review and reversal by this Court.

1. Massive Claims. The multi-billion-dollar damage award sought by the class is so large in proportion to some defendants' business that, after trebling, it

would wipe out a substantial portion of their market capitalization and exceed their cumulative adjusted net income for all of 2003-2011. Interlocutory review of the class certification decision is necessary, because claims of this magnitude create a "death knell" situation in which defendants will be coerced into substantial settlements even though plaintiffs' merits position is weak. (§ I.A.)

2. Erroneous "Widespread Injury" Standard. Interlocutory review is also warranted because the district court erroneously held that class certification is permissible even though plaintiffs cannot show by common proof that all or virtually all class members were injured by the alleged conspiracy, so long as common proof could establish a "'widespread'" injury without a "'great many'" uninjured class members. (Op. 67-68.) That decision conflicts with the standard applied in at least four circuits, which hold that, in antitrust actions, common issues predominate and class certification is appropriate only if injury in fact and antitrust injury can be established for all or virtually all class members through common proof. It is also inconsistent with *Wal-Mart*, which reversed the certification of a class that included uninjured members and held that class certification is appropriate only if the injury question is "capable of classwide resolution" with common evidence "in one stroke," considering both the plaintiffs' evidence and any individualized rebuttal evidence that defendants are entitled to present. 131 S. Ct. at 2551, 2561. (§ I.B.1.)

Proper application of the predominance requirement mandates reversal of the certification ruling here. Plaintiffs assert that they will show injury and damages with common evidence, including economic analysis of their expert that, according to the district court, creates an inference of harm. (Op. 61, 126.) Taken at face value, however, this evidence does not establish that all shippers paid increased prices during the class period or that they did so because of the alleged conspiracy. There are at least three reasons that many shippers may not have suffered any injury, and individualized evidence must be considered to determine who they are.

First, many shippers would have paid fuel surcharges, in the same or higher amount, regardless of any alleged conspiracy. Approximately 40% of all shippers, and all eight named plaintiffs, paid rate-based fuel surcharges before the conspiracy allegedly began. Surcharge coverage was rapidly increasing as fuel prices increased and became more volatile, and plaintiffs have no evidence that those trends would have ceased but for a conspiracy. For many of these shippers, the fuel surcharge formulas used during the class period were identical to the ones used before that period. Plaintiffs' expert conceded that it is "certainly possible" that these shippers would have paid the same fuel surcharges absent the conspiracy. (1stRausser.Dep. 288.)

Even the carload formula changes that plaintiffs allege were conspiratorial did not necessarily result in increased surcharges. Indeed, during the class period, carload traffic moving under contracts with fuel surcharges negotiated prior to the class period paid *higher* surcharges, on average, than those paid by class members under the allegedly conspiratorial carload formulas. Thus, determining which shippers would not have paid a fuel surcharge or would have paid lower fuel surcharges but for the alleged conspiracy requires consideration of highly individualized facts and circumstances. (§ II.B.)

Second, the class includes large and sophisticated business customers that negotiated individual contracts for freight rail service. Many of these shippers bargained to the "bottom line" and had economic power to negotiate discounts on base rates or other concessions in exchange for the fuel surcharges. The court discounted the railroad executives' declarations about these individualized negotiations because, in most instances, the shippers negotiated a "reduced increase of the base rate, not a discounting of the original base rate" in exchange for the surcharge. (Op. 109.) But that is not dispositive. What matters under the antitrust laws is whether shippers responded to fuel surcharge demands by negotiating down what the base rates *would have been*, even if that just meant "reduced increases." Regardless, it is undisputed that thousands of shippers obtained outright declines in their base rates. Identifying whether a particular

shipper actually paid more because of a fuel surcharge demand thus requires individualized analysis. (§ II.B.)

Third, of the thousands of shippers served by only one railroad, many cannot show that any alleged conspiracy would have caused them antitrust injury, *i.e.*, injury from a loss of rail competition; others can make such showings only through highly individualized evidence. The district court relied on evidence that sole-served shippers typically have options to use other modes of transportation, such as trucks and barges, that effectively compete with the sole-serving railroad. But that is legally irrelevant, because a conspiracy to fix railroad rates cannot reduce non-rail competition. The district court also noted that some sole-served shippers benefit from *indirect* rail competition that can occur if, for example, the shipper can shift production from a sole-served facility to a facility served by another railroad. Although such competitive constraints are possible, they can be demonstrated only through individualized analyses of various sole-served shippers' transportation options. (§ II.C.)

3. Erroneous "Plausibility" Standard. Finally, the district court erred in reviewing plaintiffs' expert evidence under a lenient "plausibility" standard, rather than the rigorous analysis required by *Wal-Mart*. Other circuits require a higher evidentiary burden, and the Supreme Court granted certiorari to review the Third Circuit's "plausibility" standard on which the district court relied here. (§ I.B)

Furthermore, plaintiffs' damages model is not even "plausible." It produces damages that are approximately equal to the entire fuel surcharges paid during the class period, even though their expert admits that some form of fuel surcharge would have existed absent the alleged conspiracy. It depicts an implausible scenario that, absent the conspiracy, there would have been virtually no recovery of these historic cost increases, despite the tightening capacity in the rail network during the class period. His model would also generate substantial damages when applied to shippers who entered contracts before the alleged conspiracy and could not have been affected by it. It thus provides no plausible, let alone rigorous, demonstration that all class members were injured or that determining injury and damages will be a common rather than an individualized inquiry. (§ III.)

ARGUMENT

I. INTERLOCUTORY REVIEW IS WARRANTED

Interlocutory review pursuant to Rule 23(f) is appropriate in three separate circumstances: (1) where a "'questionable' class certification decision creates a 'death-knell situation' for either party;" (2) where "the certification decision presents 'an unsettled and fundamental issue of law relating to class actions … that is likely to evade end-of-the-case review'"; or (3) where "the certification decision is manifestly erroneous." *In re Veneman*, 309 F.3d 789, 794 (D.C. Cir. 2002). Each of these standards is satisfied here.

A. This Case Satisfies The "Death Knell" Factor.

The class here consists of some [ ] shippers claiming billions of dollars in damages. (S-193 ¶2.) After the class certification ruling, plaintiffs' expert calculated damages of [ ] in damages before trebling. (Addendum B) For example, plaintiffs' expert allocated [ ] of these damages to NS; trebled, those damages would wipe out [ ] of its current market capitalization[4] and would exceed its cumulative adjusted net income for all of [ ].[5]

Claims of this magnitude can easily "induce a substantial settlement even if the [plaintiffs'] position is weak." *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 675 (7th Cir. 2001) (granting interlocutory review under "death knell" theory where plaintiffs claimed $200 million in damages); *see Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 167, n.8 (3d Cir. 2001) (large class actions present the risk of "settlements forcibly induced by the small probability of an immense judgment"). And as discussed more fully below, the district court's class certification decision is clearly "questionable." *Veneman*, 309 F.3d at 794.

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[4] As of November 27, 2012, NS's market capitalization was $18.87 billion. *See* http://www.google.com/finance?client=ob&q=NYSE:NSC.

[5] *See* http://www.nscorp.com/nscportal/nscorp/Investors/Financial_Reports/Annual%20Report/index.html (reporting unadjusted net income).

B. The District Court Erroneously Resolved Unsettled And Fundamental Issues Of Class Action Law.

The district court erroneously resolved two critical legal issues affecting class actions on which the circuits are divided and that this Court has not addressed: (1) whether and when a class can include uninjured class members, and (2) the standard that governs expert evidence on class certification.

First, the district court held that class certification is permissible even where the plaintiffs cannot show by common proof that all class members were injured, so long as common proof may establish "'widespread'" injury. (Op 67-68.) This crucial ruling is in direct conflict with the majority view.

"In antitrust class actions, common issues do not predominate if the fact of antitrust violation and the fact of antitrust impact cannot be established through common proof." *In re New Motor Vehicles Canadian Export Antitrust Litig.*, 522 F.3d 6, 20 (1st Cir. 2008); *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 311 (3d Cir. 2008); *Bell Atl. Corp. v. AT&T Corp.*, 339 F.3d 294, 302 (5th Cir. 2003). At least four circuits have held that class certification requires injury to all class members, provable by some common means. *See Hydrogen Peroxide*, 552 F.3d at 311 (requiring some injury to "every class member"); *New Motor Vehicles*, 522 F.3d at 28 (plaintiffs' theory of impact "must include some means of determining that each member of the class was in fact injured"); *Bell Atl.*, 339 F.3d at 302 (requiring proof of some damage "for every class member through proof

common to the class"); *Blades v. Monsanto Co.*, 400 F.3d 562, 571-74 (8th Cir. 2005) (denying certification where "not every member of the proposed classes can prove with common evidence that they suffered impact from the alleged conspiracy").[6]

The district court, however, adopted a much more lax standard, relying on *Kohen v. Pacific Investment Management Co.*, 571 F.3d 672, 677 (7th Cir. 2009). The court concluded that certification is permissible even where it is not "reasonably clear at the outset that all class members were injured by the defendant's conduct," as long as there are not a "great many" uninjured members and injury appears to be "widespread." (Op 67-68.)

After *Wal-Mart,* the *Kohen* standard is not nearly rigorous enough to demonstrate that injury is susceptible to class-wide resolution. *Wal-Mart* makes clear that, while Rule 23 allows persons injured by a common cause to join together, it does not permit the uninjured to hide under the cloak of injuries suffered by others. 131 S. Ct. at 2561 (rejecting as a "novel project" a plan to award average damages to all class members, whether injured or not); *see also* 28

[6] Some cases suggest that it is enough if injury to "all or nearly all" can be established by common proof. *E.g., Allied Orthopedic Appliances, Inc. v. Tyco Healthcare Grp.,* 247 F.R.D. 156, 167 (C.D. Cal. 2007) (denying class certification where common evidence could not show that "all or virtually all purchasers" suffered injury). That leeway makes sense if the number of uninjured members is limited and identifiable. A few detours into individual issues need not render the trial unmanageable as a class action.

U.S.C. § 2072(b) (Federal Rules of Civil Procedure may not "abridge, enlarge or modify any substantive right").

It is therefore not sufficient for plaintiffs to proffer evidence that could establish that many class members were injured. *Wal-Mart* held that statistical evidence of widespread discrimination does not demonstrate the existence of a "common" question if for each class member there is no "common answer to the crucial question *why was I disfavored*." 131 S. Ct. at 2551, 2555. Instead, plaintiffs must "be prepared to prove" that injury is "*in fact*" a "common question" that can be resolved with common evidence in "one stroke." *Id.* at 2552.

As explained in detail below, the proper resolution of this important question of class action law requires reversal of the decision below.

Second, the district court also erroneously resolved the important and unsettled question of whether a trial court may certify a class in reliance on proposed expert testimony that does not meet evidentiary standards for rigor and reliability. Because expert evidence is often critical to the certification decision, the standard for reviewing such evidence is a fundamental issue of class action law. *See* 1 Joseph M. McLaughlin, *McLaughlin on Class Actions* § 3:14, at 449 (8th ed. 2011) ("Particularly in putative (b)(3) employment, antitrust, consumer protection, and securities class actions, the certification decision often hinges upon the court's assessment of expert submissions.").

Here, the district court reviewed portions of plaintiffs' expert evidence under a lenient "plausibility" standard, which is more akin to a pleading standard and falls short of the "rigorous analysis" required by *Wal-Mart*. (Op. 37.) The district court cited *Hydrogen Peroxide*, 552 F.3d 305, a Third Circuit case, as the basis for this standard. (Op. 37.) The circuits are currently split on this important issue, *compare Am. Honda Co. v. Allen*, 600 F.3d 813, 816 (7th Cir. 2010) (per curiam) (rigorously analyzing expert testimony), *and Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 982 (9th Cir. 2011), *with In re Zurn Pex Plumbing Prods. Liab. Litig.*, 644 F.3d 604, 613 (8th Cir. 2011) (applying a "tailored" approach and stating "we are not convinced" by *American Honda*), *petition for cert. filed*, 80 U.S.L.W. 3378 (Dec. 15, 2011) (No. 11-740), and this Court has not yet decided the issue. Indeed, the Supreme Court has expressed "doubt" that a relaxed standard applies at the class certification stage, *Wal-Mart*, 131 S. Ct. at 2553-54, and is reviewing the Third Circuit's approach, *Behrend v. Comcast Corp.*, 655 F.3d 182 (3d Cir. 2011), *cert. granted,* 133 S. Ct. 24 (2012). This Court should therefore not permit this class action to proceed on the basis of lax scrutiny that—in light of statements in *Wal-Mart*—is suspect at best and, as shown below, in fact legally mistaken.

Furthermore, even if the Third Circuit approach were correct, the district court misapplied it here. *Hydrogen Peroxide* emphasized that "[e]xpert opinion with respect to class certification, like any matter relevant to a Rule 23

requirement, calls for rigorous analysis." 552 F.3d at 323. The district court's opinion is long, but the plausibility standard the court applied at key junctures falls far short of the required "rigorous analysis."

C. The Class Certification Decision Is Manifestly Erroneous.

Third, the district court's broader decision to certify this class was manifestly erroneous. Even if the district court's unduly lenient standards for class certification were legally correct, the class here plainly should not have been certified. As discussed below, there are a "great many" uninjured members in this class, and plaintiffs' expert evidence is not even "plausible."

II. REVERSAL IS REQUIRED BECAUSE, UNDER THE PROPER RULE 23 STANDARDS, INJURY-IN-FACT, ANTITRUST INJURY, AND DAMAGES CANNOT BE ESTABLISHED BY COMMON PROOF.

Rule 23(b)(3) was "an 'adventuresome innovation,'" *Wal-Mart*, 131 S. Ct. at 2558, limited to circumstances in which "the questions of law or fact common to class members predominate over any questions affecting only individual members," and "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). "A party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc." *Wal-Mart*, 131 S. Ct. at 2551. Certification "is proper only if 'the trial court is satisfied, after a rigorous

analysis, that the prerequisites of [Rule 23] have been satisfied.'" *Id.* (quoting *Falcon*, 457 U.S. at 161). The district court did not require plaintiffs to discharge these burdens with respect to this extraordinary class action.

A. Even If It Were Otherwise Plausible And Admissible, Plaintiffs' Expert Evidence Cannot By Itself, Or In Conjunction With Other Evidence, Establish Injury-In-Fact, Antitrust Injury, Or Damages.

The district court erred in certifying the class because individualized evidence must be considered to determine whether shippers suffered any injury. Some shippers would have paid the same (or even higher) rate-based fuel surcharges regardless of any conspiracy. Some engaged in individualized negotiations over the fuel surcharge provision and the total price and service package and extracted offsetting concessions that foreclose a finding of harm. And some shippers do not benefit from rail-to-rail competition and thus could not have been injured by an alleged conspiracy to reduce rail competition.

In an effort to show otherwise, plaintiffs argued, and the district court agreed, that Dr. Rausser's regression analysis provided a "plausible" means of proving injury on a class-wide basis. (Op. 134.) Even if these studies were otherwise valid—and as we explain in Section III below, they manifestly are not—they cannot remotely resolve the question of injury in "one stroke." *Wal-Mart*, 131 S. Ct. at 2551.

As the district court recognized, a regression equation "'cannot prove causation.'" (Op. 126.) It can only show "'a correlation that can give rise to an inference that causation exists.'" (*Id.*) Such an inference might establish that injury is susceptible to common proof in a case where defendants have no individualized competing evidence that might refute the inference in particular cases, or where the validity of defendants' competing explanation of events can itself be resolved in a single stroke through other common evidence. But neither situation is presented here. As explained below, defendants have competing evidence that can rebut any inference of common injury purportedly raised by plaintiffs' expert evidence, and that evidence is highly individualized. And Dr. Rausser has not even proposed any common way of sorting the injured from the uninjured.

In assessing predominance, the "critical need is to determine how the case will be tried." Fed. R. Civ. P. 23 advisory committee's note, 2003 amendments; *see also Sandwich Chef of Tex., Inc. v. Reliance Nat'l Indem. Ins. Co.*, 319 F.3d 205, 218 (5th Cir. 2003) (Rule 23(b)(3) requires the court to "consider how a trial on the merits would be conducted if a class were certified."); *Hydrogen Peroxide*, 552 F.3d at 311(same). If plaintiffs' common proof can establish "widespread" injury, but cannot resolve the individualized questions about whether particular class members were injured, then individual issues will inevitably predominate.

Wal-Mart makes it clear that plaintiffs cannot obtain class certification based on an inference that fails to account for defendants' contrary individualized proof. *Wal-Mart,* 131 S. Ct. at 2561 ("[b]ecause the Rules Enabling Act forbids interpreting Rule 23 to 'abridge, enlarge or modify any substantive right,' a class cannot be certified on the premise that [defendants] will not be entitled to litigate [their] statutory defenses to individual claims."); *see also Avritt v. Reliastar Life Ins. Co.*, 615 F.3d 1023, 1030 (8th Cir. 2010) (class certification inappropriate where defendant would raise individualized proof to defend against plaintiffs' claims); *Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1274-75 (11th Cir. 2009) (vacating class certification order and holding that common issues did not predominate where defendants "would proffer individualized and varying evidence to defend against claims of individual class members").

Indeed, in *Wal-Mart* itself, there was common evidence of a corporate culture that facilitated gender discrimination and statistical evidence of "'significant disparities between men and women'" in terms of salary and promotion that plaintiffs' expert claimed could "'be explained only by gender discrimination.'" 131 S. Ct. at 2555. That evidence could create an inference of widespread discrimination, which the lower courts in that case found just as the district court did here, but it could not justify class certification because it could

not generate a "common answer to the crucial question *why was I disfavored*." *Id.* at 2552.

B. Individualized Evidence Must Be Considered To Determine Whether Certain Shippers Suffered Any Injury-In-Fact.

1. Shippers Who Would Have Paid The Same Fuel Surcharges Or More Absent Any Conspiracy Were Not Injured.

The district court erroneously held that injury and damages can be adjudicated on a class-wide basis. There is strong evidence, which defendants are entitled to present, that many (not readily identifiable) shippers would have paid the same fuel surcharges—or higher ones—absent the alleged conspiracy. All eight class representatives paid rate-based fuel surcharges on some shipments (and some paid surcharges on all of their shipments) before the alleged conspiracy. (S-200.)

Their experience was not unique. It is undisputed that the proportion of shippers with a rate-based fuel surcharge was rising before the alleged conspiracy, and fuel surcharges were paid on approximately 40% of shipments before the beginning of the class period. (*Supra*, at 12-13.) The evidence also shows that, for a variety of individualized reasons, large numbers of shippers would have paid the same fuel surcharges in the absence of the alleged conspiracy. Those shippers could not have suffered any injury as a result of that alleged conspiracy. This evidence should have foreclosed class certification. *Cf. McLaughlin v. Am.*

Tobacco Co., 522 F.3d 215 (2d Cir. 2008) (class could not be certified because the fact that smokers had a variety of reasons for purchasing light cigarettes precluded class-wide litigation of the key issues of reliance, loss causation, and injury).

The district court concluded otherwise because it found that the surcharges during the alleged conspiracy were more "widespread" and "aggressive" than those in use before the class period. (Op. 86). That reasoning does not withstand scrutiny.

First, for substantial amounts of traffic shipped *during* the class period, the fuel surcharge formulas were identical to the ones used *before* the class period. For intermodal shipments, the fuel surcharge formulas used during the class period were materially the same as the formulas used before July 2003.[7] (*Supra*, at 13) Plaintiffs had no contrary evidence, and their complaint never mentioned intermodal traffic. For "carload" traffic, the fuel surcharge formulas used by CSXT and BNSF remained unchanged after March and June 2003, respectively. (*Supra,* at 13-15.)

Second, the changes in fuel surcharge formulas that plaintiffs attribute to the conspiracy did not always and necessarily result in increased surcharges. When the district court says the new formulas were more "aggressive," it means that

[7] The district court dismissed this evidence, stating that the defendants had similar intermodal surcharges. (Op. 95 n.16.) But that says nothing about whether the intermodal surcharges were *changed* during the class period.

those surcharges "'used a trigger equal to about $23 per barrel, rather than the higher $28 per barrel (or higher) that several defendants had previously used,'" and that they "'adjusted the [surcharge] based on the 30-day average fuel price, rather than, as in several Defendants' earlier programs, only when the trigger was exceeded for 30 (or more) consecutive days.'" (Op. 82, 87.)

Those changes might make the formulas more "aggressive" in a colloquial sense, but they do not invariably lead to higher prices in all situations. (*Supra*, at 14-16.) To prove injury-in-fact under the antitrust laws, a plaintiff must demonstrate that it *paid more* than it would have paid in the absence of the conspiracy. *See* 15 U.S.C. § 15 (only a claimant who was "injured in his business or property by reason of" a violation may recover damages under the antitrust laws); *Fed. Prescription Serv., Inc. v. Am. Pharm. Ass'n.*, 663 F.2d 253, 268 (D.C. Cir. 1981) (an antitrust plaintiff "must prove not only an antitrust violation but the causal link between the violation and an injury to his business or property"). Plaintiffs did not make that showing, nor could they.

Of course, the surcharges paid after July 2003 were generally higher in dollar terms than those paid before. But this is because the price of fuel was much higher. Dr. Willig demonstrated—and Dr. Rausser did not dispute— that the *formulas* used during the class period did not systematically (let alone uniformly) produce consistently higher surcharges than their predecessors when applied to the

fuel prices in the class period. In fact, shippers during the class period who were paying surcharges pursuant to pre-conspiratorial "legacy" contracts which continued to govern into the class period actually paid *higher* surcharges, on average, than shippers who first paid a fuel surcharge within the class period. (*Supra*, at 16-17.)

Plaintiffs and the district court speculate that the inclusion of fuel surcharge provisions in contracts before the alleged conspiracy "cannot be extrapolated to the class period" because "increased customer resistance would be expected as the [fuel surcharge clauses] were triggered with rising fuel prices." (Op. 83.) The court cited no evidence to support that assertion, and there is none. The conjecture rests on the implausible assumption that, prior to July 2003, many sophisticated rail shippers agreed to fuel surcharge provisions based on careless disregard for the risk of rising fuel prices. It also ignores the undisputed evidence that firms in other industries, including plaintiffs in this case, were widely using surcharges after 2003, when fuel prices had begun their upward march. (1stWillig.Rep. ¶70.) And even if the district court's speculation were valid as to some shippers—and that, as a result, after July 2003, some shippers would have successfully resisted fuel surcharges—there is no basis for presuming, and no method for determining, that the proposition is *universally* true for all members of the class.

Third, the claim that the alleged conspiracy eliminated competition among the defendants—making fuel surcharges more widespread and thereby increasing the *coverage* of fuel surcharge provisions (Rausser.Reply.Rep. 37)—obviously does not apply to the entire class, and is not amenable to class-wide proof.

The highly volatile and increasing fuel prices prior to and during the class period led to dramatic increases in the use of fuel surcharges in many industries, from trucking to taxicabs to flower deliveries. (Defs.Class.Cert.Slide 11.) It is undisputed that rate-based fuel surcharge provisions were widespread in rail shipping contracts prior to the start of the alleged conspiracy, and the trend was rapidly increasing. (*Supra,* at 12-13.) Dr. Rausser, however, performed no "analysis to determine whether [the trend] would have ended in the [but-for] world." (1stRausser.Dep. 91-92.) Common sense dictates it would not have.

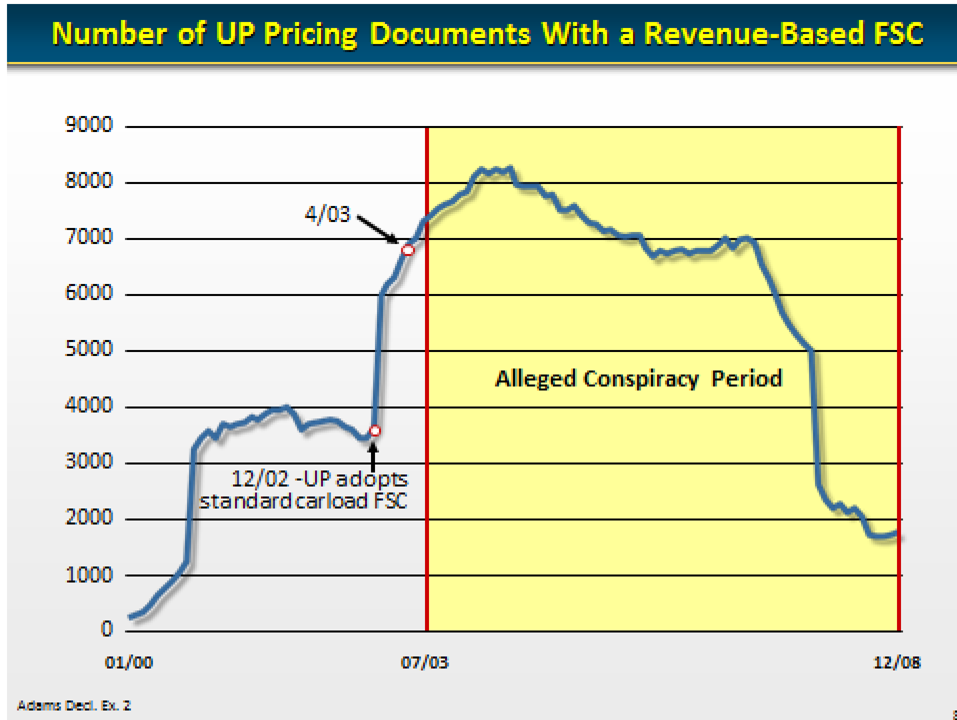
Dr. Rausser admitted that "certain fuel surcharges would have been charged by the defendants during the class period absent a conspiracy," including "the same kinds of fuel surcharges that were charged prior to the class period," which included "standardized" "rate-based" surcharges. (Rausser.Second.Dep. 119-120.) Dr. Rausser expressly conceded that it is "certainly possible" that the shippers who agreed to similar surcharge formulas prior to the class period would have done so in contract renewals during the class period regardless of any conspiracy. (*Id.* at 120.) Dr. Rausser *excluded* those shippers from his definition of the class

(1stRausser.Dep. 283-88), although the district court nevertheless *included* them in the class as certified.

But the shippers who actually paid rate-based fuel surcharges before the class period are just the most obvious manifestation of a much larger problem. Dr. Rausser also admitted that it is "certainly possible"—and that he would even "expect"—that some shippers who *did not* pay a fuel surcharge prior to the class period would have paid one during the class period absent the alleged conspiracy. (2dRausser.Dep. 120-22.) And thousands of class members, comprising roughly a third of the class, (Revised.Willig.Rep. 44 n.35), chose to begin shipping with defendants for the first time during the class period, precluding some broad generalization about these shippers' opposition to surcharges. These uncertainties affect the entire class, and neither Dr. Rausser's models nor any other common proof offered by plaintiffs says anything about whether any given shipper would have paid a fuel surcharge absent the alleged conspiracy.

These problems cannot be ignored by hypothesizing that class members had many separate shipments, and invariably suffered injury in the form of at least one surcharge caused by the alleged conspiracy. Two of the eight supposedly "typical" class representatives were already paying rate-based fuel surcharges on 100% of their traffic prior to the class period. (*Supra*, at 13.) And Dr. Rausser's own calculations show that fuel surcharge coverage was increasing prior to the class

period, topped out around [ ]for CSXT, [ ] for BNSF, [ ] for UP, and [ ] for NS, and often fell before the end of the class period. (Rausser.Reply.Rep. 34(Figure5).) The changes in total surcharge coverage for UP look like this:



(Defs.Class.Cert.Slide Issacson.Slide8/Adams.Decl.Ex. 2). Plaintiffs have no common method of proving that all (or even most) shippers paid surcharges on a higher percentage of their traffic than they would have in the "but for" world.

The district court forgave the lack of class-wide common proof of causation by hypothesizing that the answer to "*why* a shipper paid a particular fuel surcharge" is "rather simple and applies class-wide: … because the surcharges were non-negotiable." (Op. 92. (alteration omitted).) That effort to evade the causation problem fails as a matter of law. To state a claim under the antitrust

laws, it is not sufficient for plaintiffs to show that they were not offered a choice during the class period; they must also show that, absent the challenged agreement, they would have been offered a choice and would have chosen not to pay a fuel surcharge. (*Supra,* at 39.) The district court erred in certifying the class when plaintiffs did not demonstrate that they can make this required showing with common proof.

2. Shippers Who Bargain To The Bottom Line May Not Have Suffered Any Injury.

Shippers that bargained to the "bottom line" (*i.e.*, over the total cost of shipping) and thus may have negotiated other favorable terms that offset the impact of any allegedly unlawful fuel surcharge are another group that includes shippers that likely were not injured. Several named plaintiffs admit that they focused on total cost, not surcharges in isolation,[8] and portions of the class negotiated concessions on other freight terms during the class period, including base rates. (*Supra*, at 11-12.) Once again, to sort out which shippers were injured requires examinations that are highly individualized and render class certification inappropriate.

In *Robinson v. Texas Automobile Dealers Ass'n*, 387 F.3d 416 (5th Cir. 2004), the Fifth Circuit reversed certification of a class of automobile purchasers who challenged an agreement among dealers concerning how they would list a tax.

[8] *See* [ ]

The court rejected the plaintiffs' theory that the tax was simply added to the purchase price "for every consumer in the class." *Id.* at 423. It concluded that "[s]uch an assumption defies the realities of the haggling that ensues in the American market," and that "[a]lthough some purchasers certainly negotiate a price that excludes taxes, titles, and fees, others negotiate with an eye to the 'bottom line.'" *Id.* In determining whether the conspiratorial treatment of the tax affected the actual price paid, "a court would have to hear evidence regarding *each purported class member and his transaction* … [which would] destroy any alleged predominance." *Id.*; *see also* 2A, Phillip E. Areeda, et al., *Antitrust Law* § 398, at 442, n.14 ("When transaction prices are negotiated, the actual price paid will be determined at least in part by the negotiating styles of the customers" so "proof of antirust injury is bound to be individualized.") (citing *Robinson*, 387 F.3d at 423).

The same considerations weigh even more heavily against class certification here. Rail fuel surcharges are just one component of the price of a highly diversified service, sold in a wide variety of markets subject to different forms of competition nationwide. (*Supra,* at 6-9.) There is substantial evidence that many of those sophisticated shippers focused on the total shipping price, and negotiated trade-offs between base rates, fuel surcharges, and many other terms of service. (*Supra,* at 11-12.)

Thousands of shippers saw outright absolute declines in base rates. For each defendant, roughly [ ] of all shippers had a base rate decrease. (Willig.Rep. 125(Figure38).) For the 30 largest commodities,

(Willig.Rep. 122-23.) Dr. Rausser conceded that at least [ ] of shipments during the class period experienced an outright decline in all-in rates. (Rausser.Reply.Rep. 71-72.) The district court ignored this aspect of Dr. Rausser's findings, which refutes, and thus renders clearly erroneous, its conclusion that "any examples of discounting are, at best, anomalies that do not preclude a finding of predominance." (Op. 106.); *see, e.g., Oil, Chem. & Atomic Workers Int'l Union, AFL-CIO v. NLRB,* 547 F.2d 575, 596 (D.C. Cir. 1976) (rejecting as clearly erroneous a finding that was contradicted by undisputed record evidence the Special Master did not consider).

More importantly, the district court's (and Dr. Rausser's) reasoning rests on the erroneous legal premise that situations involving "reduced *increases*" in base rates can be ignored. (Op. 109-113.) Plaintiffs do not allege, and Dr. Rausser has rejected, any conspiracy to fix base rates. (1st.Rausser.Rep. 52 n.118; Rausser First Dep. 98:2-4.) The class period coincided with the dramatic post-9/11 rebound in the nation's economy, with greatly increased demand for rail freight. (*Supra,* at 10-11.) If a fuel surcharge provision led a class member to negotiate

lower base rates than it would otherwise have paid, that may have eliminated any injury from the fuel surcharge—even though the base rates were higher than before. Applied to the facts in *Robinson*, the district court's reasoning would suggest that a consumer was injured by the allegedly conspiratorial tax—even if she negotiated a perfectly offsetting reduction in the base price of the car—if the base price of this car was higher than the base price of the car she bought a couple of years earlier. That is not an actionable injury.

Finally, the district court posited that class-wide injury could be demonstrated merely by proof that surcharges were the "starting point 'from which negotiations for discounts began.'" (Op. 115.) It cited a few district court cases accepting plaintiffs' arguments that class-wide injury could be demonstrated by evidence of an elevated "starting point" for negotiations and proceeding on the now-rejected premise that the court "need not consider [Defendants' expert's] testimony in detail." *E.g., In re Indus. Diamonds Antitrust Litig.*, 167 F.R.D. 374, 378 (S.D.N.Y. 1996) (finding it "quite possible" that class members whose prices decreased would have paid even less absent the conspiracy, without addressing how that dispute could be resolved on a class-wide basis); *In re Universal Serv. Fund Tel. Billing Practices Litig.*, 219 F.R.D. 661, 665, 675 (D. Kan. 2004) (finding that plaintiffs were "presumably impacted" by "the mere fact" that negotiations included the conspiratorial charge as one element, and holding that

"[t]he court should accept the allegations in the complaint as true").) Such cases fail to apply the requirement of "actual, not presumed conformance" with Rule 23. *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 157 (1982).

Merely receiving an elevated opening offer, no matter how negotiations ultimately come out, is not antitrust injury. *Supra*, at 39.[9] And a court considering class certification cannot simply presume that an elevated "starting point" always produced higher prices, particularly when defendants are entitled to contest plaintiffs' broad generalizations with individualized proof. *Wal-Mart*, 131 S. Ct. at 2561; *see also* Areeda, *supra*, §398, at 443, n.15 ("Common proof may not exist when the defendants' rebuttal evidence raises individualized questions").

C. Individualized Evidence Must Be Considered To Determine Whether Certain Shippers Suffered Antitrust Injury.

A great many class members—including all named plaintiffs—are shippers who can be served by only one railroad.[10] Many of these "sole-served" shippers

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[9] The district court also observed that a plaintiff might be injured through the expenditure of resources on additional negotiation, but plaintiffs' theory was that the conspiracy *blocked* negotiations. Regardless, such proof still would be highly individualized.

[10] *E.g.*, Kaplan.Dep.32-33; Snow.Dep. 36; 2dGilley.Dep. 322; MyersDep. 88-90; RuoffDep. 28-29; StratesDep. 95, 196, 215; CarterDep. 76; DonnellyDep. 81; *Opening Comments of Consumers United for Rail Equity*, filed in STB Ex Parte 715, Oct. 22, 2012, at 11, *available at* http://www.stb.dot.gov/filings/all.nsf/ba7f93537688b8e5852573210004b318/4a2937a31290e1e985257a9f0073bb21?OpenDocument(largest shipper group in the country stating that 78% of rail stations are served by only one major railroad).

cannot show that the alleged conspiracy caused them antitrust injury—*i.e.*, injury that flows from the alleged loss of *rail* competition. Any attempt to determine which of them can show antitrust injury requires fact-intensive and highly individualized analyses of a large portion of the class.

Antitrust plaintiffs must prove "*antitrust* injury," *i.e.*, "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). Antitrust injury is thus a harm caused by a reduction of competition. *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 344 (1990). As the district court itself recognized, "'where there [is] no competition, there [is] no antitrust injury.'" (Op.72 (quoting *City of Pittsburgh v. West Penn Power Corp.*, 147 F.3d 256, 266-67 (3d Cir. 1998)).)[11]

Nonetheless, the district court ruled that sole-served shippers can establish antitrust injury on a class-wide basis using the same evidence as shippers who benefit from direct rail competition. It found that, before the conspiracy, sole-served shippers benefitted from "competitive constraints" that limited railroad rates, and that, during the conspiracy, these shippers paid the same fuel surcharges as other shippers. (Op. 73-74.) The court, however, misunderstood the import of

[11] *See also Cont'l Cablevision of Ohio, Inc. v. Am. Elec. Power Co.*, 715 F.2d 1115, 1119-20 (6th Cir. 1983) (price-fixed rates for utility pole attachments could cause no anticompetitive effect because the utilities did not compete with each other) .

the evidence on which it relied. That evidence does not show that all or even most sole-served shippers could be shown to have suffered injury from a loss of rail competition. Instead, the evidence confirms that individualized proof is necessary to determine which sole-served shippers could make such showings.

First, the district court relied on evidence that sole-served shippers typically have options to use other modes of transportation, such as trucks and barges, that provide effective competition to the sole-serving railroad. (Op. 72) (referring to "all competitive factors"). This is true. But a conspiracy to fix *railroad* rates would not be expected to alter or reduce this non-rail competition, leaving the shipper no worse off than it was before. *See Atl. Richfield Co.*, 495 U.S. at 342 (antitrust injury "stems from a competition-*reducing* aspect or effect of the defendant's behavior"); *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 584 n.8 (1986) (plaintiffs lack antitrust injury where an illegal agreement would "leave [them] in the same position as would market forces."); *In re Tamoxifen Citrate Antitrust Litig.*, 466 F.3d 187, 218 (2d Cir. 2006) (no antitrust injury from lawful exercise of monopoly power).[12]

[12] Such a showing is likewise not established by evidence that a single shipper "negotiated out" of the fuel surcharge proposed by UP in 2002 but not in 2003, (Op. 73.) There was zero evidence that U.S. Magnesium avoided a surcharge in 2002 because of competition from BNSF.

Second, the district court relied on public statements by railroad executives that some sole-served shippers benefit from *indirect* "product" or "geographic" competition between railroads. (Op. 72-73.) For example, the rates a railroad serving a sole-served shipper can charge may be constrained if the shipper's customer can switch to a different railroad, or if the shipper can shift production from its sole-served facility to a facility served by another railroad to avoid high rates. (*Id.*) Such competitive constraints can be real, but they are far from universal. *Ariz. Pub. Serv. Co. v. Atchison, Topeka & Santa Fe Ry.*, 3 S.T.B. 70 (1998) (finding no product or geographic competition for customer in this class). For that reason, the Staggers Act provides a regulatory remedy for sole-served shippers who face an "absence of effective competition," and permits them to ask the STB to set their rates. 49 U.S.C. §§ 10707(a), 11701(a).[13] The STB, moreover, has found that a number of shippers in this class lack rail-to-rail competition.[14] These and other sole-served class members are thus shippers that

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[13] A subsidiary of named plaintiff Olin recently filed a rate case at the expiration of its contract with NS asserting that it has no effective competition. First Amended Complaint, *Sunbelt Chlor Alkali P'ship v. Norfolk S. Ry*., STB Docket No. NOR 42130 (May 4, 2012).

[14] *See US Magnesium, L.L.C. v. Union Pac. R.R.*, STB Docket No. 42114, 2010 WL 319727 (Jan. 28, 2010); *Pub. Servs. Co. of Colo. v. BNSF Ry.*, STB Docket No. 42057, 2004 WL 1428724 (June 8, 2004), *aff'd*, 453 F.3d 473 (D.C. Cir. 2006); *Duke Energy Corp. v. CSX Transp., Inc.*, STB Docket No. 42070, 2004 WL 250254 (Feb. 4, 2004).

had the right to pursue a statutory remedy but chose instead to enter into contracts. Evidence that such sole-served shippers paid fuel surcharges as a result of this voluntary election does not establish that they suffered antitrust injury, much less on a basis in common with shippers that enjoy rail-to-rail competition.

To the contrary, sole-served shippers must demonstrate that, prior to the conspiracy, they benefited from indirect rail competition. Absent such a showing, the alleged price-fixing could not reduce rail competition that they previously enjoyed, or subject them to exercises of market power different from those they faced before the conspiracy. *See*, *e.g., Atl. Richfield Co.*, 495 U.S. at 344. Determining whether any particular sole-served shipper benefits from indirect competition requires a detailed and highly individualized inquiry into its operations, shipping options and product competition. *See Mkt. Dominance Determinations*, 365 I.C.C. 118 (1981). This inquiry is so fact-intensive that the STB now refuses even to consider indirect competition when deciding whether for a specific shipment there is "an absence of effective competition." *See Ass'n of Am. R.R. v. STB,* 306 F.3d 1108, 1109 (D.C. Cir. 2002). If these issues are too complex and burdensome for an expert agency looking at a single shipper, no regression model could resolve the issue for every sole-served shipper in this massive class in "one stroke."

* * *

In short, even assuming that Dr. Rausser's studies are valid, the inference the district court drew from them cannot, in this case, demonstrate injury-in-fact or antitrust injury in "one stroke." *Wal-Mart*, 131 S. Ct. at 2551. As defendants show next, judged under a properly rigorous standard, Dr. Rausser's studies were wholly inadequate to justify class certification.

III. CERTIFICATION MUST BE DENIED BECAUSE PLAINTIFFS' EXPERT PROOF CANNOT WITHSTAND RIGOROUS ANALYSIS AND DOES NOT ESTABLISH THAT INJURY OR DAMAGES IS A COMMON QUESTION.

The district court also failed to conduct the "rigorous analysis" *Wal-Mart* requires with respect to plaintiffs' expert evidence. Even before *Wal-Mart*, courts recognized that plaintiffs should not be able to "obtain class certification just by hiring a competent expert," as this would "amoun[t] to a delegation of judicial power to the plaintiffs." *West v. Prudential Sec., Inc.,* 282 F.3d 935, 938 (7th Cir. 2002). Accordingly, the district court was required to scrutinize plaintiffs' expert evidence with both the kind of rigor that *Daubert* requires at trial and the "rigorous analysis" that *Wal-Mart* requires to ensure compliance with Rule 23. *See Ellis*, 657 F.3d at 982-84 (district court should have determined that the expert's testimony is "reliable" and admissible under *Daubert* and also conducted a "rigorous analysis" to judge the "persuasiveness of the evidence presented").

Dr. Rausser has testified or provided expert reports in 55 cases in the four years preceding this case. (1stRausser.Rep. Ex. B.) Numerous courts have found

his analyses deeply flawed and unreliable.[15] The models he offers in this case suffer from similar flaws. Those models would not supply even a "plausible" method of common proof, if that were the benchmark. They certainly do not establish, upon "rigorous" scrutiny, that injury or damages can be established with common proof and that there are no individualized issues that defendants are entitled to litigate. *Wal-Mart*, 131 S. Ct. at 2551-52, 2561.

A. Dr. Rausser's Regressions Do Not Attempt To Analyze *Why* Particular Shippers Paid Fuel Surcharges.

Dr. Rausser modeled the responsiveness of rail rates to changes in fuel costs from January 2000-June 2003, a period when fuel surcharges were not triggered or only barely triggered because fuel prices were relatively low. He applied the same regression model to shipments included within the class definition, concluded that there was a "structural break in the relationship between fuel prices and freight rates," and called the entire price difference damages from the alleged conspiracy. (1stRausser.Rep. 113-23.)

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[15] *See, e.g., Blomkest Fertilizer v. Potash Corp.*, 203 F.3d 1028, 1038 (8th Cir. 2000) (en banc) (Dr. Rausser's model "fundamentally unreliable"); *In re Flonase Antitrust Litig.*, 284 F.R.D. 207, 230 (E.D. Pa. 2012) (Dr. Rausser's methodology "not reliable in establishing injury for uninsured consumers"); *Reed v. Advocate Health Care*, 268 F.R.D. 573, 594 (N.D. Ill. 2009) (finding Dr. Rausser's class certification testimony "essentially inadmissible" because "he has not applied econometric principles and methods reliably to the facts of this case.").

With respect, this is nonsense and certainly does not give rise to any "persuasive inference of causation," particularly at the level of individual shippers. First, Dr. Rausser used a benchmark model derived from *all shipments* before the class period, but then applied that model only to class period shipments that included a fuel surcharge provision. (1stRausser.Rep. 117.) Contracts that include a fuel surcharge provision obviously produce prices that are more responsive to fuel price changes than contracts that have no surcharge provision.

Even if that flaw were ignored, all that Rausser's regressions possibly could prove is that *something* other than his chosen variables influenced rail rates differently after mid-2003 than before. There is no mystery to what that something was. The presence and terms of fuel surcharge provisions are not variables in Rausser's model. (Rausser.Reply.Rep. 85.) When fuel prices rose after mid-2003, surcharge provisions resulted in higher charges and, of course, the previous "relationship between freight rates and fuel prices" changed. Dr. Rausser has used sophisticated math to demonstrate that all-in rail rates became more sensitive to the price of fuel in a period where fuel prices were very high, and thus triggered fuel surcharge provisions that would not have been triggered in a prior period when fuel prices were much lower. He has proven, in other words, that customers paid more in fuel surcharge payments after mid-2003 when fuel prices soared than before—hardly a startling proposition.

This math says nothing about *why* customers were paying higher fuel surcharges, or about whether they would have paid the same surcharges but for any conspiracy. It constitutes a "structural break" or suggests a "persuasive inference of causation" only if one starts from the premise that, absent a conspiracy, customers should not have been paying more in fuel surcharge payments as fuel prices rose after mid-2003 than before. The court cannot certify a class by presuming that to be true, when there is another equally reasonable possibility: customers paid more in fuel surcharges *because fuel prices went up*, triggering the surcharge provisions they already had and/or would have had regardless of any conspiracy. Dr. Rausser does not attempt to test whether shippers would have had the same fuel surcharge provisions but for any conspiracy. He *assumes* that all fuel surcharge provisions in the class were caused by the alleged conspiracy, and attempts to measure damages on that assumption.

Dr. Rausser's analysis also suffers from the same aggregation problems as the analyses offered by the plaintiffs in *Wal-Mart*. There, regressions that lumped together all Wal-Mart stores in a region or nationwide were insufficient as a means to prove that all class members experienced discrimination. Likewise, Dr. Rausser's damages model is calibrated to a "benchmark" derived from data aggregated across shippers. He assumes that an individual customer's "but for" price can be derived from "the relationship between price drivers and freight rates

calculated by the model run on the full range of data," (1stRausser.Rep. 122) without considering any individualized circumstances outside his chosen variables—which do not include whether the shipper agreed to rate-based fuel surcharges prior to the alleged conspiracy, or what the shipper's other transportation options were.

Dr. Rausser ultimately acknowledged that some shippers would have agreed to fuel surcharge provisions regardless of any conspiracy, yet he never attempted to analyze who they were. (*Supra*, at 41-42.) He had "no information on what were the factors that caused some shippers to have fuel surcharges whereas other[s] did not." (2dRausser.Dep. 295.) He conceded that none of his work tried "to explain why from a business standpoint [defendants] chose to impose [a surcharge] on some shipments and not others" before the alleged conspiracy. *Id*. 293-94. His model therefore has nothing to say about individual causation.

The district court suggested that Rausser's two models "work in conjunction" to support an inference of causation. (Op. 133.) But the court did not explain how the two models collectively answer a question that neither model purports to address. Dr. Rausser himself stated that the models could not be used together (Rausser.Reply.Rep. 84-85), and that he had not studied why particular class members paid surcharges or whether they would have done so absent any conspiracy. (2dRausser.Dep. 119-20)

The district court also acknowledged that "'complex and individualized questions of damages … weigh against a finding of predominance,'" and relied on Rausser's regressions to solve those problems. (Op. 138 (quoting *Behrend v. Comcast*, 655 F.3d at 204).) But Rausser's regressions obviously do not eliminate the complex and individualized issues that defendants will be entitled to litigate.

B. Dr. Rausser's Damages Model Cannot Measure Causation Because It Predicts "Damages" For Shippers That Could Not Have Been Injured By Any Conspiracy.

That Dr. Rausser's model does not measure price increases that are "but for" attributable to a conspiracy, and cannot give rise to any "persuasive inference of causation," (Op. 133), is also evident from the fact that it predicts substantial damages for shippers who could not have been injured by the alleged conspiracy. That defect is severe enough that Dr. Rausser's analysis ought to be excluded entirely under a mere "plausibility" standard, but certainly by applying a more "rigorous analysis."

A model that includes damages from lawful conduct is inadmissible. *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1056-57 (8th Cir. 2000) (damages model inadmissible because it "failed to account for market events that both sides agreed were not related to any anticompetitive conduct" and "did not separate lawful from unlawful conduct"); *MCI Commc'ns Corp. v. AT&T Co.*, 708 F.2d 1081, 1161 (7th Cir. 1983) ("It is essential . . . that damages reflect only the

losses directly attributable to *unlawful* competition"); *Coleman Motor Co. v. Chrysler Corp.*, 525 F.2d 1338, 1353 (3d Cir. 1975) (vacating judgment where damages expert failed to distinguish between "losses resulting from unlawful, as opposed to lawful, competition."); *In re Plastics Additives Antitrust Litig.*, 2010 WL3431837, at *17 (E.D. Pa. Aug. 31, 2010) (because "Plaintiffs' proposed method of proof demonstrates impact where there in fact was none, a motion for certification will be denied.") Dr. Rausser's model fails that test.

The validity of his model can be tested by looking at how it treats the thousands of shippers who had rate-based surcharges well before the alleged conspiracy. (*Supra*, at 12-13.) Those competitive "legacy" contracts often had multi-year terms and thus governed shipments well into the class period. Such contracts permit a straightforward test of Dr. Rausser's model: if it generates damages for such legacy shipments, it is impermissibly measuring the effects of perfectly lawful conduct, such as the rising fuel prices over which defendants had no control.

The results are clear and undisputed. Dr. Rausser's model generates very substantial damages for the legacy shipments. He finds an average overcharge of [ ] for those shipments. (Rausser.Reply.Rep. 99 n.227.) Dr. Willig calculated the figure at [ ]. (Willig.Rep. 148(Figure45).) In either case, the experts agree that Dr. Rausser's model generates enormous overcharge "damages" for legacy

shipments that could not have been affected by the alleged conspiracy because, as plaintiffs conceded, the surcharge formulas for these shipments were set before the conspiracy allegedly began. (1stRausser.Rep. 42.)

A model that generates substantial overcharges for non-conspiratorial shipments fails professional standards. *See Blue Cross & Blue Shield v. Marshfield Clinic,* 152 F.3d 588, 593 (7th Cir. 1998) ("Statistical studies that fail to correct for salient factors, not attributable to the defendant's misconduct, that may have caused the harm … do not provide a rational basis for a judgment."); *Farley Transp. Co. v. Santa Fe Trail Transp. Co.*, 786 F.2d 1342, 1351-52 (9th Cir. 1985) (plaintiffs' failure to limit damages to illegal conduct "requires reversal of the verdict"); *Litton Sys., Inc. v. AT&T*, 700 F.2d 785, 825 (2d Cir. 1983) ("[D]amage studies are inadequate when only some of the conduct complained of is found to be wrongful and the damage study cannot be disaggregated.") *S. Pac. Commc'ns Co. v. AT&T*, 556 F. Supp. 825, 1090 (D.D.C. 1983) (damages model was "fatally deficient" where it "gave the Court no means of assuring itself that injuries attributable to other causes … have been excluded from the damage claim"), *aff'd*, 740 F.2d 980 (D.C. Cir. 1984).

The district court did not address this defect in Dr. Rausser's model, even though the point was made in detail in Defendants' class certification opposition papers, Dr. Willig's expert report (at 146-49), and at oral argument (Oct.7Hrg.Tr.

273-74). Respectfully, that omission cannot satisfy any notion of "rigorous analysis," and the district court's acceptance of Dr. Rausser's model warrants no deference on appeal.

Neither plaintiffs nor Dr. Rausser argued in the district court that a damages model can properly yield such large damages to unaffected transactions. Instead, Dr. Rausser argued that legacy shipments might have been affected by the alleged conspiracy in two ways. Neither rationale saves his model.

First, he theorizes that there may have been conspiratorial activities prior to July 1, 2003 and, therefore, the legacy shipments may include some conspiratorial effects. (Rausser.Reply.Rep. 99.) But plaintiffs specifically excluded the legacy shipments from the class, recognizing that there was no plausible claim of injury for those shipments. Dr. Rausser repeatedly denied that the alleged conspiracy had an earlier start date. He reported that surcharges were "implemented by the individual Defendants *without agreement or coordination … in the period before July 2003*." (1stRausser.Rep. 42 (emphasis added); *see also* 1stRausser. Dep. 25 (testifying that the conspiracy began at "[t]he beginning of July 2003").) Dr. Rausser also chose not to re-run his model with a new conspiracy date and prove that this would eliminate damages for the legacy shipments. Professional standards require more than mere hope that a redesigned model might cure a

serious defect. *See Reed*, 268 F.R.D. at 589 (refusing to "take Dr. Rausser's analysis on faith").)

Second, Dr. Rausser nonsensically argued that "all shippers, whether or not within the Class, are affected by the restraint of competition." (Rausser.Reply.Rep. 99.) But how can a conspiracy affect the terms of a contract entered *before* the conspiracy? Dr. Rausser does not say and for obvious reason.

C. The damages model defines an implausible but-for world.

Dr. Rausser's damages model also cannot be measuring impact that is attributable to conspiracy because it generates damages approximately equal to, and sometimes in excess of, the entire surcharges paid. Here is Dr. Rausser's Figure 24:

(Rausser.Reply.Rep. 95)[16] In other words, Dr. Rausser's "competitive" price is essentially the same as Defendants' base rates, with no recovery of incremental fuel costs by any form of fuel surcharge.

That result is inherently implausible. The period 2003-08 saw diesel fuel prices increase by more than 300% after inflation, along with strong demand for rail service and tight capacity. (*Supra*, at 9-11.) A damages model cannot plausibly suggest that shippers would not have paid for any of those increased

[16] The district court found "persuasive[]" Dr. Rausser's statement that his damages are "'well below'" the average fuel surcharges. (Op. 141.) However, Figure 24—the only data from Dr. Rausser on this issue—clearly shows that, for the period January 2005 through December 2008, the damages roughly equal, and often exceed, the total fuel surcharges collected by defendants.

costs. *See Brooke Grp. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 242 (1993) ("[W]hen indisputable record facts contradict or otherwise render the opinion unreasonable, it cannot support a jury's verdict.").) Dr. Rausser *conceded* that "in the but-for world" he "would expect the prices to reflect that incremental cost change," and that a damages model that failed to reflect that principle would not be "appropriate." (1stRausser.Dep. 177-178.)

The notion that a competitive market would have little or no recovery of incremental fuel costs is also contradicted by the history of rail fuel surcharges, which were used widely before any allegedly conspiratorial conduct. Dr. Rausser conceded that rate-based surcharges would have been used absent any conspiracy. (*Supra*, at 41.) The STB also supported recovery of incremental fuel costs, including through surcharges calculated based on mileage. *Rail Fuel Surcharges*, 2007 WL 201205, at *6. Indeed, as the STB stated, "[s]hippers acknowledged that railroads are entitled to recover the increased costs they incur from the rising price of fuel." *Id.* at *2.

A model that does not reflect a plausible account of the but-for world, and that does not attempt to separate the consequences of an alleged conspiracy from the lawful and inevitable consequences of an historic increase in fuel prices, does not meet basic standards of reliability and certainly does not satisfy the "rigorous analysis" necessary at class certification. *See In re New Motor Vehicles*, 522 F.3d

at 27-28 (vacating class certification because plaintiffs' expert had not "fully answered" questions relevant to the "but-for" world and did not "sort out" the effects of legal activity from "the effects of the alleged, impermissible horizontal conspiracy"). Rather than implausibly assuming a but-for world with zero recovery of higher fuel costs, a proper model would specify and quantify the specific alternative cost recovery mechanisms that would have been used for particular shippers—an inherently complex and individualized process not susceptible to class adjudication.

* * *

The bottom line, for class certification purposes, is that Dr. Rausser's model does not eliminate the individualized inquiries necessary to determine whether particular class members paid more because of the alleged conspiracy than they otherwise would have paid. It is therefore not even a "plausible," let alone *rigorous*, demonstration that injury-in-fact or damages will be a common rather than individualized issue at the trial of this case.

CONCLUSION

For the foregoing reasons, the Court should exercise its discretion to grant review, and should reverse the certification of the class.

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CERTIFICATE OF COMPLIANCE

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

This brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because this brief contains 13,942 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii) of the Federal Rules of Appellate Procedure and Circuit Rule 32(a)(1).

This brief complies with the typeface requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure and the type-style requirements of Rule 32(a)(6) of the Federal Rules of Appellate Procedure because this brief has been prepared in a proportionately spaced typeface using the 2007 version of Microsoft Word in 14-point Times New Roman font.

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CERTIFICATE OF FILING AND SERVICE

I certify that on this 3rd day of December, 2012, service of two copies of the foregoing Initial Opening Brief of Petitioners – Non-Confidential Version has been made by first-class mail, postage pre-paid, on the following:.

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It is further certified that on this 3rd day of December, 2012, the undersigned has caused an original and fourteen copies of the foregoing Initial Opening Brief of Petitioners – Non-Confidential Version to be sent via first-class mail to the Clerk of the United States Court of Appeals for the District of Columbia Circuit.

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STATUTORY ADDENDUM

15 U.S.C. § 1 .... ADD-1

15 U.S.C. § 15(a)... ADD-2

49 U.S.C. § 10706(a)(3)(B)(ii).. ADD-3

49 U.S.C. § 10707(a).. ADD-4

49 U.S.C. § 11701(a).. ADD-5

Fed. R. Civ. P. 23 .... ADD-6

15 U.S.C. § 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 15. Suits by persons injured

(a) Amount of recovery; prejudgment interest

Except as provided in subsection (b) of this section, any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. The court may award under this section, pursuant to a motion by such person promptly made, simple interest on actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. In determining whether an award of interest under this section for any period is just in the circumstances, the court shall consider only--

49 U.S.C. § 10706. Rate agreements: exemption from antitrust laws

(a)(1) In this subsection—

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(ii) In any proceeding in which it is alleged that a carrier was a party to an agreement, conspiracy, or combination in violation of a Federal law cited in subsection (a)(2)(A) of this section or of any similar State law, proof of an agreement, conspiracy, or combination may not be inferred from evidence that two or more rail carriers acted together with respect to an interline rate or related matter and that a party to such action took similar action with respect to a rate or related matter on another route or traffic. In any proceeding in which such a violation is alleged, evidence of a discussion or agreement between or among such rail carrier and one or more other rail carriers, or of any rate or other action resulting from such discussion or agreement, shall not be admissible if the discussion or agreement—

(I) was in accordance with an agreement approved under paragraph (2) of this subsection; or

(II) concerned an interline movement of the rail carrier, and the discussion or agreement would not, considered by itself, violate the laws referred to in the first sentence of this clause.

In any proceeding before a jury, the court shall determine whether the requirements of subclause (I) or (II) are satisfied before allowing the introduction of any such evidence.

****

49 U.S.C. § 10707. Determination of market dominance in rail rate proceedings

(a) In this section, "market dominance" means an absence of effective competition from other rail carriers or modes of transportation for the transportation to which a rate applies.

****

49 U.S.C. § 11701. General authority

(a) Except as otherwise provided in this part, the Board may begin an investigation under this part only on complaint. If the Board finds that a rail carrier is violating this part, the Board shall take appropriate action to compel compliance with this part.

****

Fed. R. Civ. P. 23. Class Actions

(a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

(b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:

****

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

****

(f) Appeals. A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

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