No. 12-8003

In the
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

In re: EKATERINI KOTTARAS

On Petition for Interlocutory Appeal from an Order of the District Court Pursuant to Federal Rule of Civil Procedure 23(f)

DEFENDANT'S ANSWER IN OPPOSITION TO RULE 23(f) PETITION

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Plaintiff's petition for interlocutory appeal of the district court's class certification ruling should be denied because it fails to satisfy the standards for Rule 23(f) appeals laid down by this Court in *In re Lorazepam & Clorazepate Antitrust Litig.*, 289 F.3d 98 (D.C. Cir. 2002).

First, the legal issue that plaintiff contends is raised by the district court's ruling relates to the substantive law of the underlying antitrust claim (specifically, to the element of antitrust injury), not to the law of class certification, and therefore cannot support the grant of an appeal under Rule 23(f). *See id.* at 106-07 (holding Rule 23(f) appeal inappropriate where petitioner argued that district court's class certification ruling raised "important issues of antitrust standing," rather than issues of class certification law).

Second, in any event, far from being "questionable, taking into account the district court's discretion over class certification," *id.* at 105, the ruling below was sound, well-supported, and well within the district court's discretion.

Background

Plaintiff, a customer of defendant Whole Foods Market, Inc., brought this antitrust action claiming she was harmed by defendant's merger with Wild Oats Markets. Plaintiff claims the merger lessened competition in a market for "premium, natural, and organic" supermarkets in violation of section 7 of the

Clayton Act, 15 U.S.C. § 18, sections 1 and 2 of the Sherman Act, *id.* §§ 1 & 2, and section 3 of the Clayton Act, *id.* § 14. *See* Mem. Op. at 3.

An essential element of plaintiff's claims is "antitrust injury" (also sometimes referred to as "adverse impact")—that is, proof of monetary loss resulting from the anti-competitive aspects of the challenged merger. *See id.* at 11 (citing *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 334 (1990)). Plaintiff alleges she suffered antitrust injury because, she contends, the loss of competition caused by the merger enabled defendant to charge supracompetitive prices in violation of the antitrust laws, and she seeks damages for the higher price she allegedly paid as a result of the asserted antitrust violations. *See id.* at 3.

Plaintiff sought to certify a class comprising all consumers who purchased "premium, natural, or organic products from Whole Foods supermarkets in California's Los Angeles County" following the merger. *Id.* To obtain class certification, she had the burden of satisfying the four requirements of Rule 23(a) and at least one prong of Rule 23(b). *See* Fed. R. Civ. P. 23(a), (b). The key requirement addressed in the ruling below was Rule 23(b)(3)'s "predominance" prong, which requires the district court in relevant part to find that "the questions of law or fact common to class members predominate over any questions affecting only individual members," Fed. R. Civ. P. 23(b)(3). *See* Mem. Op. at 7-8

("23(b)(3) is at the heart of the dispute between the parties").[1] In order to satisfy the predominance requirement, plaintiff had the burden of showing that individual antitrust impact or injury could be established using evidence common to the class. *See id.* at 10-11.

In support of class certification, plaintiff offered an expert report from Dr. Oral Capps, Jr., a professor of agricultural economics at Texas A&M University, who addressed, among other things, whether the element of antitrust injury could be proved on the basis of "evidence that is predominantly common to members of the proposed class." *Id.* at 3 (quoting expert report).

Dr. Capps opined that antitrust injury would occur whenever "a customer pays more for a product at Whole Foods than he would have paid but for the merger." *Id.* at 4. He proposed to use a regression analysis to estimate the portion of any price charged for individual items (or "SKUs") that was attributable to the anti-competitive effects of the merger. *Id.* (citing expert report); *see id.* at 14 (citing expert's testimony). Dr. Capps's proposed methodology would ignore any price decreases attributable to the merger. Thus, a class member who paid less for her overall purchase could be found to have been injured. *See id.* at 14. Because defendant's prices were uniform across Los Angeles County in any given week,

[1] The district court also denied plaintiff's request for class certification under Rule 23(b)(2), *see* Mem. Op. at 20-22, but in her Rule 23(f) petition before this Court, plaintiff "does not challenge" that ruling. Petn. at 1 n.1.

Dr. Capps opined that his proposed methodology would constitute common proof of individual impact because all class members paid the same price for a particular product. *See id.* at 4.

The district court recognized, however, that the plaintiff had alleged a single product market—premium, natural and organic supermarkets (Mem. Op. at 3, 16)—and that an analysis of impact in that market must consider the totality of a class member's purchases. Both the district court and plaintiff's expert acknowledged that each consumer in the putative plaintiff class necessarily purchased a highly differentiated cluster or basket of items from defendant during the class period, rather than simply an individual SKU. *Id.* at 5, 14. The methodology proposed by plaintiff's expert failed to account for differences in the market baskets purchased by members of the putative class and failed to consider decreases in price for products comprising those baskets, including price decreases that were attributable to pro-competitive cost efficiencies achieved by the merger. *See id.* at 14. The court noted that the prospect of price decreases attributable to the merger was not a "speculative hypothetical," as shown in a study conducted by defendant's economic expert, Dr. Janusz Ordover of New York University, which found that the majority of items sold at defendant's supermarkets in Los Angeles County had actually *decreased* in price following the merger. *Id.* at 5, 14.

Relying on cases addressing the issue of antitrust injury, including in the

context of class certification, the district court concluded that to establish the essential element of antitrust injury, each member of the plaintiff class would have to show that the overall price paid for the particular basket of goods purchased by that individual plaintiff increased as a result of the alleged antitrust violations. *See id.* at 14-16. Under the methodology proposed by Dr. Capps, there is "no way of knowing what percentage of the proposed class ultimately suffered any net injury." *Id.* at 14. Rather:

> Under a framework that properly accounts for both merger-related price increases and declines, some Whole Foods shoppers may have paid more for their baskets of products than they would have without the merger, while others may have paid less—depending upon what mix of products each purchased. Determining what proportion of shoppers suffered net harm due to price movements caused by the merger therefore requires an analysis of each putative class member's purchases at Whole Foods during the class period and the amount by which the price of each [basket of purchases] changed as a result of the merger. Since the collection of products purchased by a particular customer is only provable by individual evidence—that is, evidence that varies from person to person—it would be impossible to establish widespread injury, or even determine who belongs in the class, with common proof.

Id. at 16-17 (citations and internal quotation marks omitted). *See also id.* at 17 (citing acknowledgement by plaintiff's expert "that determining what particular consumers purchased requires individualized evidence such as receipts, credit cards records, and scanner data capturing customer transactions").

Finally, the district court also found various other deficiencies in the expert report and methodology proposed by Dr. Capps. In particular, the court found that

his proposed methodology was too vague and far too tentative and ill-defined to meet plaintiff's burden under Rule 23(b)(3). *See id.* at 18-20 (pointing out, among other deficiencies in his report, that Dr. Capps "could not even tell the Court the precise analyses he intended to undertake"). In this regard, the court recognized recent decisions in the courts of appeals approving a more rigorous examination of expert methodologies at the class certification stage, consistent with the 2003 amendments to Rule 23. *See id.* at 18-19 (citing authorities).

Argument

This Court has defined three bases for granting a petition for interlocutory appeal of a class certification decision under Rule 23(f):

> (1) when there is a death-knell situation for either the plaintiff or defendant that is independent of the merits of the underlying claims, coupled with a class certification decision by the district court that is questionable, taking into account the district court's discretion over class certification;
>
> (2) when the certification decision presents an unsettled and fundamental issue of law relating to class actions, important both to the specific litigation and generally, that is likely to evade end-of-the-case review; and
>
> (3) when the district court's class certification decision is manifestly erroneous.

In re Lorazepam, 289 F.3d at 105.

Plaintiff's petition fails to meet these standards for several independent reasons.

I. The Petition Should Be Denied Because the Legal Issue Raised by Plaintiff Relates to the Merits of the Underlying Antitrust Claim and Not to Class Certification

Plaintiff's principal ground for interlocutory appeal is that the district court committed a supposed error of law in its approach to antitrust injury, an essential element of plaintiff's underlying antitrust claims. *See* Petn. at 8 ("The District Court's Predominance Conclusion Rests On An Incorrect Formulation Of Antitrust Injury").

Specifically, plaintiff argues that it was error for the district court, in addressing antitrust injury, to focus on the overall price paid for each class member's basket of goods, considering both price increases and price declines for individual components of the basket attributable to the competitive effects and efficiencies produced by the merger. *See id.* at 8-13. Plaintiff relies on *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481 (1968), and related cases, which stand for the proposition that a direct purchaser who pays an overcharge resulting from an antitrust violation has standing to sue the manufacturer for the violation, even if the direct purchaser is able to pass on some portion of the overcharge to indirect purchasers or is otherwise benefited by its position as a wholesaler of the product in question. *See* Petn. at 8-13 (also citing *In re Relafen Antitrust Litig.*, 346 F. Supp. 2d 349 (D. Mass. 2004), and *Meijer, Inc. v. Warner*

Chilcott Holdings Co. III, Ltd., 246 F.R.D. 293 (D.D.C. 2007)).[2] Relatedly, plaintiff argues that in approaching the issue of antitrust injury, the district court erred in suggesting that many Whole Foods products may have declined in price because of the cost efficiencies produced by the merger. *See* Petn. at 13-16. These arguments advanced by plaintiff are strikingly similar to the arguments for interlocutory appeal made by the petitioner in *Lorazepam*, which this Court held were "inappropriate" to support the grant of an appeal under Rule 23(f). 289 F.3d at 106. In *Lorazepam*, the petitioner contended that the district court erred in certifying a class of direct purchasers of the relevant drugs, since the FTC had previously obtained a settlement on behalf of indirect purchasers and therefore allowing recovery by direct purchasers would contravene the policy of *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), granting standing to only one class of purchasers. *See* 289 F.3d at 106. The petitioner also argued that the certification ruling was erroneous because the named plaintiffs included indirect purchasers, also contrary to *Illinois Brick* and in contravention of Rule 23's class certification requirements. *See id.* at 106. These defects, the petitioner asserted, raised "important issues of antitrust standing" that were "novel, significant, and potentially dispositive." *Id.* (internal quotation marks omitted).

[2] Plaintiff's reliance on the *Hanover Shoe* line of cases is misplaced because, as explained in part II(A) *infra*, those cases have no relevance to the issue of antitrust injury addressed by the district court here.

This Court rejected such arguments on the ground that they related more to the merits of the underlying antitrust claims, whereas "Rule 23(f) interlocutory review is limited to issues that relate to class certification" law. *Id.* Even though the Court *agreed* with the petitioner that "whether a class of direct purchasers has antitrust standing under the particular circumstances at issue is a novel question of law," the Court held that it was not an issue of class certification law properly subject to appeal under Rule 23(f). *Id.* at 107.

This Court later followed the *Lorazepam* reasoning in *In re James*, 444 F.3d 643 (D.C. Cir. 2006). There, the district court denied class certification after concluding that the plaintiffs' class employment discrimination claims were untimely under EEOC rules, even though the district court had allowed the plaintiffs' individual Title VII claims to proceed. *Id.* at 645. The plaintiffs petitioned for Rule 23(f) appeal on the grounds that the district court's denial of class certification was manifest error and that the court should have certified a class of all those plaintiffs whose individual claims were timely notwithstanding the class agents' failure to file a timely class complaint. *Id.* at 646. This Court held that *Lorazepam* required denial of the petition because the argument made by the plaintiffs related to their substantive Title VII claims, rather than to the legal standards of Rule 23. *Id.* at 646-47 ("Because this question arises under Title VII, not Rule 23, *Lorazepam* bars" interlocutory appeal.). *See also In re Delta Air*

Lines, 310 F.3d 953, 961 (6th Cir. 2002) (rejecting Rule 23(f) petition challenging class certification in antitrust case where petitioner argued that relevant market definition cut against commonality and typicality under Rule 23(a); court held that interlocutory appeal was improper because issues were "so enmeshed" with merits: "A Rule 23(f) appeal should avoid mixing the merits of the case with the class certification issues.") (citing *Lorazepam*, 289 F.3d at 107).

The present petition should be summarily rejected on the same basis, since plaintiff's claim of error goes to an issue of substantive antitrust law (the proper approach to proving antitrust injury), and not to an issue of class certification law.

II. The Petition Should Be Denied Because the Ruling Below Was Hardly "Questionable" and Was Well Within the District Court's Discretion

At bottom, the district court simply concluded that plaintiff's expert misapprehended the legal requirements for assessing antitrust injury and as a result plaintiff failed to meet her burden of showing predominance under Rule 23(b)(3) :

> In the context of the predominance inquiry in this case, . . . Plaintiff must proffer a method that will use common evidence to show that a substantial majority of the members of the proposed class were injured by—or, put another way, that there was widespread injury to the class from—Defendant's unlawful conduct.
>
> Plaintiff, however, has failed to satisfy the very standard she herself sets forth. Even if the regression analyses Capps proposes to perform show that the price of some products increased as a result of the merger, they fail to take into account any *benefits* customers may have received . . . from products that dropped in price because of Whole Foods' acquisition of Wild Oats. There is thus no way of

> knowing what percentage of the proposed class ultimately suffered any net injury.

Mem. Op. at 14 (citations omitted).

That conclusion was sound and well-supported, and it fell comfortably within the bounds of the discretion given to the district court under Rule 23. Thus, plaintiff has failed to show that the district court's class certification ruling was "questionable, taking into account the district court's discretion over class certification," let alone that it was "manifestly erroneous."

A. The District Court's Approach to Antitrust Injury Fits the Particular Facts of this Case and Is Supported by Established Antitrust Law

The district court's treatment of antitrust injury, focusing on the overall price of each plaintiff's differentiated basket of goods rather than simply on the separate price movements of individual SKUs, was consistent with precedent and appropriate in light of the facts at issue. This approach to the question of injury was compelled by plaintiff's product market allegation—premium, natural and organic supermarkets—which focuses on the cluster or basket of items purchased by consumers who shop at defendant's supermarkets, not individual items. In a case such as this one, involving separate purchases of unique or highly differentiated clusters of goods rather than a single common product, established principles of antitrust law support the district court's approach. *See, e.g.*, *Exhaust Unlimited, Inc. v. Cintas Corp.*, 223 F.R.D. 506, 513 (S.D. Ill. 2004) (concluding

that class plaintiffs in antitrust case involving cluster of various charges for textile rentals could only show antitrust injury from challenged environmental fee if overall charges resulted in "net payments for textile rental services above the competitive (or 'but-for' price"); *see id.* at 514 (holding that individual questions predominated, thus precluding class certification under Rule 23(b)(3), because "[t]he impact of total invoice price would not be measureable without considering the particular mix of products and services covered by each invoice") (citation omitted).[3] *See also Midwestern Waffles, Inc. v. Waffle House, Inc.*, 734 F.2d 705, 718-19 (11th Cir. 1984) (affirming grant of summary judgment for defendant after finding that plaintiff failed to show net economic harm from all purchases).

Indeed, this point is considered "fairly obvious" by noted antitrust scholars:

> **Net Harm.** It must be emphasized that the antitrust plaintiff is entitled to recover only its *net* harm. As the Ninth Circuit put it, "[a]n antitrust plaintiff may recover only to the 'net' extent of its injury; if benefits accrued to it because of an antitrust violation, those benefits must be deducted from the gross damages caused by the illegal conduct." The sense of this is fairly obvious as it reduces the chances of overcompensation.

[3] Similarly, the Seventh Circuit in *Kohen v. Pac. Inv. Mgmt. Co.*, 571 F.3d 672 (7th Cir. 2009) (a case plaintiff relies on), recognized that members of a proposed plaintiff class would not be able to show injury to support a claim if their gains from the alleged unlawful conduct outweighed their losses, such that they were "net gainers." *See id.* at 676, 678-79 (discussed in Mem. Op. at 14-15).

IIA Areeda Hovenkamp Blair & Durrance, Antitrust Law ¶ 392c (3d ed. 2007) (quoting *Los Angeles Mem'l Coliseum Comm'n v. Nat'l Football League,* 791 F.2d 1356, 1367 (9th Cir. 1986), *cert denied,* 484 U.S. 826 (1987)).

In contrast, plaintiff's motion for class certification rested on the counterintuitive proposition that a shopper who paid less overall for her basket of goods after the merger was nonetheless injured if the price of a single item in her basket increased as a result of the merger. The district court correctly found that proposition to be "contrary to law and logic." Mem. Op. at 15.

In her petition to this Court, plaintiff now places heavy reliance on the Supreme Court's decision in *Hanover Shoe* (a case she hardly mentioned before the district court), but *Hanover Shoe* has no relevance here. It held that direct purchasers have standing to sue for overcharges due to antitrust violations even if they pass on the overcharges to their own customers. The Court's rejection of the "pass-through defense" in *Hanover Shoe* turned on the need to identify the best-situated plaintiff to redress an antitrust violation and on the practical difficulties and inefficiencies that would arise if courts were required to assess the complex chain of effects involved in any pass-through of overcharges, including whether and to what extent the direct purchaser has increased its prices to achieve the pass-through and whether any passing on of overcharges caused the direct purchaser to suffer a loss of sales. *See* 392 U.S. at 492-94.

These considerations are unrelated to the question of antitrust injury in the present case. Here, there is no argument that plaintiffs have "passed on" any alleged overcharges, and there is no claim that consumers who can prove they paid a higher overall price for the goods they purchased because of an antitrust violation would lack antitrust standing. Rather, the issue here, simply put, is whether it is proper to focus on the overall price paid by each consumer for a differentiated basket of goods in evaluating whether the consumer has a provable claim of antitrust injury.

Plaintiff's reliance on two district court class certification opinions that cited *Hanover Shoe—In re Relafen*, 346 F. Supp. 2d at 369, and *Meijer, Inc. v. Warner Chilcott Holdings*, 246 F.R.D. at 303-04—is equally unavailing. The issue in those cases alleging delayed entry of generic pharmaceutical products was whether the named plaintiffs (small direct purchasers of the defendants' branded drug products) were adequate plaintiffs under Rule 23(a) to represent a proposed class that included the three largest drug wholesalers, notwithstanding the fact that, according to the defendants, the three large wholesalers actually benefited from the alleged delay of generic entry, since the generic producers were unlikely to distribute through the large wholesalers (thus likely driving down their sales of the drugs following generic entry). The courts there held that the large wholesalers could still maintain an action for anti-competitive overcharges in their purchases of

branded drugs even if they benefited "in some other way" from the lack of generic competition. Plaintiff highlights this language, *see* Petn. at 9, but these cases did not involve the question of predominance of common proof under Rule 23(b)(3) and did not address the proper measure of price in assessing antitrust injury.

Here, the district court did not conclude that it was acceptable to ignore an overcharge if the plaintiff benefited "in some other way"; rather, the court simply concluded that what is at issue in this particular case is the purchase of differentiated baskets of goods and that the antitrust injury inquiry in this context properly turns on whether the overall price for that basket of goods increased or decreased as a result of the merger. That approach was correct.

B. It Was Reasonable for the District Court to Conclude that Plaintiff Failed to Carry Her Burden of Showing that Antitrust Injury for the Proposed Class Could Be Proved on the Basis of Predominantly Common Evidence

Plaintiff failed to persuade the district court that antitrust injury could be proved on the basis of classwide evidence (or any other kind of evidence) because the methodology proposed by her expert completely ignored the relevant factor—the overall price that individual consumers paid for the basket of goods they purchased. *See* Mem. Op. at 14. There was nothing questionable about that ruling. The district court could only throw up its hands in frustration because under

plaintiff's methodology, there would be "no way of knowing" what percentage[4] of the proposed class, if any, may have suffered the necessary injury. *Id.* at 14.[5]

Plaintiff argues that the district court improperly relied on the unsupported "assumption" that a significant number of items sold by defendant declined in price as a result of the cost efficiencies produced by the merger. Petn. at 13-16. The district court, however, made no such "assumption." Rather, the court observed that defendant's expert, Dr. Ordover, made a showing that the majority of items sold in Whole Foods supermarkets in Los Angeles County actually decreased

[4] The district court carefully considered decisions of various courts of appeals on whether the plaintiff's burden at this juncture is to demonstrate injury to "all" class members, concluding that plaintiff needed to "proffer a method that will use common evidence to show that a substantial majority of the members of the proposed class were injured by—or, put another way, that there was widespread injury to the class from—Defendant's unlawful conduct." Mem. Op. at 14. In the end, the parsing of this standard was not decisive because the court concluded that Dr. Capps's approach was flawed and would not identify antitrust injury at all. *Id.*

[5] Plaintiff argues that the district court's ruling means the "death knell" for her claims, since her individual damages are not large enough to justify litigation. Petn. at 20. But whether the denial of class certification heralds the "death knell" of plaintiff's claims is not sufficient to support an interlocutory appeal under Rule 23(f). Plaintiff must also show that the substance of the district court's ruling was "questionable" in light of its discretion under Rule 23 *and* that the "death-knell situation" created by the district court's ruling "*is independent of the merits of the underlying claims*." *Lorazepam*, 289 F.3d at 105 (emphasis added). Here, the deficiencies in plaintiff's predominance showing, which led the district court to deny class certification, are *not* independent of the merits, for the reasons discussed in part I *supra*. In fact, the district court implicitly found that her expert's proposed methodology would fail to establish the element of antitrust injury essential to the underlying claims for *any* member of the putative class, even for plaintiff herself. *See* Mem. Op. at 14.

in price following the merger. The court relied on Dr. Ordover's testimony (not a "speculative assumption") that most likely many of these price declines were attributable to pro-competitive merger efficiencies.[6] *See* Mem. Op. at 14. While noting that Dr. Ordover had not reached a conclusion about which of the price declines were attributable to efficiencies, *id.*, the court determined that the distinct possibility that some were was an important factor that must be taken into account by plaintiff's expert. *See id.* at 14-17. Dr. Capps's admission that he would not even consider price decreases that were attributable to the merger is what moved the court to deny plaintiff's motion. *See id.* at 16-17. That ruling turned on the particular facts and proffered evidence at issue in this case and was entirely reasonable.[7]

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[6] Plaintiff's criticism that Dr. Ordover had not run regression analyses, *see* Petn. at 13-14, misses the mark. It was not Whole Foods' burden to prove anything about the data. Dr. Ordover undertook a price analysis only to demonstrate to the court that his expert opinion was based on more than hypotheses and theories. His observations gave heft to his critique of Dr. Capps's decision to ignore benefits of the merger in the face of many decreased prices.

[7] Plaintiff suggests that the district court committed error by subjecting her expert's methodology to a *Daubert*-style analysis. Petn. at 19 n.2. This suggestion is ironic, since plaintiff herself brought an unsuccessful *Daubert* challenge to Dr. Ordover's expert report at the class certification stage. *See* Mem. Op. at 15-16. The district court found Dr. Capps's report and testimony deficient in a number of important respects, including his glaring inability "even [to] tell the Court the precise analyses he intended to undertake." *Id.* at 18. Although the district court did not purport to conduct a full *Daubert* review of Dr. Capps's proposed methodology, the Supreme Court's most recent class certification decision strongly suggests that a *Daubert* analysis is fully appropriate in applying Rule 23. *See Wal-*

C. There Was Nothing Questionable or Erroneous in the District Court's Application of Class Certification Standards

Plaintiff is off base when she criticizes the district court for "resort[ing]" to the Supreme Court's decision in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011); for citing recent decisions of other courts of appeals rigorously analyzing Rule 23's requirements, including *In re Hydrogen Peroxide Antitrust Litigation*, 552 F.3d 305, 317-18 (3d Cir. 2008), *In re Initial Public Offerings Securities Litigation*, 471 F.3d 24, 39 (2d Cir. 2006), and *Oscar Private Equity Invs. v. Allegiance Telecom, Inc.*, 487 F.3d 261, 267 (5th Cir. 2007), rather than rotely repeating articulations used in prior district court decisions from within this Circuit; and for observing that this Court has not yet had occasion to provide detailed guidance on all aspects of Rule 23, including the standards for evaluating expert evidence in the application of Rule 23(b)(3). *See* Petn. at 5-6, 17-20.

It was fully appropriate for the district court to acknowledge the legal developments represented by recent decisions of the Supreme Court and other courts of appeals. *See* Mem. Op. at 6-11, 18-20. These decisions, which recognize that it is proper (indeed necessary) for district courts to evaluate how the plaintiff proposes to prove the elements of the underlying claim in considering whether

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Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2553-54 (2011) ("The District Court concluded that *Daubert* did not apply to expert testimony at the certification stage of class-action proceedings. We doubt that is so . . . ." (citation omitted)).

those elements are susceptible of common proof, are entirely consistent with the Supreme Court's longstanding admonition that the application of Rule 23's requirements must involve a "rigorous analysis" taking into consideration the legal and factual issues raised by the underlying claims. *Gen. Tel. Co. of SW v. Falcon*, 457 U.S. 147, 160-61 (1982). The district court was also surely correct that recent developments in the law create important qualifications on the continued vitality of certain less rigorous legal formulations articulated in some prior district court decisions, including *In re Nifedipine Antitrust Litig.*, 246 F.R.D. 365, 369 (D.D.C. 2007). *See* Mem. Op. at 8-10, 18-20.

Moreover, the fact that this case involves differentiated clusters or baskets of goods, rather than a single common product, such as the drug products at issue in *Nifedipine* and *Meijer*, makes this case very different from previous cases arising within this Circuit that have applied Rule 23(b)(3) to expert methodologies. The district court's finding that plaintiff's proffered methodology failed adequately to account for the differentiated nature of the cluster product at issue here readily distinguishes this methodology, and the application of Rule 23 to it, from the straightforward and logical methods found to be sufficient in *Meijer* and *Nifedipine*. *See Meijer*, 246 F.R.D. at 309 (plaintiffs' expert offered sufficient evidence to show that "'prices for the generic are uniformly lower for all [segments of the putative class] and class members than prices paid for the brand'" (alteration

in original)); *Nifedipine*, 246 F.R.D. at 371 (finding "no fault" with same expert's calculations showing that branded drug's price fell after introduction of generic version of same drug).

Thus, the district court's observations about current trends in the development of class certification law do not provide any basis for granting interlocutory appeal.

Conclusion

For all of the foregoing reasons, plaintiff's Rule 23(f) petition should be denied.

Respectfully submitted,

/s/ Paul T. Denis
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February 27, 2012

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Answer in Opposition to Rule 23(f) Petition was served this February 27, 2012, on the following persons by overnight mail:

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/s/ Paul T. Denis
Paul T. Denis

CORPORATE DISCLOSURE STATEMENT
OF WHOLE FOODS MARKET, INC.

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rules 5(a) and 26.1, Whole Foods Market, Inc. states that it operates retail food stores nationwide. It has no parent company and no publicly held company owns 10% or more of its stock.

/s/ Paul T. Denis
Paul T. Denis

Attorney for Whole Foods Market, Inc.