No. 12-8003

IN THE

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

EKATERINI KOTTARAS, On Behalf Of Herself And All Others Similarly Situated,

Plaintiff-Petitioner

v.

WHOLE FOODS MARKET, INC.

Defendant-Respondent

PETITIONER EKATERINI KOTTARAS' REPLY IN SUPPORT OF HER RULE 23(f) PETITION FOR INTERLOCUTORY APPEAL

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INTRODUCTION

Ekaterini Kottaras' Rule 23(f) Petition showed that the two bases for the district court's denial of Kottaras' motion for class certification relied upon a wrong legal standard, and therefore resulted in a manifestly erroneous class certification decision. Even the district court acknowledged that the two grounds upon which it based its decision were ones for which the District of Columbia Circuit had provided unclear or little guidance. *See* Opinion [attached as Tab 2 to Addendum to Petition], at 8 ("There is little guidance from the D.C. Circuit with respect to the standard for certifying a class under this subsection [Rule 23(b)(3)]."); *id*. at 19 ("this Circuit has not articulated clear standards for evaluating expert evidence at the class certification stage."). Granting the Petition would provide an opportunity for this Court to announce the clear guidance for class certification-related standards that the district court lamented were lacking.

Despite this, Whole Foods opposes Rule 23(f) review, arguing that the Petition does not meet the criteria set forth in *In re Lorazepam & Clorazepate Antitrust Litig.*, 289 F.3d 98 (D.C. Cir. 2002). *See* Whole Foods' Opp. at 1. Whole Foods is wrong. Kottaras' Petition and the district court's decision raise important and unresolved questions pertaining to Rule 23' class certification requirements, and the district court's resort to incorrect legal standards to resolve those questions rendered its decision to deny class certification manifestly

erroneous. The district court's denial of class certification also amounts to the "death knell" for the case, as it would not be feasible for Kottaras to continue to litigate only an individual antitrust case against Whole Foods at a cost of hundreds of thousands of dollars to be able to recover, at best, only the hundred dollars' worth of overcharges that she paid.

Kottaras' Petition should be granted.

I. REVIEW OF THE ISSUES RAISED IN THE RULE 23(f) PETITION IS NOT PRECLUDED BY *IN RE LORAZEPAM*.

Whole Foods argues that Kottaras' Petition should be denied because the issues it raises are not restricted to class certification standards, but go to the merits of the underlying case. *See* Whole Foods' Opp. at 7-9. It argues that *In re Lorazepam* forecloses Rule 23(f) review under such circumstances. *Id*. Whole Foods is wrong on both counts.

A. The District Court's Rejection Of Dr. Capps' Expert Testimony Relates Directly And Solely to Class Certification Standards.

One of the two bases relied upon by the district court to deny class certification was its decision that Kottaras' proffered expert testimony by Dr. Oral Capps, Jr., was "too vague." Opinion, at 18. In reaching that conclusion, the district court acknowledged that "this Circuit has not articulated clear standards for evaluating expert evidence at the class certification stage." Opinion at 19. Clearly, the question with which the district court struggled; i.e., what standard should

apply in evaluating expert evidence submitted in support of class certification, is one that is directed discretely at Rule 23's requirements, as opposed to the substantive merits of the underlying action. Contrary to Whole Foods' claim, therefore, this is the precise type of question that *In re Lorazepam* counsels as being an appropriate subject for Rule 23(f) review.

Although there is no extended discussion provided by the district court to explain its rejection of Dr. Capps' expert testimony, the court's conclusory decision appears to have been founded on two premises. First, despite this Court's opinion in *In re Nifedipine Antitrust Litig.*, 2009 U.S. App. LEXIS 3643 (D.C. Cir. 2009) (Fed. 23, 2009) that there was nothing improper about a district court refusing to probe the credibility of expert evidence when passing on class certification, the district court believed it appropriate to "reject" *In re Nifepidine* in favor of the reasoning of other "courts [that] now apply more scrutiny to experts at the class certification stage" because the 2003 amendments to Rule 23 impose a more rigorous class certification review. *See* Opinion, at 18 (*citing In re Hydrogen Peroxide Antitrust Litig.*, 553 F.3d 305, 323 (3d Cir. 2008)). Second, under this more rigorous review that the district court held was now to apply to Dr. Capps' expert testimony, the district court concluded that his expert report was "not sufficiently developed to meet Plaintiff's burden of showing that common questions predominate," (Opinion, at 20), because Dr. Capps had "not yet

performed a single regression [*id*., at 18]" and because although his report's presentation of his econometric model set forth the "'possible explanatory factors' that he might use in his regression – e.g., wholesale cost, advertising or sales promotional activities, seasonality, competition from other stores, average or median disposable income of the customer base—[he also testified that]. . . . the results of merits discovery may further refine this assessment and provide the basis for including additional explanatory factors to be considered as part of any regression model.'" (Opinion, at 18, *quoting* Capps' Expert Rpt., at ¶¶ 57, 58).

Both of these asserted explanations for rejecting Dr. Capps' expert evidence in the context of Kottaras' Rule 23 motion for class certification are questionable, at best. For starters, the suggestion that either the 2003 amendments to Rule 23 or the Third Circuit's *In re Hydrogen Peroxide* decision provide support for the district court to have rejected this Court's decision in *In re Nifedipine* is simply wrong. *In re Nifedipine* ***was decided a full 6 years <u>after</u> the 2003 amendments to Rule 23, and nearly a year <u>after</u> In re Hydrogen Peroxide***. This Court was thus fully aware of those two authorities when it decided *In re Nifedipine*, but chose not to interpret them as requiring heightened scrutiny for expert evidence proffered in support of class certification, as the district court concluded here.[1]

[1] Nor does the Supreme Court's more recent decision in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011) support the district court's treatment of Dr. Capps' expert report in support of class certification. *Wal-Mart* was opining only on the

The district court candidly admitted that had it employed this Court's *In re Nifedipine* standard to scrutinize Dr. Capps' expert opinion, its conclusion likely would have been different. *See* Opinion, at 18 (noting that "Capps' proposal may have satisfied the *In re Nifedipine* standard."). Until and unless this Court overrules *In re Nifedipine*, the district court was bound to follow it, as opposed to revisiting for itself the import of the 2003 amendments to Rule 23 (which were long in place already when *In re Nifedipine* was decided by this Court). Because the district court admitted that its decision as to Dr. Capps' expert opinion on the predominance of common economic proof to show adverse impact may have been different had the court applied *In re Nifedipine*, its rejection of Dr. Capps' expert report is at least questionable, and merits Rule 23(f) review.

Further, even if one could overlook the error in the district court's adoption of a wrong standard for review of expert evidence proffered at the class certification stage, the district court's application of that standard was erroneous. The district court rejected Dr. Capps' expert testimony because Dr. Capps had not yet performed the regression presented in the model he proffered, and because he conceded that some of the explanatory variables that would form part of the

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"commonality" requirement of Rule 23, as opposed to predominance, because, unlike the Rule 23(b)(3) class sought to be certified by Kottaras, the *Wal-Mart* class was certified pursuant to Rule23(b)(2), which does not require a showing of predominance. The Supreme Court, therefore, made clear that the standards for showing predominance under Rule 23(b)(3) was not before it. *Id*. at 2549, n.2.

regression equations of the model could change based on information garnered from the merits discovery that was yet to take place. No reading of Rule 23(f) supports those grounds for rejecting Dr. Capps' expert report. Even courts in those circuits that employ a *Daubert*-type or more strict review of expert evidence at the class certification stage, do not require an expert to actually have carried out his analysis at the class certification stage. *See* Petition at 19-20 (collecting cases). To hold otherwise, absurdly would require resolving the merits of the action prior to the rendering of any decision on class certification.

B. The Improper Recognition Of An Offset Affirmative Defense To Find Predominance Lacking Is Properly Reviewed Under Rule 23(f).

The district court's other ground for denying class certification—that Kottaras failed to show that adverse impact could be shown by common proof that would predominate over questions affecting individual class members— was also flawed. The district court recognized that its decision as to Kottaras' failure to meet Rule 23(b)(3)'s predominance requirement was saddled by the fact that "[t]here is little guidance from the D.C. Circuit with respect to the standard for certifying a class under this subsection [i.e. Rule 23(b)(3)]." Opinion, at 8. Hampered by this lack of guidance from this Court, the district court's flawed reasoning led to a manifestly erroneous decision.

As Kottaras' Petition documented, the district court was wrong because it concluded that to show adverse impact, each Plaintiff would have to offset against

the overcharges she paid for any Whole Foods' products purchased, the value of any lower costs that Whole Foods' realized on other products as a result of the merger and passed on to the class member on her purchases of those other products. *See* Petition, at 8-11. Because different consumers purchase a different mix of products at Whole Foods, the district court reasoned that that type of analysis would call for individual proof of adverse impact as opposed to common proof that would predominate. *See* Opinion, at 16-17.

As Kottaras' Petition showed, however, the district court relied on the wrong premise that Whole Foods was, in fact, legally entitled to use any such merger-related lower costs that it may have passed on to a consumer on Whole Foods' pricing of some products as an offset against any overcharges that Whole Foods' imposed directly on that consumer on other products as a result of the merger. Longstanding Supreme Court precedent dating to *Hanover Shoe v. United Shoe Machinery Co.*, 392 U.S. 481, 494 (1968) precludes that type of pass-on defense. Courts have interpreted *Hanover Shoe's* holding to preclude an antitrust defendant from arguing that although the plaintiff was overcharged as a result of the antitrust violation, she nevertheless sustained no injury because she realized an

equivalent benefit as a result of the violation that offsets any overcharge. *See In re Relafen Antitrust Litig.*, 346 F. Supp.2d 349, 369 (D. Mass. 2004).[2]

Whole Foods counters that regardless of the merits of Kottaras' argument, it should not be subject to review now because it is not limited to an issue of class certification standards, but goes to the merits of Kottaras' antitrust case.[3] That argument proves too much. *In re Lorazepam* makes clear that, although Rule 23(f) review is appropriate where the questions presented are discretely directed to Rule 23 criteria, that does not preclude Rule 23(f) appellate review to encompass merits issues that relate to the class certification decision:

> [T]here may be occasions when threshold issues (e.g., statute of limitations), jurisdictional issues (e.g., Article III constitutional

[2] Aside from erroneously recognizing an offset defense for passed-on savings in violation of the pass-on defense bar, the district court's decision is wrong for merely assuming, without any evidentiary support, that there were, in fact, a large number of Whole Foods' products that experienced a merger-related price decline.

[3] Whole Foods quotes Professor Areeda for the unremarkable proposition that an antitrust plaintiff is entitled to recover only for his "net harm." *See* Opp. at 12. That language says nothing about whether the downstream passing-on of savings provides a cognizable basis for an antitrust defendant to deduct these passed-on savings amounts from the direct overcharges it imposed directly on the plaintiff, so as to arrive at a lower or non-existent "net harm." *Hanover Shoe* holds that the passing-on defense and its recognized corollaries do not permit such offsets. Were Professor Areeda's quoted passage read out of context, as presented by Whole Foods, it would lead to the doing away of the bar on the pass-on defense because one could argue that a plaintiff who has been overcharged by $1.00 for a product as a result of the defendant's antitrust violation, but then was able to resell it at an increased price of $2.00 above the pre-violation period, has suffered no net harm because the antitrust violation permitted him to profit by $1.00. Yet, clearly this is what *Hanover Shoe* forbids.

> standing), or *issues on the merits (e.g., affirmative defenses or the elements of a cause of action),* would be appropriate for interlocutory review pursuant to Rule 23(f). In such circumstances, however, those issues would relate in some manner to the certification of the class or the court's jurisdiction.

In re Lorazepam, 289 F.3d at 108 (emphasis added).

Here, Whole Foods' argument that it is entitled to use any merger-related cost decreases that it received from its suppliers and then passed on to consumers on some products as an offset against higher prices that it directly charged consumers on other products as a result of the merger is precisely the type of affirmative defense that is related to class certification that *In re Lorazepam* recognized would be the proper subject of Rule 23(f) review. *Id*.; *see also United States v. Renda Marine, Inc.*, 667 F.3d 651, 659 (5th Cir. 2012) ("The district court correctly noted that offset is an affirmative defense."). Because Whole Foods maintains that determining whether this offset defense applied against a particular class member would require an individual inquiry into each class member's particular purchases, the correctness of that affirmative defense assertion is inextricably related to the class certification decision. Contrary to Whole Foods' assertion, therefore, *In re Lorazepam* permits Rule 23(f) review of the district court's reliance on this defense as a basis for its class certification denial.

II. DENIAL OF CLASS CERTIFICATION IS A "DEATH KNELL."

In re Lorazepam recognized that Rule 23(f) review is appropriate, *inter alia*, "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." *In re Lorazepam*, 289 F.3d at 105. The denial of class certification leaves only Kottaras' individual case to be litigated. Relegating Kottaras to pursuing only her individual case valued at a few hundred dollars, at most, clearly would be unfeasible in light of the hundreds of thousands of dollars it would cost to prosecute this antitrust case.

Other federal courts have recognized the futility of forcing a lone plaintiff to litigate a complex antitrust action against a large defendant on an individual basis rather than a class action. *See In re American Exp. Merchants' Litig.*, 667 F.3d 204, 218 (2d Cir. 2012) (in antitrust case "the only economically feasible means for plaintiffs enforcing their statutory rights is via a class action."); *see also Eisen v Carlisle & Jacquelin*, 417 U.S. 156, 161 (1974) ("A critical fact in this litigation is that petitioner's individual stake in the damages award he seeks is only $70. No competent attorney would undertake this complex antitrust action to recover so inconsequential an amount. Economic reality dictates that petitioner's suit proceed as a class action or not at all."). Unsurprisingly, Whole Foods' does not dispute that the district court's denial sounds the "death knell" to the case.

CONCLUSION

For all the foregoing reasons, Kottaras' Petition should be GRANTED.

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Respectfully submitted,

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