United States Court of Appeals

for the

Third Circuit

Case No. 15-3791

IN RE: CLASS 8 TRANSMISSION INDIRECT PURCHASER ANTITRUST LITIGATION

RYAN AVENARIUS, on behalf of themselves and all others similarly situated; BIG GAIN, INC.; CARLETON TRANSPORT SERVICE; JAMES CORDES, on behalf of Cordes Inc.; MEUNIER ENTERPRISES LLC; PAUL PROSPER; RODNEY E. JAEGAR; PURDY BROTHERS TRUCKING CO.; TC CONSTRUCTION CO. INC.; PHILLIP E. NIX,

Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

REDACTED BRIEF AND APPENDIX
Volume 1 of 7 (Pages A-1 to A-62)
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JURISDICTIONAL STATEMENT

This is an appeal from (1) an order dismissing the case, accompanied by a memorandum opinion, entered by Judge Sue L Robinson (the "District Court") on October 21, 2015, and (2) a ruling by the District Court at a June 25, 2013 hearing limiting the scope of discovery.

STATEMENT OF ISSUES

1. Did the District Court err when it denied class certification for lack of adequate representatives, where the District Court never examined the issue of Article III standing of each individual proposed class representative, and where it did not address the facts regarding the adequacy of proposed substitute representatives for the only two states that were challenged?

2. Did the District Court err by refusing to allow substitution of the California and Kansas Plaintiffs, when those Plaintiffs provided full discovery, the adequacy of such Plaintiffs was fully briefed by the parties in the normal course of the class certification proceedings, and Appellees would not have been prejudiced by the substitution?

3. Did the District Court err by dismissing the entire case for lack of Article III standing, where the District Court did not address the individual standing of any of the Appellants, who have individual actions that survive even after the District Court denied their motion for class certification?

4. Did the District Court erroneously deny class certification by, *inter alia*: (a) ruling on an outdated class definition that was no longer being proposed by Appellants; (b) denying predominance by relying on an older partial dataset of truck purchaser data that was later supplanted with more robust data analyzed in Appellants' rebuttal expert report; (c) finding the proposed class representatives inadequate and refusing to allow substitution of two proposed substitute class representatives; and (d) faulting Appellants' expert's exclusion of various data in his analysis without explanation after previously restricting Appellants' access to relevant data by denying Appellants' motion to compel post-2010 data.

5. Did the District Court abuse its discretion in denying Appellants' motion to compel Appellees to produce transactional data that post-dated March 2010, despite the fact that that such data were necessary to analyze damages caused by the alleged conspiracy?

RELATED CASES AND PROCEEDINGS

This case was coordinated with *Mark S. Wallach et al. v. Eaton Corp. et al.*, 1:10-cv-00260 (SLR) (D. Del.), an action that was dismissed on August 31, 2015, and is currently before this Circuit, captioned 15-3320.

STATEMENT OF THE CASE

Appellants[1] seek to represent a class of tens of thousands of truck purchasers who purchased Class 8 trucks containing Eaton transmissions. Appellants allege the prices of those transmissions were inflated by Appellees' conspiracy to monopolize the market for truck transmissions. Appellees conspired to drive ZF Meritor, Eaton's only significant competitor, out of the Class 8 transmission business. In a prior case involving the same wrongdoing, affirmed by this court as to liability, Eaton was found to have violated the antitrust laws by illegally driving ZF Meritor out of business. *See ZF Meritor, LLC v. Eaton Corp.,* 696 F.3d 254, 264 (3d Cir. 2012). Appellees' conduct increased prices, reduced choice, and stunted technological advances in the Class 8 transmissions market, thus injuring the proposed Class.

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[1] The Appellants who filed the appeal include Ryan Avenarius (representing the Iowa State Class); Big Gain Inc. (representing the Minnesota State Class); Carleton Transport Service (representing the Nebraska State Class); James Cordes on behalf of Cordes Inc. (representing the Michigan State Class); Meunier Enterprises LLC, individually and as parent company of Auto Transport Leasing, Inc. and Exotic Car Transport, Inc. (representing the Florida and North Carolina State Classes); Paul Prosper on behalf of Prosper Trucking Inc. (representing the Vermont State Class); Rodney E. Jaeger (representing the Wisconsin State Class); Purdy Brothers Trucking Co. (representing the Tennessee State Class); proposed California representative T.C. Construction Co. Inc. (seeking to represent the California State Class); and proposed Kansas representative Philip E. Nix (seeking to represent the Kansas State Class). However, as the class definition was modified during the course of class certification briefing to exclude purchasers of Daimler trucks, the current class representatives from the states of Tennessee, Iowa, Nebraska,

On October 4, 2010, Appellants filed a class action (the "Action"), on behalf of Appellants Avenarius and Jaeger in the District of Kansas (additional class representatives were added to subsequent complaints). On January 4, 2011, the Action was transferred to the District of Delaware. On February 4, 2011, Appellants filed an Amended Complaint. Appellees moved to dismiss and, on October 16, 2012, the District Court denied that motion.

On July 25, 2013, the District Court held a discovery conference to address, *inter alia*, Appellants' request for cost and sales data from each of the Appellees that postdated March 2010. After hearing argument from counsel for all parties, the District Court denied that request.

On November 3, 2014, while fact discovery had not yet concluded, Appellants filed (1) a Motion For Leave To Withdraw Class Representatives And To Substitute New Class Representatives In Their Place, and (2) a Motion For Class Certification. The proposed new class representatives, T.C. Construction Co. and Philip Nix, produced relevant documents and were subsequently deposed by Defendants at approximately the same time the other indirect plaintiffs were being deposed. After all motions were fully briefed, the District Court held an evidentiary hearing on March 25, 2015.

Vermont, and Minnesota, would no longer be included under that modified class definition.

On October 21, 2015, the District Court issued an order and memorandum denying class certification and dismissing the case, holding that no named plaintiff had Article III standing to pursue its claims. This is the ruling that is presented for review.

STATEMENT OF FACTS

A. Industry Background: Class 8 Trucks and Accompanying Transmissions

Appellee Eaton manufactures and sells transmissions for Class 8 Trucks (also known as heavy duty trucks). Class 8 Trucks consist of three distinct subgroup -- linehaul, vocational, and performance -- with each subgroup requiring its own type of Class 8 Transmission. Eaton had been the only significant manufacturer of heavy duty (HD) transmissions from the 1950s until Meritor entered the market in 1989. *ZF Meritor,* 696 F.3d at 264. As detailed below, Eaton's long-term agreements ("LTAs") with the original equipment truck manufacturer Appellants ("OEMs")[2] stifled competition.

[2] The OEMs include Appellees Daimler Trucks North America LLC ("Daimler"); Navistar International Corporation ("Navistar"); International Truck and Engine Corporation ("International"); PACCAR Inc. ("PACCAR"); Kenworth Truck Company ("Kenworth"); Peterbilt Motors Company ("Peterbilt"); Volvo Trucks North America ("Volvo"); and Mack Trucks, Inc. ("Mack"). Daimler produces trucks under the labels Freightliner, Sterling, and Western Star. Navistar produces trucks under the International label. PACCAR produces trucks under the Peterbilt and Kenworth labels. Volvo and Mack merged in 2002.

In the United States, Class 8 Truck purchasers essentially customize their own trucks by working with a dealer to select the brand and model for various component parts, including transmissions, to be included in their specific truck. *See ZF Meritor,* 696 F.3d at 264. Class 8 Truck purchasers then select components, such as the transmission, tires, and engines, from an OEM's "data book." In a data book, each component has an associated price. The data book, thus, allows one to disaggregate the price of each component, such as the transmission, from the total price of the truck.

In a data book, various prices for optional components are listed, relative to the "standard" or "preferred" offering. *Id*. A component's position in the data book is crucial for business, and data book positioning is "essential in the industry." *Id*.

B. <u>ZF Meritor's Entry Threatens Eaton's Monopoly</u>

Meritor began manufacturing Class 8 Transmissions in 1989, focusing mostly on transmissions intended for linehaul trucks. *Id.* Soon thereafter, Meritor and ZF Friedrichshafen AG, a European manufacturer of automatic and fully-automated manual Class 8 Transmissions, formed the joint venture ZF Meritor. *Id*. One of the purposes of this joint venture was to adapt the two-pedaled European ASTronic transmission for the North American market. *Id.* In 2001, this transmission, called the "FreedomLine," was unveiled. *Id*. The FreedomLine represented a significant improvement over other transmissions in reliability, fuel

economy, and ease of operation.[3]

C. The Conspiracy: Eaton and the OEMs Plan to Eliminate Meritor and Share in the Proceeds of Eaton's Enhanced Monopoly

In response to ZF Meritor's growing competitive threat and an economic downturn affecting the OEMs' bottom line, Eaton and the OEMs agreed to marginalize ZF Meritor products and enhance Eaton's monopoly power. In exchange, the OEMs would receive a share of the monopoly's profits.

Eaton and each of the OEMs facilitated their conspiracy by entering into substantially similar LTAs that were designed to, and did, foreclose competition in the Class 8 Truck Transmission Market, and amounted to what were essentially *de facto* exclusive dealing arrangements. *ZF Meritor*, 696 F.3d at 282-84. A key component of these LTAs were share-based rebates, whereby the OEM would receive rebates on a quarterly basis that were tied to minimum purchasing

thresholds that required a large percentage of their trucks (often 90% or more)[4] be sold with Eaton transmissions. *Id*. at 265. These rebates were often applied directly to the OEM's bottom line, and funds from the rebates were rarely used to lower the selling price of a truck.[5]

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[4] Freightliner: "Eaton's LTA with Freightliner, the largest OEM, provided for rebates if Freightliner purchased 92% or more of its requirements from Eaton . . . . In 2003, Freightliner and Eaton modified the agreement from a fixed 92% goal to a sliding scale, which entitled Freightliner to different rebates at different market-penetration levels." *ZF Meritor*, 696 F.3d at 264 and n.7.

Navistar: "Under Eaton's LTA with International, Eaton agreed to make an up-front payment of $2.5 million, and any additional rebates were conditioned on International purchasing 87% to 97.5% of its requirements from Eaton." *Id.* at 264.

PACCAR: "The PACCAR LTA provided for an up-front payment of $1 million, and conditioned rebates on PACCAR meeting a 90% to 95% market-share penetration target." *Id.*

Volvo/Mack: "Eaton's LTA with Volvo provided for discounts if Volvo reached a market-share penetration level of 70% to 78%. . . . The share penetration targets in the Volvo LTA were lower because Volvo also manufactured transmissions for use in its own trucks. The commitment to Eaton, plus Volvo's own manufactured products, accounted for more than 85% of Volvo's needs." *Id*. at 264 and n.8.

To meet the penetration targets, the OEMs and Eaton employed a variety of tactics to further their conspiracy to ensure the OEMs reached their purchase thresholds, and to enhance Eaton's monopoly power, including, among other things:

- **Manipulating the OEMs' data books in favor of Eaton and to the disadvantage of ZF Meritor:** For example, [redacted] replaced ZF Meritor with Eaton as the standard data book option.[6] Freightliner eventually removed certain ZF Meritor transmissions from their data books entirely,[7] and PACCAR and Volvo "require[d] that Eaton products be listed as the preferred offering."[8]
- **Pricing competing transmissions such as ZF Meritor's at artificial penalties compared to Eaton's:** Daimler[9] and International[10] each assigned

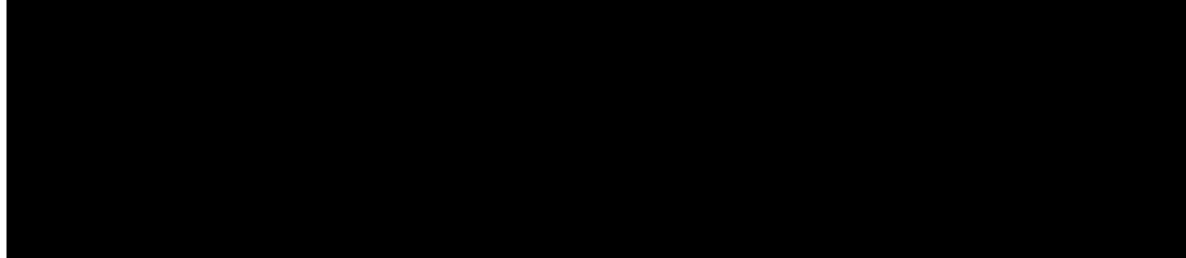
[redacted]

[7] *ZF Meritor,* 696 F.3d at 265.

[8] *Id.*

[9] "[T]he Freightliner LTA required that ZF Meritor's products be priced at a $200 premium over equivalent Eaton products." *ZF Meritor,* 696 F.3d at 266.

artificially-high prices to ZF Meritor products in their data books.

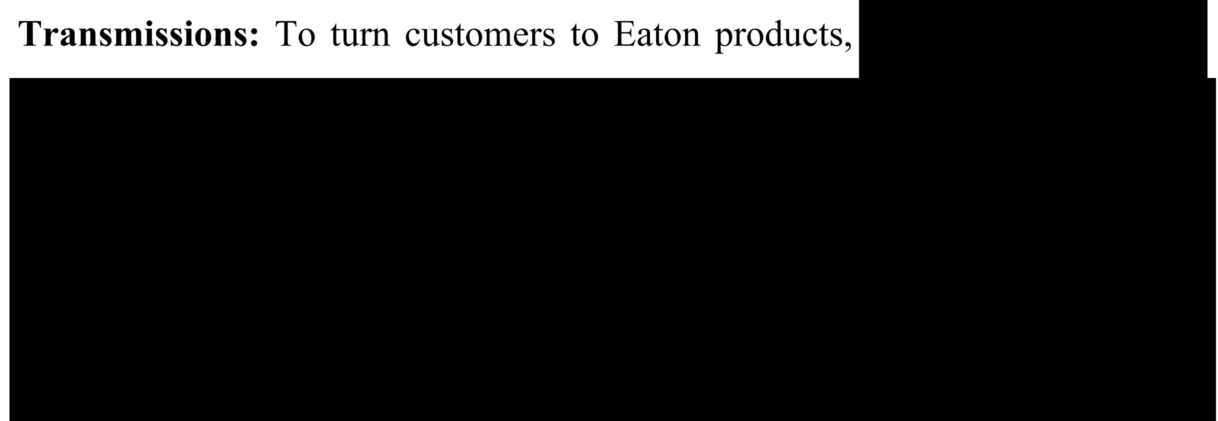


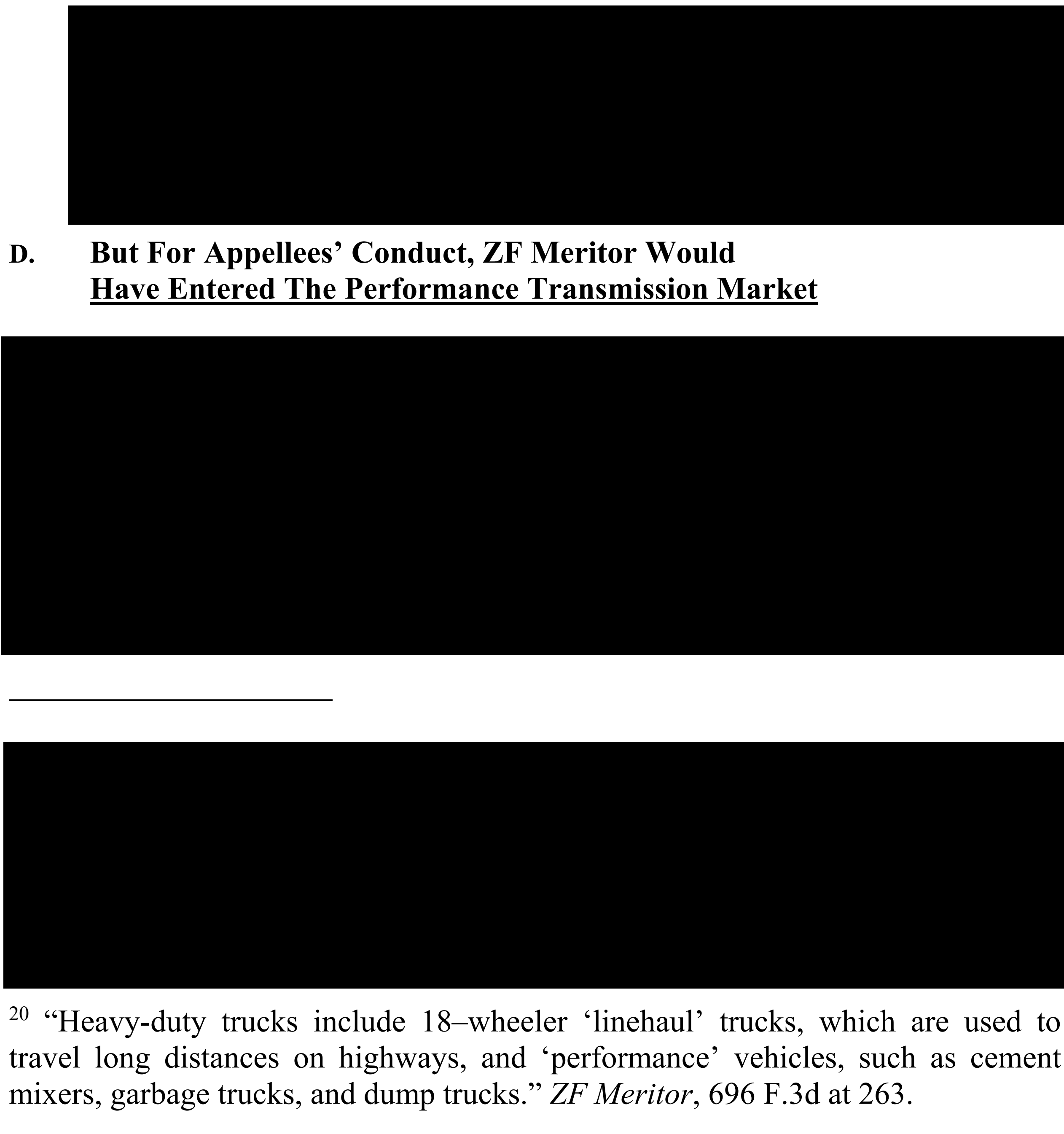
- **Identifying truck purchasers and fleets that could be converted to Eaton transmissions and assisting with that conversion**: all worked with Eaton to provide them with

[10] "International agreed to an 'artificial[ ] penal[ty]' of $150 on all of ZF Meritor's transmissions as of early 2003." *Id*.

information about customers who could be "conquested," i.e. convinced to change their orders from Meritor to Eaton Transmissions.

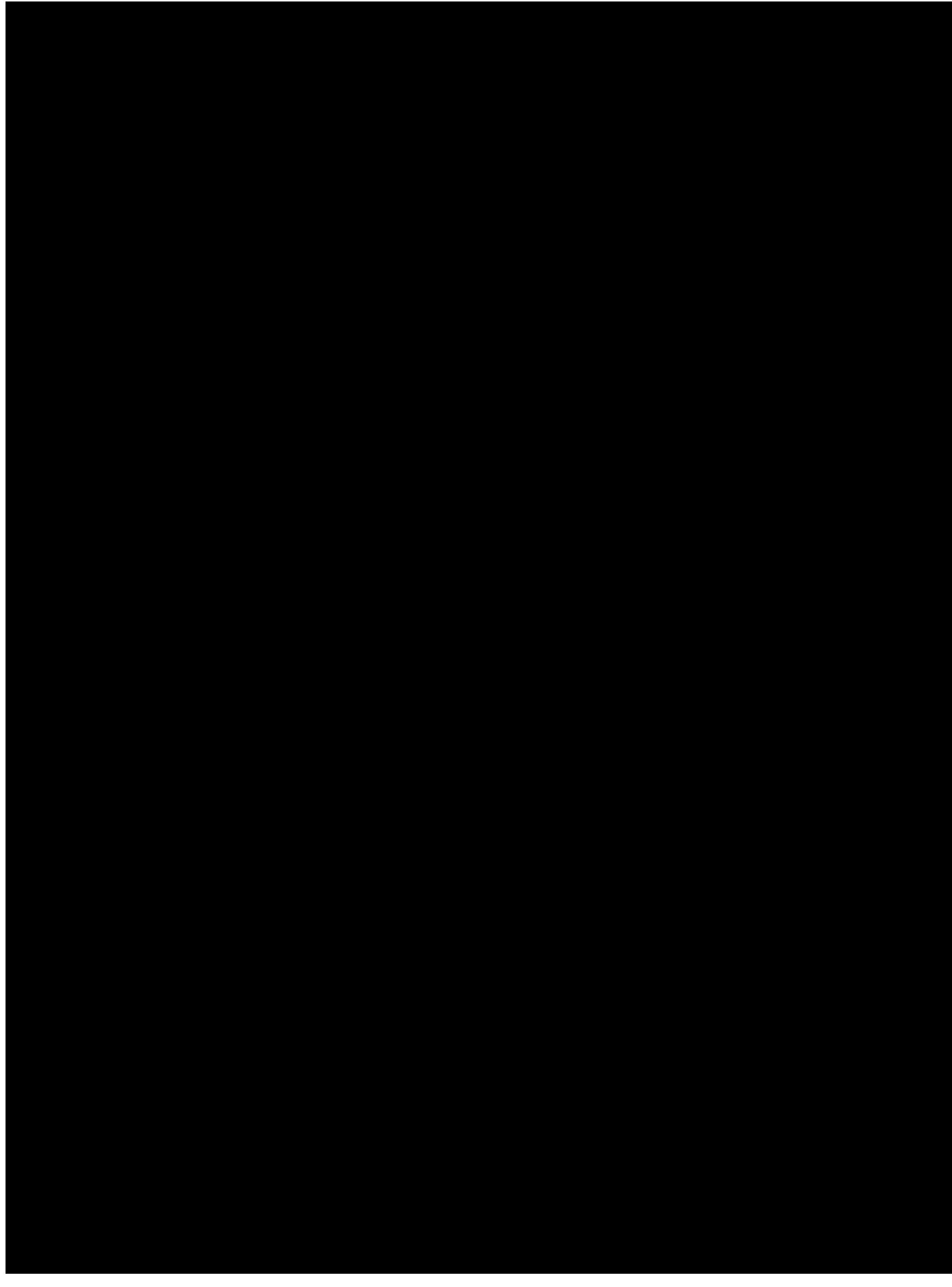
- **Dissuading buyers from choosing, or refusing to promote ZF Meritor Transmissions:** To turn customers to Eaton products,

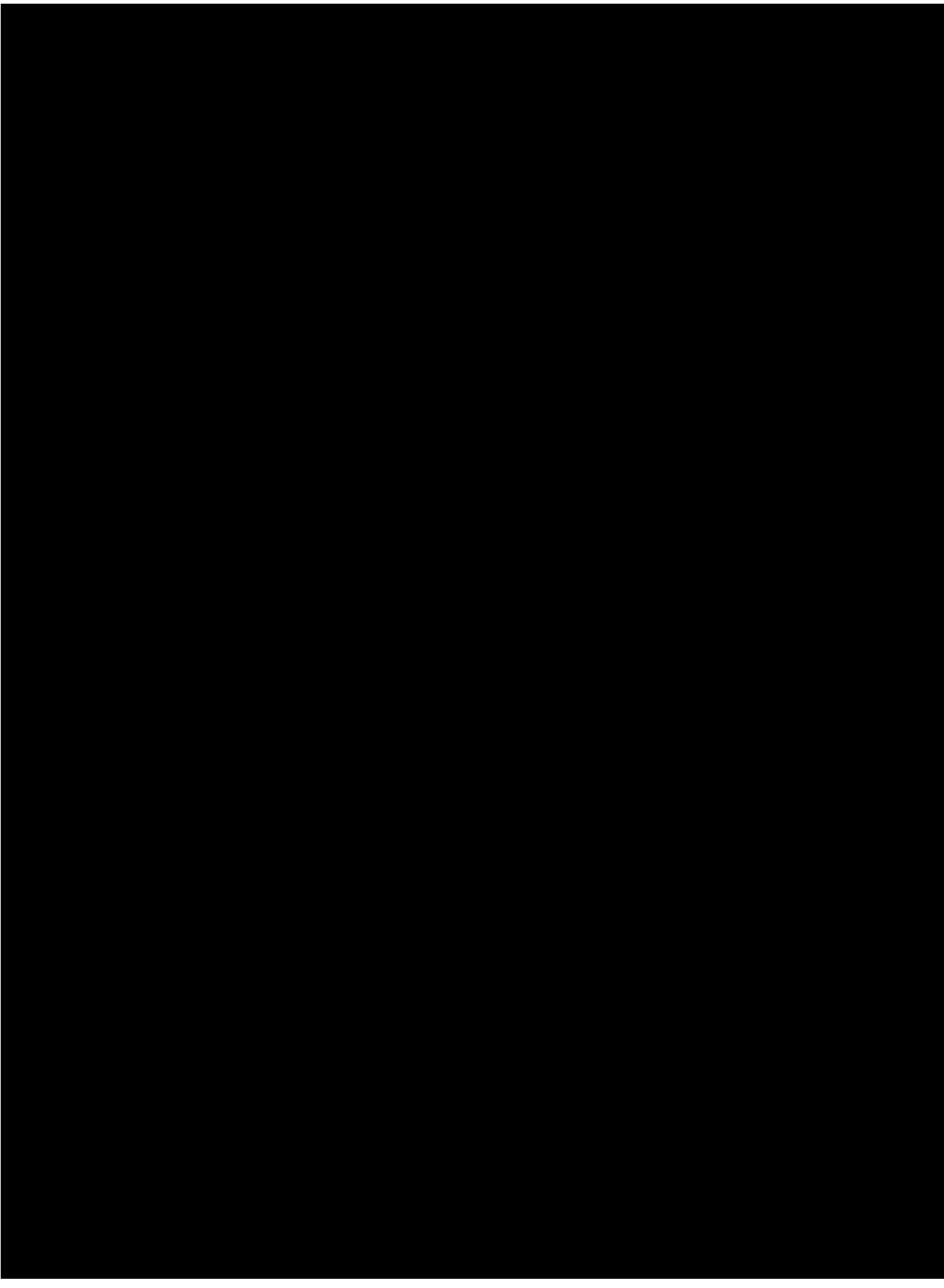




D. But For Appellees' Conduct, ZF Meritor Would Have Entered The Performance Transmission Market

[20] "Heavy-duty trucks include 18–wheeler 'linehaul' trucks, which are used to travel long distances on highways, and 'performance' vehicles, such as cement mixers, garbage trucks, and dump trucks." *ZF Meritor*, 696 F.3d at 263.





E. A Jury Decides Eaton Violated The Federal Antitrust Laws And Finds Against Eaton And In Favor Of ZF Meritor

The conduct above hurt ZF Meritor and competition in general. In 2003, the ZF Meritor joint venture dissolved, and in January 2007, Meritor all but exited the transmission business. *ZF Meritor*, 696 F.3d at 267.

On October 5, 2006, ZF Meritor filed a complaint in the District Court of Delaware against Eaton, alleging Eaton engaged in illegal predatory and monopolistic activity with respect to its Class 8 Transmission business, in violation of Federal antitrust laws. *ZF Meritor,* 696 F.3d at 267. On October 14, 2009, a jury rendered a verdict against Eaton, finding, *inter alia*, as follows:

- Eaton's LTAs with the OEMs constituted a contract, combination, or conspiracy that unreasonably restrained trade in violation of Federal antitrust laws;
- Eaton's LTAs with the OEMs constituted *de facto* exclusive dealing agreements which substantially lessened competition or tended to create a monopoly in the Class 8 Truck Transmission Market; and
- Eaton unlawfully acquired or maintained monopoly power in the

Class 8 Truck Transmission Market.[29]

On October 30, 2009, the District Court released the trial transcripts—which outlined the OEMs' substantial involvement in (and initiation of) the price fixing conspiracy with Appellee Eaton. On March 10, 2011, the District Court denied Eaton's motion for judgment as a matter of law, or in the alternative, a new trial,[30] and, on September 28, 2012, the Third Circuit affirmed.[31]

SUMMARY OF ARGUMENT

The District Court, in limiting the scope of discovery, denying class certification, and dismissing the action, made findings and rulings that contravened both the facts and the law, while simultaneously neglecting to consider and rule on other issues, and thus committed reversible error. The District Court erred as a matter of law in dismissing the case in its entirety, and failed to conduct the required rigorous analysis in examining class certification under Fed. R. Civ. P. 23.

First, the District Court not only denied Appellants' motion for class certification, but it then dismissed Appellants' claims "because the proposed class lacks representation." District Court's Memorandum Opinion, dated October 21, 2015 ("Opinion") at 27. The District Court did so apparently based upon the

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[29] Jury Verdict Sheet in *ZF Meritor* Action [A-1180-85].

[30] *ZF Meritor, LLC v. Eaton Corp.*, 769 F. Supp. 2d 684 (D. Del. 2011).

[31] *ZF Meritor, LLC v. Eaton Corp.*, 696 F.3d 254 (3d Cir. 2012).

conclusion that since it found the proposed class representatives were inadequate, there was no Article III case or controversy left. But class certification and Article III do not interact in that way. The Appellants' claims were brought as indirect claims on behalf of themselves *and* the proposed class. The District Court provided no explanation as to why these Appellants, even if a class was not certified, would be prohibited from proceeding with their individual claims.

Second, the District Court found all the Appellants to be inadequate class representatives because of changes proposed to the representatives, but it never actually addressed the adequacy of those proposed representatives.

Third, the District Court refused to allow substitution of two class representatives, even though Appellees were provided full and timely discovery from the two proposed substitutes, and Appellees did not establish any other prejudice.

Fourth, the District Court failed to conduct the required "rigorous analysis" in determining whether a class should be certified. The District Court, among other things, (1) ignored Appellants revision to the class definition that mooted several of Appellees' arguments; (2) ignored Appellants' expert rebuttal report and revised damages models that relied on a much broader data set; (3) erroneously held that several class representatives actually obtained *benefits* directly from the alleged conspiracy "that exceeded the alleged overcharge;" (4) failed to evaluate the

reasons why Dr. Lamb chose to exclude certain data from his analysis; (5) failed to rigorously analyze Dr. Lamb's pass through models, and (6) failed to consider Dr. Lamb's analysis of Appellees' documents, industry publications, and economic literature, which also demonstrated pass through to indirect purchasers.

Fifth, at a June 13, 2013 hearing, the District Court failed to require Appellees to produce pricing and sales data that post-dated March 2010, even though such data was important to Appellants' injury and damages analysis, and even the District Court and Appellees' counsel seemed to recognize its relevance.

ARGUMENT

I. Standards of Review

The standard of review is *de novo* for legal conclusions concerning a party's Article III standing, and clear error for any factual findings underlying the lower court's determination. *Nat'l Collegiate Athletic Ass'n v. Governor of N.J.*, 730 F.3d 208, 218 (3d Cir. 2014).

In reviewing a denial of class certification, the trial court's legal rulings are subject to *de novo* review. *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 312 (3d Cir. 2008). The trial court's findings of fact, its application of law to facts, and its decision regarding class certification are otherwise reviewed for an abuse of discretion. *Id.* at 312, 320. Abuse of discretion "occurs if the district court's decision rests upon a clearly erroneous finding of fact, an errant conclusion of law

or an improper application of law to fact." *Grandalski v. Quest Diagnostics Inc.*, 767 F.3d 175, 179 (3d Cir. 2014).

The standard of review of a district court's denial of a motion to substitute plaintiffs is abuse of discretion. *DirecTV, Inc. v. Leto*, 467 F.3d 842, 847 n.1 (3d Cir. 2006). However, the district court's discretion is "restricted to what is "just"" and is "abated when it 'prejudic[es] any substantial right of plaintiffs." *Id.* at 845-846. A result that would prejudice any substantial right would be an abuse of discretion as a matter of law. *Id.* at 847.[32]

II. The District Court Improperly Dismissed The Entire Case For Want of Adequate Class Representatives

While the District Court improperly denied Appellants' motion for class certification, the subsequent dismissal of the entire case, which constituted dismissal of each Appellant's individual claims was improper as a matter of law. These individual claims could not properly be dismissed merely because class certification was denied or because of a proposed class representative was found to be inadequate. *See, e.g., Amgen Inc. v. Connecticut Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1195 (2013) ("Merits questions may be considered to the extent—but

[32] *DirectTV* involved the effects of a statute of limitations when dropping a party and choosing between dismissal or severance. As dropping and adding parties are governed by the same sentence of the rule, the question of what is just limitation applies to both and the court's discretion cannot be exercised in a manner that would prejudice any substantial right by refusing an addition absent strong countervailing considerations to the contrary.

only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied."); *Bell v. Lockheed Martin Corp.*, No. CIV. 08-6292 RBK/AMD, 2014 WL 2920503, at *4 (D.N.J. June 27, 2014) ("the Court denied class certification, so that now only Plaintiff's individual claims remain"). For this reason, the dismissal of the entire action, which included dismissal of each of Appellants' individual claims (and not only state class claims), merely because the District Court concluded some individuals would not be representing a class, was improper.

III. The District Court Erred When If Found the Proposed Class Representatives Were Not Adequate Without Actually Addressing the Adequacy of the Proposed Representatives

The District Court found the proposed class representatives were inadequate because of the "potential upheaval in class representation at this stage" resulting from the proposed substitution of two class representatives and perhaps the Parties' dispute over the standing of two other representatives. Order at 12-13. The District Court, however, did not actually address the standing of any of the proposed class representatives or whether any prejudice would actually result from substitution. In fact, Appellees were provided full discovery of the proposed replacement representatives through document productions and depositions that occurred prior

to class certification briefing. Thus, Appellees would not have been prejudiced by permitting the substitution and there would not have been any "upheaval."[33]

The District Court ruled that the proposed replacement of those two representatives created a "potential upheaval in class representation at this stage of the litigation," such that "the court is unable to find that the proffered class representatives or their proposed substitutions can fairly and adequately protect the interests of the class." Opinion at 12. In short, based solely on the proposed substitution of class representatives from two states, the representatives from *every state* were rejected on adequacy grounds. The District Court then compounded that error by inexplicably dismissing the entire case and all individual claims, not for lack of any individual standing to assert a claim, but because "the proposed class lacks representation." Opinion at 27.

The District Court's rulings were contrary to law because the "rigorous analysis" on adequacy under Rule 23 required a *determination* on these issues, not identification of *possible* issues. The District Court was required to examine the adequacy of each proposed representative. Adequacy cannot be resolved by simply

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[33] The District Court also noted that "[t]he parties additionally dispute whether the Michigan and Vermont subclasses have standing." Appellants allege that both Mr. Cordes suffered the harm from overcharge, by way of his complete ownership of Cordes, Inc. He also made the purchasing decisions at issue. (Mr. Prosper, the proposed representative from Vermont now falls outside the modified class definition that excludes Daimler purchasers.) However, to the extent that the District Court requires that the formal entities be intervened or substituted for Mr. Cordes, Appellants will do so.

noting that Appellees raised an issue as to certain representatives, or even just blindly dismissing the two proposed substitutions as being too late, without finding any prejudice as to Appellants. Indeed, this Court has directed that all issues relevant to class certification must be resolved with factual findings. *Marcus v. BMW of North America LLC,* 687 F.3d 583, 591 (3d. Cir. 2012). This the District Court failed to do.

Moreover, as long as "there is at least one named Plaintiff who will fairly and adequately represent the class," the adequacy requirement is met. *In re K-Dur Antitrust Litig.*, CIV. A. 01-1652 (JAG), 2008 WL 2660723 (D.N.J. Mar. 27, 2008). The mere disqualification of one state's proposed representative does not serve to disqualify all other proposed class representatives. Even the disqualification of a proposed representative based solely on the fact that substitute class representatives were proposed, or might be needed in the event of an adverse standing determination, is erroneous too since substitution of plaintiffs is common in class litigation. *Phillips v. Ford Motor Co.,* 435 F.3d 785, 787 (7th Cir. 2006) ("[s]ubstitution of unnamed class members for named plaintiffs who fall out of the case because of settlement or other reasons is a common and normally an unexceptionable ('routine') feature of class action litigation . . . in the federal courts"). Certainly, the issue of whether *two* class representatives can be

substituted does not excuse analysis of whether the Rule 23 factors have been met by any of the other proposed class representatives.

Moreover, the District Court faulted Appellants for seeking substitution "four years" after the case was filed, but the need to substitute these representatives did not arise until just prior to the class certification motion. Substitution of the Kansas representative resulted from Appellants' decision to amend the class definition, and the other arose from recent circumstances unique to the California representative. It is "[n]ot until the existence and limits of the class have been established and notice of membership has been sent does a class member have any duty to take note of the suit or exercise any responsibility with respect to it." *McKowan Lowe & Co. v. Jasmine, Ltd.,* 295 F.3d 380, 384 (3d Cir. 2002). In fact, when a class representative is found to be inadequate, the usual rule is to allow time to find a replacement:

> [l]ater replacement of a class representative may become necessary… In such circumstances, courts generally allow class counsel time to make reasonable efforts to recruit and identify a new representative who meets the Rule 23(a) requirements. The Court may permit intervention by a new representative or may simply designate that person as a class representative in the order granting class certification.

Manual for Complex Lit., § 21.26 (4th ed. 2004). Here, the District Court's reasoning about "potential upheaval" is inconsistent with the law regarding when new class representatives may appear in the case, and the rigorous analysis

required under Rule 23. The District Court should have conducted a full analysis as to the adequacy of each class representative and allowed further time to find a new representative as to any found lacking.

IV. The District Court Abused Its Discretion When It Failed To Allow Substitution Of The California and Kansas Appellants

The District Court abused its discretion when it failed to permit the substitution of the California and Kansas Appellants. The District Court's Opinion is unclear about the procedural status of these proposed representatives, as the District Court did not expressly rule on the motion to substitute. It is not clear from the Opinion whether the motion to substitute was (1) not ruled upon, (2) impliedly granted (since there would be no reason to discuss adequacy of the proposed substitute representatives if they were not allowed in the case),[34] or (3) impliedly denied (as T.C. Construction Co. and Nix were referred to in the Opinion at 12 as "proposed substitutions"). To the extent Appellants' substitution motion was denied, Appellants appeal that ruling.

Substitution or addition of new class representatives is proper, even long after the initial certification stage. *Rogers v. Paul*, 382 U.S. 198, 198-99 (1965) (adding new representatives on motion in the Supreme Court). Courts within the

[34] At one point the District Court analyzed the purchasing circumstances "Philip Nix (Kansas)" in the same way that it referenced other class representatives that were in the case. Opinion at 24. Presumably, this would not have been done if the District Court declined his participation outright.

Third Circuit have permitted either substitution or addition of a new class representative. *See, e.g., In re Wellbutrin XL Antitrust Litig.*, 282 F.R.D. 126, 139 (E.D. Pa. 2011) ("[C]ourts generally allow class counsel time to make reasonable efforts to recruit and identify a new representative who meets the Rule 23(a) requirements. The Court may permit intervention by a new representative or may simply designate that person as class representative in the order granting class certification.").[35] Fed. R. Civ. P. 21 can be used by a court to remove or add plaintiffs. *Apple Computer, Inc. v. Unova, Inc.*, No. Civ. A. 03–101–JJF, 2003 WL 22928034 (D. Del. Nov. 25, 2013) ("Rule 21, in relevant part, holds that '[p]arties

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[35] While Appellants did not need to amend the Class Action Complaint to name the two new class representatives (*see Telectronics Pacing Sys., Inc. v. Accufix Atrial "J" Leads Prods. Liab. Litig.*, 172 F.R.D. 271, 283 (S.D. Ohio 1997) (court named substitute new class representative without formal intervention joinder), they offered to do so if the District Court so desired. Indeed, if Fed. R. Civ. P. 21 was not considered the proper vehicle, then the District Court should have treated the request as a motion to intervene and granted it as of right just the same. *See Favia v. Indiana Univ. of Pennsylvania*, 7 F.3d 332, 337 (3d Cir. 1993)("we must look beyond the motion's caption to its substance."); *Snyder v. Smith*, 736 F.2d 409, 419 (7th Cir. 1984) ("The Federal Rules are to be construed liberally so that erroneous nomenclature in a motion does not bind a party at his peril"), *cert. denied*, 469 U.S. 1037 (1984); *Miller v. Transamerican Press, Inc.*, 709 F.2d 524, 527 (9th Cir. 1983) ("The court will construe [a motion], however styled, to be the type proper for the relief requested"); *Harris v. Paige*, No. CIV. A. 08-2126, 2011 WL 1288672, at *1 (E.D. Pa. Apr. 4, 2011)("When construing a motion, ordinarily its substance is controlling over its form; that is, even though a party generally bears the burden to correctly label its motion so as to inform the adversary of the nature of the motion and the relief sought, the nature of the motion is ordinarily determined by its essence or substance or the relief sought, not by its title, label, or caption.").

may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just'").

As discussed below, there was no reason to deny substitution of the California and Kansas representatives. Appellants diligently moved to substitute those new representatives once the need to do so arose, and Appellees were afforded timely discovery of those proposed representatives.

The original California representative, Premier Produce, informed counsel in August that it no longer wanted to participate in the litigation, and counsel informed Appellees on August 11, 2014 of that fact and that Appellants would likely move to substitute a new representative. *See* Declaration of Lee Albert, dated December 1, 2014 (noting that withdrawal was likely and a request to substitute would be made if a new class representative could be found). [A-315] On October 23, 2014, Appellants advised they would be filing a motion to substitute T.C. Construction as a California class representative. *Id*. at ¶ 5. [A-315-16] T.C. Construction answered discovery in November 2014, and was deposed in December 2014. *Id*. at ¶¶ 7-8. [A-316]

Meanwhile, during the preparation of the class certification briefing, Appellants modified the class definition to no longer include used truck purchasers. Mr. Williams, the original Kansas representative, leased a truck which he ultimately purchased second-hand, so the new class definition excluded his

claim. Accordingly, a new Kansas representative retained Class Counsel, and Appellants advised Appellees shortly before Appellants' certification motion was due that Appellant Nix would seek to substitute and be available for deposition at the same date as his predecessor would have been. *See* Declaration of David Sharp, dated December 1, 2014, at ¶¶ 6-7 [A-321].

Before Appellees responded to the class certification motion, the new proposed Kansas and California representatives provided written discovery responses and sat for depositions, and addressed all issues as to them in their briefing on class certification. Accordingly, there was no prejudice to the Appellees. The District Court had all the facts and arguments regarding the adequacy of these representatives in the ordinary course. There was simply no reason to deny substitution, and in doing so, the District Court abused its discretion. Mr. Nix and T.C. Construction also have individual claims, separate from class claims, that should still be before the District Court. Failure to allow them to substitute runs afoul of Rule 21's requirement that the District Court's discretion does not extend to denial of substitution when it would not be "just" to do so.[36]

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[36] The District Court also failed to assess whether there would be any adverse effect on absent class members by failing to allow substitution, such as harm to putative class members if they would not get the benefit of limitations tolling. *See, e.g., Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017, 1025 (9th Cir. 2008) (declining to apply tolling cross-jurisdictionally); *Hatfield v. Halifax PLC*, 564 F.3d 1177,

V. The District Court Abused Its Discretion By Not Conducting A Rigorous Analysis of Class Certification

This Court has provided specific instructions on how to analyze class certification issues. "In deciding whether to certify a class under Fed. R. Civ. P. 23, the district court must make whatever factual and legal inquiries are necessary and must consider all relevant evidence and arguments presented by the parties." *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 307 (3d Cir. 2008). "Factual determinations necessary to make Rule 23 findings must be made by a preponderance of the evidence." *Id.* at 320.

In conducting this rigorous analysis, "the [district] court cannot be bashful. It must resolve all factual or legal disputes relevant to class certification, even if they overlap with the merits—including disputes touching on elements of the cause of action. Rule 23 gives no license to shy away from making factual findings that are necessary to determine whether the Rule's requirements have been met." *Marcus v. BMW of North America LLC,* 687 F.3d 583, 591 (3d Cir. 2012) (quotations omitted).

This rigorous analysis applies in particular to analysis of expert testimony. "[T]he [district] court's obligation to consider *all* relevant evidence and arguments [on a motion for class certification] extends to expert testimony, whether offered

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1188 (9th Cir. 2009) (disallowing California equitable tolling to those who were not residents of California).

by a party seeking class certification or by a party opposing it." *Hydrogen Peroxide*, 552 F.3d at 307 (emphasis added).

A. The District Court Apparently Ignored Appellants' Revised Class Definition

The District Court, in denying class certification, relied on a definition that was later revised, as Appellants amended the class definition to exclude (1) purchasers of Daimler Trucks and (2) truck resellers. The District Court ruled upon the definition proposed in Appellants' opening motion and brief, which was:

> All persons or entities, in the state of [California, Florida, Kansas, Iowa, Michigan, Minnesota, Nebraska, North Carolina, Tennessee, Vermont, Wisconsin], that indirectly purchased from Defendants new Class 8 Heavy Duty trucks containing Eaton transmissions, beginning October 1, 2002 and continuing until the present ("Class Period"). Excluded from this class are: (i) Defendants and their parent companies, subsidiaries, affiliates, officers, directors, employees, legal representatives, heirs, assigns, and co-conspirators; and (ii) any judges presiding over this action and the members of his/her immediate family and judicial staff, and any juror assigned to this action.

Opinion at 6-7. However, at the time of the reply brief, the Appellants modified the proposed class definition to be:

> [A]ll persons or entities, in the state of [STATE] that, beginning October 1, 2002 and continuing until the present ("Class Period"), indirectly purchased new Class 8 Heavy Duty trucks containing Eaton transmissions from the following companies: **Navistar International Corporation ("Navistar"); Kenworth Truck Company ("Kenworth"); Peterbilt Motors Company ("Peterbilt"); Volvo Trucks North America ("Volvo"); and Mack Trucks, Inc. ("Mack").** Excluded from this class are: (i) Defendants and their parent companies, subsidiaries, affiliates, officers, directors employees, legal representatives, heirs, assigns, and co-conspirators;

> (ii) any judges presiding over this action and the members of his/her immediate family and judicial staff, and any juror assigned to this action; and (iii) **any person or entity who purchased a new Class 8 Heavy Duty truck for the purpose of reselling that truck as new.** [Emphasis added.]

Appellants' Reply Br. in Further Support of Class Certification, at 2 n.2. [A-842]

The new definition modified the previous definition in two material respects: (1) it excluded purchasers of Daimler Trucks, and (2) it excluded truck resellers. These modifications were made to moot certain issues raised by Appellees on class certification.

The District Court, however, failed to consider that this new definition excluded resellers,[37] and actually held that "there appears to be fundamental conflict defeating certification as the class includes parties who claim to have been harmed by the same conduct that benefitted other members of the class" because "the truck resellers within the class have an interest in proving that they passed-through zero overcharge in order to recover 100% of the damages attributed to each resale, while the downstream purchasers have an opposite interest." Opinion at 13 n.7. The District Court's analysis failed to take into account the revised class definition, which specifically excluded "any person or entity who purchased a new Class 8 Heavy Duty truck for the purpose of reselling that truck as new." DPP Reply Brief at 2-3, n.2. [A-842] Rather than conducting a rigorous analysis, the

[37] It is important to note that the District Court did not reject the modified definition. Instead, it seemingly ignored it.

District Court did not analyze the modified class definition. Had it done so, there would have been no issue about conflicts regarding resellers. The failure to even consider the revised class definition strongly suggests the District Court did not engage in the "rigorous analysis" required by the Third Circuit.

B. The District Court Critiqued Appellants' For Not Analyzing Enough Data, But Apparently Ignored Appellants' Revised Econometric Analysis That Relied On A Substantially Broader Data Set

The District Court found the indirect pass-through analysis was flawed because Appellants' expert "only analyzed 1,833 out of 235,868 truck sales during the relevant Class Period" which "exclud[ed] ten of the 11 states for which plaintiffs seek class certification." Opinion at 26. However, the District Court's finding was based entirely on the Declaration of Russell Lamb filed in the indirect purchaser action ("IPP Report") with the opening brief, which used a smaller dataset that was later augmented when the reply briefs and accompanying expert rebuttal reports were filed. Between the filing of the opening and reply briefs, Appellants received significant additional indirect pass-through data.

Moreover, the enhanced dataset specifically addressed those very issues the District Court raised with respect to sample size and number of states included therein.

While Appellants believe it was error for the District Court to find Dr. Lamb's dataset too small to be reliable without explanation of such findings, the District Court's failure to consider the enhanced dataset is inconsistent with the requirement that it conduct a rigorous analysis. In fact, the District Court seems to have ignored Plaintiffs Reply Brief, which included a revised class definition (see *supra*) and Dr. Lamb's IPP Reply Report, which featured an updated indirect pass-through model, which addressed several criticisms raised by Appellees and subsequently adopted by the District Court.[39] *See Reyes v. Netdeposit, LLC,* 802

[38] As Dr. Lamb explained, it was not relevant whether the dataset came from a state for which Appellants were seeking to certify a class, because an "indirect purchaser state [may be] next to a state that doesn't have indirect purchaser repealer law and sells half it across those borders all the time. They are part of the same, the same set of transactions. It's just not relevant." Transcript of March 25, 2015 Class Certification Hearing ("3/25 Tr.") at 154:10-14. [A-883.]

[39] In addition to being included in the Reply Report, the experts discussed the updated indirect pass-through model and the addition of new transactional data at the class certification hearing. *See* 3/25 Tr. at 105:8-12, 157:22-158:10, 227:17-22, 243:9-16. [A-871, 883-84, 901.]

F.3d 469, 495 (3d Cir. 2015) (finding reversible error where District Court ignored expert testimony).

C. The District Court Erred When it Found, Without Analysis, That Several of the Named Representatives "Benefitted" From The Alleged Conspiracy

The District Court also looked at several class representatives' purchasing circumstances, and made the incorrect and unsupported finding that "the benefits [provided in connection with the purchase] exceeded the alleged overcharge." Opinion at 24-25. The District Court then concluded "plaintiffs' claims may not be 'proven with evidence common to the class because it fails to account for many real-world facts surrounding this complicated market.'" Opinion at 25 (citing *In re Intel*, 2014 WL 6601941, at *15 (D. Del. Aug. 6, 2014)).[40] The problem with the District Court's conclusion here is that it misapprehends the proper measure of damages and what common factors actually bear on that analysis.

As this Court has stated, "[t]he usual measure in an overcharge case 'is the difference between the illegal price that was actually charged and the price that

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[40] In *Intel*, that court's discussion of "real-world facts surrounding this complicated market" concerned multiple-distribution levels. 2014 WL 6601941, at *15-16. Here, by contrast, almost all trucks in the class are sold from OEMs to dealers, and then to end-user truck purchasers.

would have been charged 'but for' the violation multiplied by the number of units purchased' . . .Given the inherent difficulty of identifying the 'but for' world, we do not require that damages be measured with certainty." *Behrend v. Comcast Corp.*, 655 F.3d 182, 203 (3d Cir. 2011) (quoting IIA Phillip E. Areeda et al, ANTITRUST LAW ¶ 392a (3d ed. 2007)); *rev'd on other grounds* 133 S. Ct. 1426 (2013).[41] Where there are facts and circumstances that would be the same in both the actual and "but-for" worlds, those facts are to be considered constant. They do not give rise to "individual issues." For example, negotiated prices are a factor inherent in many markets, as they are in this market. But it defies common sense to suggest that any of the proposed class representatives, or members of the proposed class, specifically negotiated down (or away) an overcharge of which none were aware at the time of the negotiations.

Here, each of the specific circumstances cited by the District Court has no bearing on the overcharge caused by Appellees' conduct,[42] and would not have

[41] Accordingly, Appellants need not prove price increases as the District Court appears to suggest, but that prices were higher than they would have been "but for" Appellees' anticompetitive conduct. *See* 3/25 Tr. 263:22-24 (the District Court states "I guess I'm hoping at someplace here you can point me to not just a risk, not that it's likely, but there's evidence that the numbers change for the prices.") [A-910].

[42] Because Appellants have narrowed their class definition to exclude purchasers from Appellee Daimler, the current class representatives from the states of Tennessee, Iowa, Nebraska, Vermont, and Minnesota, are excluded from that modified definition, as those representatives purchased only Daimler trucks.

differed in the but-for world:

Cordes, Inc.: The District Court noted that "Cordes, Inc. (Michigan) received a special financing rate from PACCAR in conjunction with one new Class 8 truck purchase. More specifically, Mr. Cordes testified that another customer originally ordered the truck and no longer wanted it, and 'they gave me a cheap financing rate on it, because they wanted to dump it. So I can borrow it cheaper [from PACCAR] than I can borrow money at the bank.'" Opinion at 24. However, there is no evidence that Mr. Cordes's transmission choices, monopoly pricing, or the alleged conspiracy in general had any connection to Mr. Cordes's special financing rate. This special financing rate would have been the same in the actual and "but-for" worlds, except the price of the truck to which the rate was applied would not have included an overcharge in the "but-for" world, according to Dr. Lamb's analysis. The special financing rate does not create an "individual issue" for Mr. Cordes that impacts his damages in any way and it is thus irrelevant to this

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Nonetheless, the District Court analyzed purchasing circumstances of Paul Prosper (Vermont), Purdy Brothers (Tennessee), and Ryan Avenarius (Iowa), and found that those class representatives had unique issues which provided benefits which "exceeded the overcharge" because these purchasers (1) used Daimler's own financing company; (2) traded in used trucks for new ones, and/or (3) did not haggle with the dealer over the price of the truck. Opinion at 24-25. Even if these purchasers were still encompassed by the modified class definition, the District Court's reasoning would be flawed as to them as well, as, for the same reasons discussed herein, all of their circumstances would have been identical in the "but-for" world.

case. Furthermore, the District Court does not cite to any evidence that this special financing rate actually "exceeded the alleged overcharge", nor could it as the two are completely unrelated.

Rodney Jaeger: The District Court noted that "Rodney Jaeger's (Wisconsin) sole new Class 8 truck purchase during the Class Period involved a complicated trade-in transaction including both a used Class 8 truck that he owned and a used Class 8 truck owned by a third party. Mr. Jaeger also purchased the truck under a special sales program that granted a $3,500 discount provided certain components were selected, including an Eaton transmission." Opinion at 24. However, just as with Mr. Cordes's financing rate, there is no evidence that this special sales program was impacted in any way by the alleged conspiracy. For example, there is no evidence that PACCAR either (1) used rebate money specifically provided by the LTAs to fund this particular program, or (2) would not have promoted this discount program if it did not receive rebates from Eaton. Thus, this factor too would have been the same in the "but-for" world, and is thus irrelevant here. Furthermore, there was no evidence before the District Court that any benefits Mr. Jaeger realized from this special rebate program, which applied not just to transmissions but other components as well, "exceeded the alleged overcharge."

Meunier Enterprises and Philip Nix: The District Court noted that "Meunier Enterprises LLC (Florida and North Carolina) typically traded in used trucks in conjunction with new truck purchases and shopped dealers and brands based on who offered the best trade-in values. Philip Nix (Kansas) traded in a used truck in conjunction with all of his truck purchases and aggressively negotiated the trade-in values he received. In one case the trade-in value made up nearly 75% of the price of the new truck." Opinion at 24. These facts, though, are entirely irrelevant to whether these representatives paid an overcharge on transmissions. There is no evidence that the transmission choice or pricing played any role in negotiation of trade-in values. Whether a customer pays all cash, finances, or uses trade-in value, the factors relating to these' representatives' purchases would also have been the same in the "but-for" world, and are again irrelevant here. Furthermore, the District Court cites to no evidence that this trade-in deal "exceeded the alleged overcharge."

While the District Court cites to several differing purchasing circumstances among Appellants, there is no evidence that any of these purchasing circumstances would have been any different in a world free from the alleged conspiracy. As a more egregious example, the District Court, when examining the transactions of Jaeger, Meunier, and Nix, seemed to apply a blanket rule that anyone who trades a used vehicle as part of his purchase (as presumably many purchasers do) is *per se*

inadequate, without explaining why this should be so. However, as Dr. Lamb stated:

[43] Contrary to the District Court's finding that "Dr. Lamb further fails to account for additional factors that can affect the relationship between transmission and truck price," Opinion at 26, Dr. Lamb specifically recognized that any of these factors would have been the same in the but-for world and are thus irrelevant to the analysis here.

Not only did the District Court fail to provide explanation as to how the Appellants' circumstances above actually "exceed[ed] the overcharge", but it provided no explanation as to why the Appellants' circumstances above could have affected the respective overcharges at all.[44] Indeed, it is nonsensical to suggest that

[43] Dr. Lamb was the class certification expert for the Direct Purchaser Plaintiffs, as well as the Appellants. Accordingly, several of Dr. Lamb's expert reports cited to herein were filed in the *Wallach* Action.

[44] Even assuming *arguendo* that some class members benefitted from the conduct, that would not present an intra-class conflict that defeats adequacy and, moreover, the notion that it would do so has been rejected by this Court. *In re K-Dur Antitrust*

any of the proposed class representatives (or proposed class members) would have specifically negotiated away an overcharge when they were not even aware it existed.[45] That the District Court made its conclusions about the overcharge, without providing any further explanation or analysis, strongly suggests the District Court did not engage in the "rigorous analysis" required by the Third Circuit.

D. The District Court Failed To Rigorously Analyze Dr. Lamb's Overcharge Model, And Failed To Evaluate Dr. Lamb's Reasons For "Excluding" Certain Data

Although the District Court has "a healthy dose of cynicism" for econometrics and economists,[46] it is nonetheless required to conduct a rigorous

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Litig., 686 F.3d 197, 223-24 (3d Cir. 2012) *cert. granted, judgment vacated sub nom. Merck & Co. v. Louisiana Wholesale Drug Co.,* 133 S. Ct. 2849 (2013) and *cert. granted, judgment vacated sub nom. Upsher-Smith Labs., Inc. v. Louisiana Wholesale Drug Co.,* 133 S. Ct. 2849 (2013) and *reinstatement granted*, No. 10-2077, 2013 WL 5180857 (3d Cir. Sept. 9, 2013) ("[A]ppellants need not show "that no class member benefitted from the challenged conduct.").

[45] Dr. Johnson has seen no evidence that any truck purchaser specifically negotiated a transmission price nor any evidence that any buyer was able avoid an overcharge by "pushing back against the overcharge." 3/25 Tr. at 243:3-17 [A-905]. Moreover, Dr. Johnson has seen no evidence that any indirect purchaser suspected an overcharge. *Id*. at 243:18-22 [A-905].

[46] *See* 3/25 Tr. at 256:5-9 (stating "[y]ou are not using all the data points and I'm still cynical about econometrics, economists, litigation, and where the truth is in all of this. So don't get too self-righteous on me because I have a healthy dose of cynicism for all of this.") [A-908]; 160:15-16 (stating "[s]omeone explained an economist is someone who digs a hole and then assumes there's a ladder") [A-884]; *see also* Transcript of the June 25, 2013 conference before the District Court

analysis of all relevant evidence, including expert reports. *See Hydrogen Peroxide*, 552 F.3d at 307. The District Court erred in faulting Dr. Lamb's analysis for not including certain data, while failing to address Dr. Lamb's reasons why the data could not be included.

Appellants cannot construct a benchmark period in the *performance* transmission market because Eaton always had a monopoly in that market and actually prevented ZF Meritor from entering that market. Accordingly, Dr. Lamb's overcharge model does not include performance transmissions. Nevertheless, the District Court faults Dr. Lamb for failing to include performance transmissions, stating that "[b]y basing his analysis solely on linehaul transmission data, Dr. Lamb has excluded half of the data he proffers as common evidence that direct purchasers paid an overcharge." Opinion at 20.

The District Court faults Dr. Lamb's yardstick analysis for utilizing "assumptions based on a modicum[47] of data not fully representative of Eaton transmission sales during the Class Period, in that he 'used less than 55% of the relevant Eaton transmission sales.'" Opinion at 21. However, the District Court assumed without further analysis that Dr. Lamb's exclusion is improper, and did

Tr. ("6/25 Tr.") at 41:1-3 (stating "[t]he inferences on an inference on an inference. I know what kind of experts you get in antitrust cases.") [A-209].

not rigorously analyze "excluded" performance transmissions from the overcharge regression analysis, or otherwise explain why Dr. Lamb's yardstick analysis is unacceptable.[48]

At the class certification hearing, Dr. Lamb explained, "[a]s I point out in my reports, Eaton was always a monopolist essentially in the performance transmission market, and therefore there's no period of time to use [as a] benchmark for performance [transmissions]." Transcript of March 25, 2015 Class Certification Hearing ("3/25 Tr.") at 70:23-71:1 [A-862]. As a result, because Dr. Lamb could not use a benchmark analysis for this specific analysis, he instead utilized a "yardstick approach." *Id*. at 71:12-18 [A-862]; *see also* Expert Reply Report of Russell Lamb, filed on March 6, 2015 ("DPP Reply Report") at ¶¶ 69-72 [A-3234-360]. The yardstick approach is a common econometric methodology often employed in antitrust litigation.

By monopolizing the performance transmission market and stifling nascent competition, Eaton effectively precluded a benchmark analysis of transmission prices. It is well-established that a "wrongdoer may not object to the plaintiff's reasonable estimate of the cause of injury and of its amount, supported by the

[48] The District Court appears to accept that Appellants may need to make assumptions based upon the information they received from Appellees, when she stated that "it's appropriate for the plaintiffs' experts to make assumptions based on the information you have given them, the plaintiff." *See* September 23, 2014 Tr. at 48:10-20. [A-248]

evidence, because not based on more accurate data which the wrongdoer's misconduct has rendered unavailable." *See Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 265 (1946); *see also In re Scrap Metal Antitrust Litig.*, 527 F.3d 517, 533 (6th Cir. 2008) (noting "it does not 'come with very good grace' for the wrongdoer to insist upon specific and certain proof of the injury which it has itself inflicted"). Moreover, the District Court failed to recognize that in Appellees' expert's critique of Dr. Lamb's analysis, Dr. Johnson essentially double-counted the transmissions "excluded" by the non-existence of a benchmark period for performance transmissions. Opinion at 21.[49] This made it appear as though multiple categories of data were not included in Dr. Lamb's overcharge analysis. In reality, Dr. Johnson's list merely restates that performance transmission data were not included in the overcharge regression.

Additionally, the District Court seems to fault Appellants' assertion that ZF Meritor, having already made preparations to enter Class 8 performance transmission

market, would have actually done so but for Appellees' anticompetitive conduct. Opinion at 20, n.10. Appellants offered evidence both at the class certification hearing[50] and in Dr. Lamb's expert report that ZF Meritor would have entered the performance transmission market.[51] The District Court merely states "[t]his is debatable," *id.* at n.10, while conducting no analysis of Appellants' evidence in support of this assertion.[52] To the extent the District Court found Appellants could not prove this assertion, the District Court provided no discussion of its finding. Further, if the "exclusion" of performance transmissions is a fatal flaw to Dr. Lamb's analysis, the District Court had the discretion to modify the class definition to exclude performance truck purchasers. *See Jordon v. Commonwealth Fin. Sys.*, 237 F.R.D. 132, 136 n.3 (E.D. Pa. 2006) (noting "Rule 23 gives [the] district court 'broad discretion to modify the definition of the class even after certification.'") (quoting 2 NEWBERG ON CLASS ACTIONS § 6:14 (4th ed. 2006)).

The District Court similarly faults Dr. Lamb's overcharge model for excluding data from Daimler, "comprising 'over 40 percent of the linehaul trucks

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[50] *See* 3/25 Tr. at 66:2-68:10 [A-861].

[51]

[52] Notably, the jury found Eaton had monopolized the HD transmission market in *ZF Meritor*, 696 F.3d at 263. In the competitor case, the relevant market included performance transmissions. *Id.* Thus, as explained herein, it is plausible, if not likely, Plaintiffs can prove ZF Meritor would have entered the performance market but for Appellees' anticompetitive conduct.

in this case.'" Opinion at 20. Yet, Daimler purchasers have been excluded from the modified class definition. It was improper to fault Dr. Lamb's model because it failed to include transactions that are not part of the proposed class definition. This is by itself a failure to conduct a rigorous analysis. In any event, this Court cannot be asked to "speculate as to what the District Court must have considered." *See Neale v. Volvo Cars of N. Am., LLC*, 794 F.3d 353, 372 (3d Cir. 2015). Rather, the District Court must "provide sufficient information" for this Court "to engage in meaningful appellate review." *See New Directions Treatment Servs. v. City of Reading*, 690 F.3d 293, 313 (3d Cir. 2007).

E. The District Court Failed To Rigorously Analyze Pass Through Of The Overcharge To Direct Purchasers

The District Court found "plaintiffs have failed to identify common evidence that any alleged overcharges were passed on to the indirect purchasers"[53] without (1) engaging in a rigorous analysis of evidence showing all costs are automatically incorporated into truck prices on a cost-plus-margin basis or (2) adequately evaluating either of Plaintiffs' pass-through models.

First, the District Court states that "[d]etermining what portion of the alleged overcharge was passed on[54] to a transmission cannot be determined simply by the

[53] Order at 22.

[54] The parties agree there are two pass-through models, the direct pass-through and the indirect pass-through. 3/25 Tr. at 200:12-24. [A-894.] In the District Court's

overall purchase price of the truck." Opinion at 22. It is difficult to ascertain what the District Court meant by this statement. Dr. Lamb calculated the overcharge as a percentage of the overall cost of the transmission, which was only one component of the overall purchase price of the truck.[55] While this may reflect the District Court's misunderstanding of Appellants' damages models, this Court should not be required to "speculate" as to what the District Court meant. *See Neale*, 794 F.3d at 372.

Second, the District Court noted that some companies add a "'significant body,'" (i.e. a modification to certain performance trucks, such as a dumper body or tow-truck body) but failed to address whether such trucks would even be part of the class, as the class definition excludes resellers, or why the addition of significant bodies would have any effect on the pass-through rate for the transmission.

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section titled "[t]ruck pricing and the transmission distribution chain", Opinion at 22-25, it is unclear which model is being critiqued.

Third, the District Court states "'[t]here has been no effort to correlate transmission . . . cost to truck price.'" Opinion at 23. Any simple correlation, however, would not accurately reflect the operation of the Class 8 truck market. Truck prices can be affected by factors other than the price of the transmission, such as the demand for the truck or the cost of other truck components.

Appellants have, in fact, shown the relationship between transmission cost and truck prices, and have done so in a manner more sophisticated, and thus more accurate, than a mere correlation analysis. Thus, the District Court's finding that Appellants made "no effort" to correlate transmission cost to truck price is a misunderstanding of Dr. Lamb's analysis, bears no relation to the factual record in the case, and is factual error constituting an abuse of discretion.

Finally, the District Court misapplied the law to the facts in finding "rebates complicate the damages issue not only because the rebates benefitted some

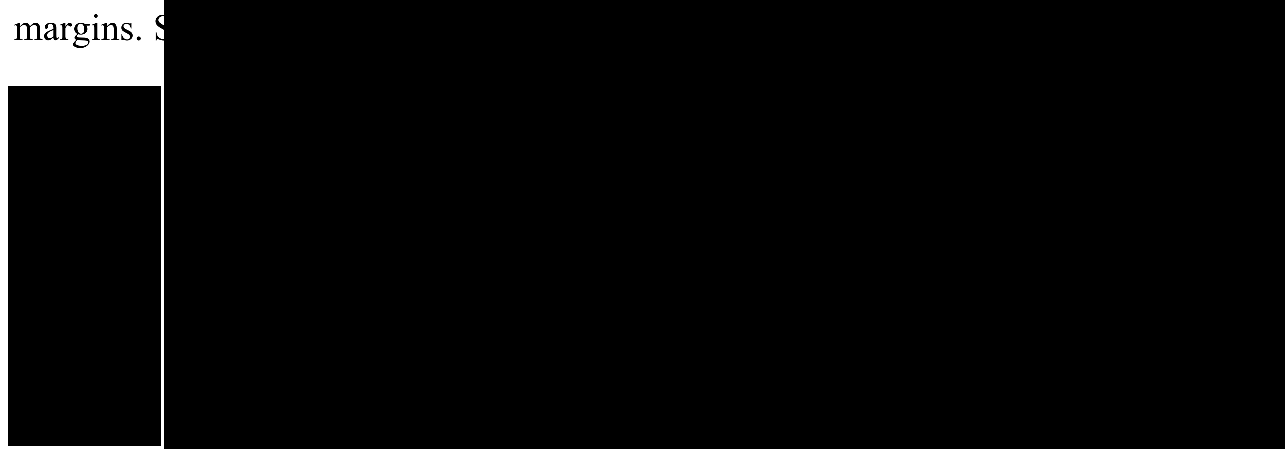
members of the class through price reduction, but also in terms of individualized transactions and the inability to account for them through common proof." Opinion at 23-24 (citing *In re Intel Corp. Microprocessor Antitrust Litig*., 2014 U.S. Dist. LEXIS 165261 (D. Del. Aug. 6, 2014)). This is a misapplication of the facts here to *Intel*. In *Intel*, the court found plaintiffs had failed to analyze the impact of rebates on class members. *Id*. at *49-*53. Since some class members may have received lower prices as a result of rebates and challenged conduct, the court found common issues would not predominate over individual inquiries. *Id*. In contrast, Dr. Lamb has given Appellees the benefit of the doubt, assuming *all* rebates are passed on to class members. 3/25 Tr. at 84:23-85:5, 134:5-17 [A-865]. Thus, there is no individual issue as to which class members benefitted from rebates.

F. The District Court Failed To Rigorously Analyze Pass Through Of The Overcharge From Direct Purchasers To Indirect Purchasers

The District Court faulted Dr. Lamb's analysis of pass-through to indirect purchasers for "utilizing less than *one percent* of the relevant truck sale data . . . In no way does an analysis of one percent compel the conclusion that plaintiffs can proffer sufficient common evidence to prove the alleged overcharges were passed through to indirect purchasers." Opinion at 26 (emphasis in original). The District Court further found Dr. Lamb has analyzed data from just two dealers in California.

As an initial matter, it was legal error to require Appellants to offer an analysis that "compels" the conclusion that "plaintiffs can proffer sufficient common evidence to prove the alleged overcharges were passed through to indirect purchasers." At the class certification stage, "preponderance of the evidence" is the appropriate quantum of proof. *Reyes v. Netdeposit, LLC*, 802 F.3d 469, 484 (3d Cir. 2015). A plaintiff seeking class certification need not offer sufficient evidence to compel a finding of predominance; they need only show it is more likely than not that common issues will predominate.

Moreover, after Dr. Lamb's IPP Report was filed, Plaintiffs obtained additional transactional data that had been subpoenaed before the filing of the class certification motion. These additional transactional data quadrupled the number of observations in the indirect pass-through analysis. As a result of the additional data, the indirect pass-through analysis now includes transactions from seven states, 3/25 Tr. at 147:2-3 [A-881], and more closely resembles the degree of pass through one would expect from real world evidence relating to dealer behavior and margins. S



However, the District Court failed to conduct any analysis of Dr. Lamb's model in comparison to real world observations. Instead, the District Court cites an outdated dataset of less than one percent as insufficient, without any analysis as to why these data would be inadequate or what would constitute an adequate sample size.[56] *See* Opinion at 26. As noted above, Appellants have used all available data, which account for more than two percent of all transactions.. Without such an analysis, however, this Court cannot conduct a meaningful review of the District Court's rejection of the IPP pass-through model. *See New Directions Treatment Servs.*, 690 F.3d at 313 (a district court must "provide specific information" to enable the appellate court to do a "meaningful appellate review").

Finally, the District Court committed legal error in its interpretation of *Comcast* and in its application of *Comcast* to the facts. The District Court states:

[56] *See also* September 23, 2014 Tr. at 57:19-21 (stating, in response to Plaintiffs' request for additional Eaton data, "I think your problem is having too much data, not an insufficient amount of data, to tell you the truth.") [A-250].

> Dr. Lamb further fails to account for additional factors that can affect the relationship between transmission and truck price as discussed above. As the Supreme Court noted in *Comcast*, '[t]here is no questions that the model failed to measure damages resulting from the particular antitrust injury on which [defendants'] liability in this action is premised.' *Comcast*, -- U.S. – 133 S.Ct. at 1433.

Opinion at 26. As this Court has noted, "*Comcast* held that an antitrust litigation class could not be certified because plaintiffs' damages model did not demonstrate the theory of antitrust impact that the district court accepted for class action treatment…*Comcast* went on to analyze the evidence of damages resulting from antitrust impact, and noted that the expert testimony 'assumed the validity of all four theories of antitrust impact initially advanced by [the plaintiffs].'" *Neale*, 794 F.3d at 374. This is simply not the case here. Plaintiffs have not offered either (1) multiple theories of liability or (2) an expert report assuming the validity of multiple theories. The District Court has not subsequently rejected some of Plaintiffs' theories, but not others. Instead, Appellants' theory is, and has always been, the Appellees "conspired 'to maintain and enhance the monopoly power of Eaton in the Class 8 Truck Transmission Market . . .through the implementation of a series of exclusive dealing arrangements among and between Eaton and the OEM Defendants'" IPP Report ¶8 (quoting the Third Amended Class Action Complaint) [A-1412]. This is not a case like *Comcast*, where it is possible to tie damages to a liability theory that have been rejected by the court. Appellants have always had one theory of liability – that Defendants conspired to monopolize the market for

Class 8 transmissions – and it is that theory of liability that is the basis for Appellants' damages theory.

G. The District Court Failed To Consider Dr. Lamb's Analysis Of Appellees' Own Documents, Industry Publications, And Economic Literature

While Dr. Lamb conducted data-driven regression and margin analyses, he also cited to other sources, including Appellees' own documents, industry articles, and economic literature, to demonstrate that pass through to indirect purchasers occurs in this market. None of this non-data evidence was apparently considered by the District Court's opinion.

For example, Dr. Lamb opined:

The evidence above is not addressed anywhere in the District Court's opinion. The failure to even consider this evidence demonstrates that the District Court did not engage in the "rigorous analysis" required by the Third Circuit.

VI. The District Court Abused Its Discretion When It Denied Appellants' Motion To Compel Appellees To Produce Transactional Data After 2010, Even Though Such Data Was Highly Relevant To Appellants' Damages Analysis

The standard of review for a district court's denial of a discovery motion is abuse of discretion. *Lloyd v. HOVENSA, LLC*, 369 F.3d 263, 274-75 (3d Cir. 2004).

At a hearing on June 13, 2013, Appellants requested transactional data encompassing sales compiled through December 31, 2012. Although Appellants' Counsel argued that "there has been no evidence or any showing that an additional period of time would be some sort of huge additional burden" for Appellees, the District Court declined to require Appellees to provide data compiled after March 2010. Transcript of the June 25, 2013 conference before the District Court ("6/25 Tr.") at 52:6-14. [A-212]

This arbitrary discovery limitation hindered the ability of Appellants' expert to provide analysis of injury and damages after March 2010. For example, as Dr.

Lamb opined, "[b]ecause the Defendants produced sales data only through March of 2010, I cannot calculate Eaton's market share past that date." Expert Report of Russell Lamb, filed November 3, 2014 ("DPP Report"), at ¶ 64 [A-1265]. Also, as a result of this arbitrary limitation, Plaintiffs were required to project damages[57] as well as rebates and sales performance incentive funds ("SPIFs") for the remainder of the class period. The District Court's discovery order also appears to be inconsistent with the District Court's acknowledgment that discovery of "ongoing data, like damages data . . . is something that is usually up to the end of discovery anyway." 6/25 Tr. at 34:15-17 [A-208]. To show damages for the entire class period, Eaton should have been compelled to produce transactional data through the close of discovery, as the District Court appears to understand in the above quotation. Accordingly, the District Court abused its discretion in arbitrarily limiting Eaton's data production, as the class period runs through the present. This error was compounded at class certification, when the District Court rejected Dr. Lamb's analysis almost entirely because of the District Court's perception that Appellants' expert failed to analyze enough or adequate data.

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[57] *Id.* at ¶ 211; *see also* 3/25 Tr. at 267:13-16 (counsel explaining Plaintiffs have been forced to rely on projections due to the March 2010 discovery cutoff) [A-911].

CONCLUSION

For the foregoing reasons, the District Court's Opinion and Order should be reversed and remanded.

Dated: February 10, 2016

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CERTIFICATE OF BAR MEMBERSHIP

I certify, pursuant to 3d Cir. L.A.R. 28.3(d) that I am a member of the bar of the Third Circuit.

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/s/ Gregory B. Linkh
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NOTICE OF APPEAL
TO
U.S. COURT OF APPEALS, THIRD CIRCUIT

U.S. District Court for the District of Delaware

IN RE CLASS 8 TRANSMISSION INDIRECT PURCHASER ANTITRUST LITIGATION	Circuit Court Docket Number: _________________ District Court Docket Number: Civil Action No. 11-009-SLR District Court Judge: Sue L. Robinson

Notice is hereby given that the Indirect Purchaser Plaintiffs[1] in the above-named case appeal to the United States Court of Appeals for the Third Circuit from all prior adverse rulings and orders in this case, including, without limitation:

1. the Order and Opinion of this Court entered in the above-captioned action (the "Action") on October 21, 2015 [D.I. 327 and 328, attached as Exhibit A and B hereto], (a) dismissing the Action, and, (b) denying Indirect Purchaser Plaintiffs' Motion For Leave To Withdraw Class Representatives And To Substitute New Class Representatives In Their Place [D.I. 180], and (c) denying Indirect Purchaser Plaintiffs' Motion For Class Certification [D.I. 184]; and

2. the discovery order of this Court at the court conference of June 25, 2013 [a transcript is attached as Exhibit C hereto].

[1] Indirect Purchaser Plaintiffs include Ryan Avenarius (representing the Iowa State Class); Big Gain Inc. (representing the Minnesota State Class); Carleton Transport Service (representing the Nebraska State Class); James Cordes on behalf of Cordes Inc. (representing the Michigan State Class); Meunier Enterprises LLC, individually and as parent company of Auto Transport Leasing, Inc. and Exotic Car Transport, Inc. (representing the Florida and North Carolina State Classes); Paul Prosper on behalf of Prosper Trucking Inc. (representing the Vermont State Class); Rodney E. Jaeger (representing the Wisconsin State Class); Purdy Brothers Trucking Co. (representing the Tennessee State Class); proposed California representative TC Construction Co. Inc. (seeking represent to the California State Class); and proposed Kansas representative Phillip E. Nix (seeking to represent the Kansas State Class).

Dated: November 17, 2015

Respectfully Submitted,

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EXHIBIT A

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

IN RE CLASS 8 TRANSMISSION INDIRECT PURCHASER ANTITRUST LITIGATION	)))	Civ. No. 11-00009-SLR

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MEMORANDUM OPINION

Dated: October 21, 2015
Wilmington, Delaware

ROBINSON, District Judge

I. INTRODUCTION

Presently before the court is indirect purchaser plaintiffs'[1] ("plaintiffs") motion for class certification pursuant to Fed. R. Civ. P. 23(a), 23(b)(2) and 23(b)(3). (D.I. 184) Also before the court is plaintiffs' motion to substitute various parties as class representatives. (D.I. 180) Defendants to this action include Eaton Corporation ("Eaton"), Daimler Trucks North America LLC ("Daimler Trucks"), Freightliner LLC "Frightliner"), Navistar International Corporation ("Navistar"), International Truck and Engine Corporation ("International"), Paccar, Inc. ("Paccar"), Kenworth Truck Company ("Kenworth"), Peterbilt Motors Company ("Peterbilt"), Volvo Trucks North America ("Volvo"), and Mack Trucks, Inc. ("Mack") (collectively, "defendants").

Plaintiffs assert that defendants engaged in anticompetitive conduct. (D.I. 34 at ¶¶ 1-2) Specifically, defendants allege Eaton entered into exclusive dealing agreements with the Original Equipment Manufacturers ("OEMs") (Daimler Trucks, Freightliner, Navistar, International, PAACAR, Kenworth, Peterbilt, Volvo and Mack) of Class 8 trucks to maintain or enhance their monopoly power in the market for

[1] The indirect purchaser plaintiffs or the "proposed IPP class" include Ryan Avenarius (representing the Iowa State Class); Big Gain Inc. (representing the Minnesota State Class); Carleton Transport Service (representing the Nebraska State Class); James Cordes on behalf of Cordes Inc. (representing the Michigan State Class); Meunier Enterprises LLC, individually and as parent company of Auto Transport Leasing, Inc. and Exotic Car Transport, Inc. (representing the Florida and North Carolina State Classes); Paul Prosper on behalf of Prosper Trucking Inc. (representing the Vermont State Class); Rodney E. Jaeger (representing the Wisconsin State Class); and Purdy Brothers Trucking Co.(representing the Tennessee State Class).

transmissions used the Class 8 trucks. (*Id.*) Both direct[2] and indirect purchaser plaintiffs allege that such anticompetitive conduct resulted in the elimination of Eaton's biggest competitor ZF Meritor. (*Id.*) The court has jurisdiction pursuant to 15 U.S.C. § 15 and 28 U.S.C. §§ 1331 and 1337.

II. BACKGROUND

A. The Parties

Plaintiffs purchased Class 8 trucks from one or more of defendants' authorized sales agents or dealers and, therefore, are indirect purchasers of Class 8 transmissions. (D.I. 34 at ¶¶ 9-12) Plaintiffs assert violations of 20 state antitrust laws and 2 state unfair competition laws in a total of 21 different states.

Defendants are involved in the manufacture and sale of Class 8 trucks. Eaton manufactures transmissions for Class 8 trucks. (*Id.* at ¶ 13) The OEM defendants manufacture and sell Class 8 trucks. (*Id.* at ¶¶ 14-21) In order to assemble and sell Class 8 trucks, OEMs purchase component parts, such as transmissions, from suppliers, such as Eaton. (*Id.* at ¶ 27)

B. Class 8 Trucks and Transmissions

There are eight recognized classes of vehicles, with Class 8 trucks being the heaviest. (*Id.* at ¶ 25) Examples of Class 8 heavy duty trucks include fire trucks, garbage trucks, and long-distance freighters. (*Id.* at ¶ 26) The purchase of Class 8 trucks is unique in the sense that buyers can essentially build a truck to their desired

[2] Direct purchaser plaintiffs have since been dismissed for lack of standing. (Civ. No. 10-260, D.I. 393 at 6, D.I. 394). The issue of standing as related to the indirect purchaser plaintiffs as a whole has not been reasserted since the court denied defendants' motion to dismiss with respect to plaintiffs' state antitrust claims. (D.I. 60)

specifications. (*Id.* at ¶ 27) When purchasing a Class 8 truck, buyers can consult OEM "databooks," which list an OEM's standard and non-standard component offerings,[3] and designate the specific components they desire in their trucks. (*Id.*) Since manufacturers of component parts in the Class 8 truck industry market products directly to potential customers, it is not uncommon for buyers to select non-standard options from a databook. (*Id.*)

C. Plaintiffs' Allegations

Plaintiffs contend that Eaton has been the dominant and most widely recognized American manufacturer of Class 8 transmissions, holding a near monopoly in the market since the 1950s. (*Id.* at ¶¶ 28, 42-45) In the 1990s, ZF Meritor established itself as a viable competitor to Eaton, producing desirable, competitive and innovative transmissions. (*Id.* at ¶¶ 28-29, 51-61) In response to this competition from ZF Meritor and a significant downturn in the Class 8 truck market which occurred in late 1999-early 2000, plaintiffs allege that Eaton and the OEMs conspired to put ZF Meritor out of business, thereby expanding Eaton's monopoly and permitting all defendants to share in the profits resulting from this monopoly. (*Id.* at ¶ 62)

This conspiracy was allegedly achieved by Eaton entering into Long Term Agreements ("LTAs") in the early 2000s with each of the four OEMs.[4] (*Id.* at ¶¶ 62-68). While each Eaton-OEM LTA was separately negotiated and thus distinct, the LTAs

[3] A databook is a term of art used in the trucking industry. It represents the truck broken down to its core components and provides customers with standard and nonstandard component options. (D.I. 25 at ¶¶ 4, 41) A transmission is an example of a component part that exists in a databook. (*Id.*)

[4] A series of mergers in the mid-1990's reduced to four the number of OEMs purchasing Class 8 transmissions. (D.I. 25 at ¶ 51)

shared a similar purpose and features. (*Id.* at ¶¶ 74-112) Each LTA contained a provision whereby the OEMs would receive sizable and lucrative rebates from Eaton assuming the OEMs utilized a certain percentage of Eaton transmissions annually. (*Id.*) For example, under the Freightliner-Eaton LTA, Freightliner was required to purchase 92% of its Class 8 transmission needs from Eaton in order to receive the specified rebates. (*Id.* at ¶ 77) Aside from tying percentage requirements to rebates, the LTAs included other provisions designed to minimize ZF Meritor's market share. Examples of these provisions included eliminating ZF Meritor transmissions from databooks or removing them from the standard position, refusing to provide warranties on trucks with ZF Meritor transmissions, overcharging for ZF Meritor transmissions, and refusing to provide financing on vehicles with ZF Meritor transmissions. (*Id.* at ¶¶ 74-113) In essence, plaintiffs argue that the LTAs were defacto exclusive dealing contracts and the OEMs all agreed with each other to enter into these agreements in order to eliminate ZF Meritor and share in the profits of Eaton's monopoly. (*Id.* at ¶¶ 62; 66) In the end, plaintiffs allege that defendants' conspiracy was successful as the LTAs greatly diminished ZF Meritor's market share in the Class 8 transmission field and left it no opportunity for growth. (*Id.* at ¶¶ 115-117) In the face of these economic realities, ZF Meritor's market share declined to an insignificant level. (*Id.*) Plaintiffs ultimately contend that they had to pay higher prices for transmissions and, in turn, for Class 8 trucks, as a result of defendants' actions; they also assert that "they had less choice and suffered from a decrease in innovation." (*Id.* at ¶¶ 4; 114)

III. STANDARD

A district court has broad discretion to grant or deny class certification. *See Eisenberg v. Gagnon*, 766 F.2d 770, 785 (3d Cir. 1985). The court does not inquire into the merits of a lawsuit when determining whether it may be maintained as a class action. *See Eisen v. Carlisle and Jacquelin*, 417 U.S. 156, 177 (1974). However, the court must conduct a limited preliminary inquiry, examining beyond the pleadings, to determine whether common evidence could suffice to make out a prima facie case for the class. *See General Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 160 (1982) ("[T]he class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action.") (internal citation omitted); *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 167 (3d Cir. 2001) ("[C]ourts may delve beyond the pleadings to determine whether the requirements for class certification are satisfied.").

The party seeking class certification bears the burden of establishing that certification is warranted under the circumstances. *Carrera v. Bayer Corp.,* 727 F.3d 300, 306 (3d Cir. 2013). Rule 23 of the Federal Rules of Civil Procedure sets forth the requirements for certification of a class. Under Rule 23(a), these requirements are: (1) the class is so numerous that joinder of all members is impracticable ("numerosity"); (2) there are questions of law or fact common to the class ("commonality"); (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class ("typicality"); and (4) the representative parties will fairly and adequately protect the interests of the class. *See In re Warfarin Sodium Antitrust Litig.,* 391 F.3d 516, 527 (3d Cir. 2004). Plaintiffs bear the burden to "establish that all four requisites of Rule 23(a)

and at least one part of Rule 23(b) are met." *Baby Neal v. Casey*, 43 F.3d 48, 55 (3d Cir. 1994).

Under Rule 23(b)(3), two additional requirements must be met for a class to be certified: (a) common questions must predominate over any questions affecting only individual members; and (b) class resolution must be superior to other available methods for the fair and efficient adjudication of the controversy. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613 (1997). Relevant to this inquiry are the following factors: (a) the interest of members of the class individually controlling the prosecution or defense of separate actions; (b) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (c) the desirability or undesirability of concentrating litigation of the claims in the particular forum; (d) the difficulties likely to be encountered in the management of the class action. *Id.* at 615-16. The Supreme Court has noted that the dominant purpose behind certifying Rule 23(b)(3) cases is to vindicate the rights of people who individually would be without the strength to bring their opponents into court; it overcomes the problem of small recoveries, which do not provide enough incentive for individual actions to be prosecuted. *Id.* at 617.

IV. DISCUSSION

The proposed IPP state classes are as follows:

> All persons or entities, in the state of [California, Florida, Kansas, Iowa, Michigan, Minnesota, Nebraska, North Carolina, Tennessee, Vermont, Wisconsin], that indirectly purchased from Defendants new Class 8 Heavy Duty trucks containing Eaton transmissions, beginning October 1, 2002 and continuing until the present ("Class Period"). Excluded from this class are: (i) Defendants and their parent companies, subsidiaries, affiliates, officers, directors, employees, legal representatives, heirs, assigns, and co-conspirators; and (ii) any judges presiding over this action and the members

of his/her immediate family and judicial staff, and any juror assigned to this action.

(D.I. 184 at 1-3) Plaintiffs assert the following claims: 1) violation of 20 state antitrust laws (for the following states: Arizona, California, District of Columbia, Iowa, Kansas, Maine, Michigan, Minnesota, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, North Dakota, South Dakota, Tennessee, Vermont, West Virginia and Wisconsin); and 2) violation of two state unfair competition laws (for the following states: Florida and New Hampshire). (D.I. 68 at ¶¶ 168-277) Plaintiffs move for certification pursuant to Fed. R. Civ. P. 23(a) and (b)(3). (D.I. 184)

A. Numerosity

To be certified, the class must be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). "No minimum number of plaintiffs is required to maintain a suit as a class action, but generally if the named plaintiff demonstrates that the potential number of plaintiffs exceeds 40, the first prong of Rule 23(a) has been met." *Stewart v. Abraham*, 275 F.3d 220, 227–28 (3d Cir. 2001). Plaintiffs argue that the number of relevant Class 8 truck sales during the proposed class period numbers in the thousands to tens of thousands and joinder, therefore, is impracticable. (D.I. 185 at 15). Dr. Russell Lamb ("Dr. Lamb"), plaintiffs' proffered expert, provided a range of relevant Class 8 truck sales per state between 1,572 and 41,307. (D.I. 187 at ¶ 18) Defendants do not dispute that the numerosity requirement is satisfied. The court notes that once all potential class members are identified, the class will be so numerous as to make joinder impracticable. Accordingly, the proposed IPP class satisfies the numerosity requirement.

B. Commonality

Commonality requires that class members share a single common issue of law or fact. *See Baby Neal*, 43 F.3d at 56. The proposed IPP class alleges a common course of conduct which, it contends, had a general effect on the market in that defendants' conduct artificially raised the price of Class 8 transmissions and decreased innovation. Specifically, plaintiffs assert that at least eight questions of law or fact are common to the proposed IPP class: (1) whether defendants engaged in a contract, combination, or conspiracy to restrain trade in, exclude competition in, or monopolize the relevant market for Class 8 truck transmissions; (2) whether defendants conspired to unreasonably restrain trade and maintain prices for Class 8 truck transmissions sold in the United States, and the indirect purchaser state submarkets, at supra-competitive levels by foreclosing the market for Class 8 truck transmissions in the United States and in the states at issue; (3) the existence and duration of the illegal conduct alleged herein; (4) whether defendants concealed their unlawful activities; (5) whether defendants' anticompetitive conduct resulted in diminished competition for Class 8 truck transmissions in the United States and in the states at issue; (6) whether defendants' anticompetitive conduct caused prices for Class 8 truck transmissions to be higher than they would have been in the absence of defendants' conduct; (7) whether members of the proposed IPP class were injured by defendants' conduct and, if so, the appropriate classwide measure of damages; and (8) whether defendants' conduct violated the antitrust and unfair competition laws of the indirect purchaser states. (D.I. 185 at 17-18) Defendants do not dispute that the commonality prong is satisfied. The proposed IPP class has demonstrated the commonality requirement because these questions generally focus on defendants' conduct and, as such, are common to all members of

the class. *See In re Warfarin*, 391 F.3d at 529 (stating that allegations for a violation of § 2 of the Sherman Act "naturally raise several questions of law and fact common to the entire class"); *In re Linerboard Antitrust Litigation*, 305 F.3d 145, 151-52 (3d Cir. 2002) (finding that, when the inquiry focuses on defendants' actions, a conspiracy claim pursuant to § 1 of the Sherman Act involves common issues of fact and law).

C. Typicality

Typicality requires that "the claims . . . of the representative parties are typical of the claims . . . of the class," not that the claims are identical. *See* Fed. R. Civ. P. 23(a)(3); *see also In re Warfarin*, 391 F.3d at 531-32. "The typicality inquiry centers on whether the interests of the named plaintiffs align with the interests of the absent members." *Stewart*, 275 F.3d at 227-28. More specifically, "[f]actual differences will not render a claim atypical if the claim arises from the same event or practice or course of conduct that gives rise to the claims of the [absent] class members, and if it is based on the same legal theory." *Id.* (alteration in original) (citing *Hoxworth v. Blinder, Robinson & Co., Inc.*, 980 F.2d 912, 923 (3d Cir. 1992)). The proposed IPP class contends that typicality is satisfied because "claims of the representatives of the proposed [s]tate [c]lasses are based on the same conduct by [d]efendants and substantially similar legal theories." (D.I. 185 at 23-24) Generally, plaintiffs argue the same legal theory applies across the state classes because all proposed IPP class members allege defendants conspired or contracted to reduce competition in the Class 8 transmission market. Defendants submit that typicality is not met because plaintiffs are not large fleet or leasing company purchasers. (D.I. 233 at 28) Rather, defendants assert that as indirect purchasers, plaintiffs purchased trucks through intermediary dealers and did not

negotiate with OEMs and component suppliers or enter into any long-term purchase contracts. (*Id.* at 28-29) Defendants additionally assert that absent subclass members "negotiate[d] deals in a different competitive landscape than individual customers." (*Id.* at 29 (citing *In re Intel Corp. Microprocessor Antitrust Litig.*, Civ. No. 05-485-LPS, 2014 WL 6601941, at *12 (D. Del. Aug. 6, 2014)) The court disagrees with defendants' assertions as related to the typicality requirement. Regardless of plaintiffs' status as indirect purchasers, typicality is met because recovery necessitates proof of defendants' collusive conduct resulting in artificially high prices for Class 8 transmissions. As discussed above, plaintiffs' claims arise out of the same course of alleged conduct that, if true, would have similarly injured each of them by artificially raising the price of Class 8 transmissions. Thus, any claims from absent class members will also arise out of the same course of conduct and alleged overpayment. *See In re* Warfarin, 391 F.3d at 531-32. Typicality, therefore, is satisfied.

D. Adequacy

Rule 23(a) also requires that the representative class members "fairly and adequately protect the interests of the class." *See* Fed. R. Civ. P. 23(a)(4). This inquiry "has two components designed to ensure that absentees' interests are fully pursued." *See In re Warfarin*, 391 F.3d at 532 (citing *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 630 (3d Cir. 1996), *aff'd, Amchem*, 521 U.S. at 591. "First, the adequacy inquiry 'tests the qualifications of the counsel to represent the class.' " *Id.* (quoting *In re Prudential Ins. Co. America Sales Practice Litig. Agent Actions*, 148 F.3d 283, 313 (3d Cir. 1998)). "Second, it seeks 'to uncover conflicts of interest between named parties and the class they seek to represent.'" *Id.* (quoting *Prudential*, 148 F.3d at 313).

1. **Qualifications of counsel**

Counsel for the proposed IPP class have submitted firm resumes demonstrating that counsel possess the competence, skill, and experience necessary to prosecute the class' claims. (D.I. 186, exs. 46-47); *See Jerry Enterprises of Gloucester County, Inc. v. Allied Beverage Group, L.L.C.*, 178 F.R.D. 437, 446 (D.N.J. 1998). The resumes demonstrate that counsel have participated in several class action antitrust suits, including representing indirect purchasers alleging overcharges as a result of price-fixing and market allocation conspiracy. (*See id.*) Plaintiffs have sufficiently demonstrated this requirement.

2. **Absence of conflict**

The proffered representatives are indirect purchasers of Class 8 truck transmissions from one or more of defendants' authorized sales agents/dealers. (D.I. 68 at ¶¶ 9-18) Plaintiffs argue that the members of the proposed IPP class do not have any interests antagonistic to those of the other class members, as all share a strong interest in proving defendants' liability. (D.I. 185 at 25-26) That is, each class representative has the same interest as each class member in proving their claims. Additionally, plaintiffs assert that each class member has been adversely impacted by defendants' conspiracy because their ability to purchase Class 8 transmissions has been restricted by defendants' conduct. As a result of that conduct, plaintiffs assert they have paid artificially inflated prices for Class 8 transmissions. (*Id.* at 26) Defendants challenge the adequacy of the proffered representatives, arguing that fundamental intra-class conflicts exist and that plaintiffs lack understanding of their claims and duties as class representatives. (D.I. 233 at 30-32)

At the outset, the court notes plaintiffs' request to withdraw and substitute two new parties as class representatives filed on the same day as the instant motion for class certification.[5] (D.I. 180) Apparently, California class representative Premier Produce Co., Inc. "is no longer able to participate in this action," and Kansas class representative Joseph Williams is no longer a class member as the proposed class is now defined. (*Id.*) This lawsuit was initially filed on October 4, 2010. (D.I. 1) It is, therefore, four years into the course of this litigation that plaintiffs request to remove class representatives and substitute new parties.[6] On the very same day plaintiffs requested removal and substitution of several class representatives, plaintiffs also asserted that their proffered representatives would adequately represent the class. The parties additionally dispute whether the representatives of the Michigan and Vermont subclasses have standing. (D.I. 233 at 34-36; D.I. 239 at 19) Given the potential upheaval in class representation at this stage of the litigation, the court is unable to find that the proffered class representatives or their proposed substitutions can "fairly and adequately protect the interests of the class." *See* Fed. R. Civ. P. 23(a)(4). Plaintiffs have had over four years to proffer adequate class representatives that can represent

[5] The court additionally notes that plaintiffs' request was filed more than ten months after the court's deadline of January 1, 2014 to add or amend parties. This deadline was set in the original scheduling order filed on February 7, 2013 in the related case, *Wallach v. Eaton, Corp.*, Civ. No. 10-260, D.I. 99 at ¶ 3, and here on March 12, 2013. (D.I. 88)

[6] Over the course of this four-year-old litigation, the parties briefed a motion to dismiss, completed extensive fact discovery, and the parties' class certification economists drafted expert reports and were subsequently deposed. At the time this motion was filed, defendants had "already taken nine depositions, with at least five more scheduled, and produced over 24,000 documents." (D.I. 204 at 4)

the interests of both present and absent class members without conflict.[7] Based on the foregoing, the court concludes that, while counsel is adequately qualified to represent the class, plaintiffs have not demonstrated that the adequacy requirement is satisfied with respect to class representatives.

E. Predominance

The court recognizes that the predominance requirement has been characterized as "readily met" in cases alleging violations of the antitrust laws.[8] *Amchem*, 521 U.S. at 625. However, the Supreme Court has acknowledged in this regard that questions of individual damages can "overwhelm questions common to the class." *Comcast Corp. v. Behrend*, – U.S. –, 133 S. Ct. 1426, 1433 (2013). Additionally, the Supreme Court has noted that Rule 23(b)(3) is an "'adventuresome innovation' of the 1966 amendments,

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[7] Moreover, there appears to be fundamental conflict defeating certification as the class includes parties who claim to have been harmed by the same conduct that benefitted other members of the class. (D.I. 233 at 31-32); *In re Intel*, 2014 WL 6601941, at *12 (citing *In re Photochromic Lens Antitrust Litig.*, Civ. No. 8:10-CV-00984-T-27EA, 2014 WL 1338605 at *10 (M.D. Fla. April 3, 2014)). First, the truck resellers within the class have an interest in proving that they passed-through zero overcharge in order to recover 100% of the damages attributed to each resale, while the downstream purchasers have an opposite interest. Second, the rebates, as discussed in the pass-through analysis below, were not applied uniformly to the class. Instead, it appears that large fleet and leasing companies may have "received a disproportionate share of rebates such that they offset the alleged overcharge." As result, these class members were not injured by the alleged anti-competitive conduct. (Civ. No. 10-260, D.I. 299, ex. 1 at ¶ 93)

[8] The Third Circuit has also recognized that monopolization and conspiracy claims involve predominantly common issues. *See In re Warfarin*, 391 F.3d at 528 (stating that allegations for violations of § 2 of the Sherman Act "naturally raise several questions of law and fact common to the entire class and which predominate over any issues related to individual class members, including the unlawfulness of [Eaton's] conduct under federal antitrust laws as well as state law, the causal linkage between [Eaton's] conduct and the injury suffered by the class members, and the nature of the relief to which class members are entitled."; *In re Linerboard*, 305 F.3d at 152 (finding violation of Sherman Act's § 1 conspiracy claim would predominantly involve common issues of fact and law, where the inquiry focused on defendants' actions, not individual class members).

framed for situations 'in which class-action treatment is not as clearly called for.'" *Wal-Mart Stores, Inc. v. Dukes*, – U.S. –, 131 S. Ct. 2541, 2558 (2011) (quoting *Amchem*, 521 U.S. at 625 (citing advisory committee's notes, 28 U.S.C. app., at 697 (1994 ed.))).

Rule 23(b)(3)'s predominance element requires that common issues predominate over issues affecting only individuals, and tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation. *See Amchem*, 521 U.S. at 623; *In re Warfarin*, 391 F.3d at 527. Significantly, the predominance requirement "is far more demanding" than the commonality requirement of Rule 23(a), which it incorporates. *In re Warfarin*, 391 F.3d at 527. Although common issues must predominate over individual inquiries, the existence of an individual inquiry does not preclude class certification, especially where all members face the necessity of proving the same fraudulent scheme. *See In re Community Bank of Northern Virginia*, 418 F.3d 277, 306 (3d Cir. 2005) (discussing *Amchem*, 521 U.S. at 625). Similarly, individualized damages calculations do not defeat a Rule 23(b)(3) certification if the predominance requirement is otherwise met. *Id.* at 305-06; *Chiang v. Veneman*, 385 F.3d 256, 273 (3d Cir. 2004).

"The essential inquiry for predominance is whether the proposed class is 'sufficiently cohesive to warrant adjudication by representation.'" *In re Intel*, 2014 WL 6601941, at *13 (citing *Amgen Inc. v. Connecticut Ret. Plans & Trust Funds*, – U.S. –,133 S. Ct. 1184, 1196 (2013)). The Third Circuit has further instructed that "[c]lass certification is proper only 'if the trial court is satisfied, after a rigorous analysis, that the prerequisites' of Rule 23 are met." *In re Hydrogen Peroxide Antitrust Litigation*, 552 F.3d 305, 309 (3d Cir. 2008) (quoting *Gen. Tel. Co. of the S.W. v. Falcon*, 457 U.S. 147,

161 (1982)). Additionally, "actual, not presumed, conformance with Rule 23 requirements is essential." *Marcus v. BMW of North America, LLC*, 687 F.3d 583, 591 (3d Cir. 2012). "Expert opinion with respect to class certification, like any matter relevant to a Rule 23 requirement" compels rigorous analysis. *Hydrogen Peroxide*, 552 F.3d at 323. "Weighing conflicting expert testimony at the certification stage is not only permissible; it may be integral to the rigorous analysis Rule 23 demands." *Id.*

Generally, plaintiffs contend that the common issues regarding the proposed IPP class' allegations of a conspiracy predominate over the possibility of individualized damages. (D.I. 233 at 28) Specifically, plaintiffs' assertion of common issues that predominate this action include: (1) whether defendants engaged in a conspiracy to fix, raise, stabilize, and maintain the prices of Class 8 transmissions; (2) whether defendants monopolized or engaged in a conspiracy to monopolize trade and commerce in the market for Class 8 transmissions sold to consumers in the United States; and (3) whether defendants' conduct caused the prices of Class 8 transmissions to be maintained at higher levels than would exist in a competitive market. (D.I. 185 at 28) Defendants argue that plaintiffs have failed to meet their burden; specifically, that plaintiffs are unable to show through common proof that direct purchasers paid an overcharge. Defendants also contend that proof of pass-through requires an individualized, transaction-by-transaction, reseller-by-reseller analysis, and that litigation as a class action is unmanageable due to state law variances. (D.I. 233 at 14, 25)

The Third Circuit has pointed out that in antitrust cases, the element of "impact often is critically important for the purpose of evaluation of Rule 23(b)(3)'s predominance requirement because it is an element of the claim that may call for

individual, as opposed to common proof." *In re Intel*, 2014 WL 6601941, at *13 (citing *Hydrogen Peroxide*, 552 F.3d at 311). While plaintiffs need not prove common impact at the class certification stage, they must at least

> demonstrate that the element of antitrust impact is capable of proof at trial through evidence that is common to the class rather than individual to its members. Deciding this issue calls for the district court's rigorous assessment of the available evidence and the method or methods by which plaintiffs propose to use the evidence to prove impact at trial.

Id.

At this stage, the court does not question plaintiffs' proposition that defendants' anticompetitive conduct "could, in theory, impact the entire class despite a [resultant] decrease in prices for some customers in parts of the class period, and despite some divergence in the prices different plaintiffs paid." *Hydrogen Peroxide*, 552 F.3d at 325. However, "the question at [the] class certification stage is whether, if such impact is plausible in theory, it is also susceptible to proof at trial through available evidence common to the class." *Id.* The threshold issue of predominance, then, is whether plaintiffs have established common proof to show that all or nearly all class members suffered antitrust injury, and that any benefits received by certain purchasers as a result of defendants' anticompetitive payments are exceeded by the overcharges imposed that were subsequently passed on to end purchasers. *Id.* Based on the record before it and as discussed below, plaintiffs have failed to meet this common evidence burden.

1. Overcharge analysis

Both parties agree that class certification requires plaintiffs to demonstrate the ability to show through common proof that (1) Eaton assessed an overcharge on all of its transmission sales to all of the OEMs; (2) each of the OEMs passed on the alleged

overcharge to substantially all of its direct purchasers; and (3) each of the many hundreds of direct purchasers passed on part of that alleged overcharge to substantially all of the thousands of indirect purchasers. (D.I. 233 at 14) Generally, plaintiffs rely on Dr. Lamb's expert report and testimony in support of the overcharge propositions as related to the direct purchasers. Defendants ask the court to deny class certification because "both direct plaintiffs and Dr. Lamb can show neither antitrust impact nor damages with proof common to the putative class of 'direct' purchasers." (*Id.*)

As noted above, class certification requires plaintiffs to establish that reliable, common evidence can be used to prove that all or nearly all of the proposed class members paid a higher price than they would have absent the alleged conspiracy. *Hydrogen Peroxide*, 552 F.3d at 311. While plaintiffs need not prove antitrust impact at the class certification stage, plaintiffs must show that "impact is capable of proof at trial through evidence that is common to the class rather than individual to its members." *Id.* at 311-12.

Here, however, plaintiffs' status as indirect purchasers must be taken into account. Eaton did not sell any transmissions directly to any of the plaintiffs. Rather, Eaton sold the transmissions to OEMs who then included the transmissions in Class 8 trucks purchased from defendants' authorized sales agents or dealers. Similar to *In re Intel,* this case is distinguishable from price-fixing class actions involving alleged overcharges to direct purchasers. *In re Intel*, 2014 WL 6601941, at *14. Plaintiffs at bar must show that they can prove, through common evidence, that Eaton not only overcharged its OEM customers, but that overcharges were then passed from the OEMs to direct purchasers and eventually to plaintiffs as indirect purchasers. An

additional distinction between the instant case and a majority of price-fixing cases is that the "challenged 'conduct is a price **reduction**" that benefitted members of the class. *In re Intel*, 2014 WL 6601941, at *14 (emphasis in original) (citing *In re Photochromic Lens,* 2014 WL 1338605 at *11) ("[A] class cannot be certified when some members of the class benefitted from the alleged wrongful conduct.").

Notably, the Supreme Court in *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 735 (1977), "established the general rule that only direct purchasers from antitrust violators may recover damages in antitrust suits." *Howard Hess Dental Labs. Inc. v. Dentsply Int'l, Inc.*, 424 F.3d 363, 369 (3d Cir. 2005). Indirect purchasers are generally **not** entitled to recover damages for passed-on overcharges. *Id.* (emphasis added) This is referred to as the "indirect purchaser rule." Three policy reasons justified the Supreme Court's decision to impose this rule:

> (1) a risk of duplicative liability for defendants and potentially inconsistent adjudications could arise if courts permitted both direct and indirect purchasers to sue defendants for the same overcharge; (2) the evidentiary complexities and uncertainties involved in ascertaining the portion of the overcharge that the direct purchasers had passed on to the various levels of indirect purchasers would place too great a burden on the courts; and (3) permitting direct and indirect purchasers to sue only for the amount of the overcharge they themselves absorbed and did not pass on would cause inefficient enforcement of the antitrust laws by diluting the ultimate recovery and thus decreasing the direct purchasers' incentive to sue.

Id. at 369-70 (citing *Illinois Brick*, 431 U.S. at 730-35). The threshold issue necessary to predominance, therefore, turns on whether plaintiffs have proffered sufficient common evidence to prove that Eaton overcharged its direct purchasers.

a. Dr. Lamb's analysis

Dr. Lamb calculated a damages model "using a 'benchmark' model, whereby he determine[d] prices that would have prevailed in a world free of alleged misconduct,

called 'but for' prices." (D.I. 185 at 30) According to this report, "Dr. Lamb calculated that 94.2% of the overcharges were passed from direct purchasers to indirect purchasers." (*Id.* at 31) Dr. Lamb arrived at this conclusion following three separate regressions and a "yardstick approach" to account for the lack of benchmarks in the performance transmission market. (*Id.*; Civ. No. 10-260, D.I. 397 at 71) Specifically, Dr. Lamb calculated the alleged overcharge on Eaton Class 8 linehaul transmissions to the OEMs (direct purchasers).[9] From this regression, he concluded that during the class period, "prices for Eaton Class 8 Linehaul transmissions were not fully explained by market forces ... Thus, common evidence is available to show that the alleged misconduct inflated Eaton Class 8 transmission[] prices above the level that would have prevailed absent the alleged misconduct." (Civ. No. 10-260, D.I. 232, ex. 1 at ¶¶ 179-90) Dr. Lamb then performed a second regression to measure the damages to direct purchasers, calculating that as a result of pass-through, the direct purchaser class suffered $398.4 million in damages during the class period. (*Id.* at ¶¶ 192-212) A third regression of that data was utilized to calculate the damages allegedly passed on from the direct purchaser dealers to end user indirect class members whereby Dr. Lamb calculated 94.2% of the overcharges were passed on, resulting in $91,391,262 in damages to the class. (D.I. 187 at ¶¶ 40-51)

b. Direct purchaser analysis

[9] The court notes this analysis relies entirely on Dr. Lamb's report in the related direct purchaser case, *Wallach v. Eaton, Corp.*, Civ. No. 10-260. (D.I. 185 at 31) Dr. Lamb additionally applied the same overcharge percentage calculated from his Eaton linehaul regression in order to calculate the damages on Class 8 performance transmissions. (Civ. No. 10-260, D.I. 232, ex. 1 at ¶ 189) As will be discussed in the next section, this regression assumes a single uniform overcharge to all OEMs across all transmissions. (*Id.* at ¶¶ 179-90)

As noted, plaintiffs are required to show there is common proof that Eaton overcharged the individual class members who purchased Eaton transmissions contained in Class 8 trucks during the Class Period. In support of this proposition, plaintiffs rely entirely on Dr. Lamb's analysis, asserting that his model calculates the overcharge to direct purchasers by analyzing "various data provided by the Defendants." (D.I. 185 at 31) Defendants assert, and the court agrees, however, that Dr. Lamb's model analyzes only a "small slice of data." (Civ. No. 10-260, D.I. 397 at 42:13-14) Dr. Lamb's report additionally assumes, rather than analyzes, several important points. First, Dr. Lamb reached his conclusions by applying "the same overcharge percentage calculated from [the] Eaton Linehaul regression to Eaton's sales in order to calculate the damages on Class 8 Performance Transmissions." (Civ. No. 10-260, D.I. 232, ex. 1 at ¶ 189) In other words, Dr. Lamb ignored performance transmissions, basing his conclusions solely on a portion of linehaul transmission data.[10] Notably, defendants' expert, Dr. Johnson, concluded that performance transmissions comprise "nearly half of Eaton's transmissions sold during the relevant period." (Civ. No. 10-260, D.I. 299, ex. 1 at ¶ 20) By basing his analysis solely on linehaul transmission data, Dr. Lamb has excluded half of the data he proffers as common evidence that direct purchasers paid an overcharge. Moreover, Dr. Lamb's model excludes data from Daimler and Freightliner, comprising "over 40 percent of the linehaul trucks in this case." (*Id.* at 42:12-17) It appears, then, that Dr. Lamb's analysis

[10] Dr. Lamb argues this is appropriate because, but for Eaton's anti-competitive conduct, "ZF Meritor would have entered the Class 8 performance Transmission market." (Civ. No. 10-260, D.I. 232, ex. 1 at ¶ 189) This is debatable. As defendants assert, "performance truck purchasers must prove at trial that ZF Meritor would have entered the performance market." (D.I. 233 at 24)

is based on less than 60 percent of half of the data. As Dr. Johnson explained, "Dr. Lamb failed to include (a) more than 19,000 transmissions with prices above $7000, (b) all performance transmissions, (c) 47.1% of manual transmissions, (d) 40.5% of Volvo-Mack purchases, (e) 36.9% of Daimler purchases, (f) 33.0% of Navistar purchases, and (g) 64.5% of PACCAR purchases." (D.I. 298 at 31; Civ. No. 10-260, D.I. 299, ex. 1 at ¶ 22) When asked about the most persuasive component of his analysis, Dr. Lamb testified that his analysis "is more credible because it's grounded in the facts of the case." (Civ. No. 10-260, D.I. 397 at 42:13-14) In reality, Dr. Lamb's analysis utilizes assumptions based on a modicum of data not fully representative of Eaton transmission sales during the Class Period, in that he "used less than 55% of the relevant Eaton transmission sales." (D.I. 298 at 31; Civ. No. 10-260, D.I. 299, ex. 1 at ex. 2) Dr. Lamb's "compartmentalized view" of damages does not comprise common proof that Eaton overcharged the direct purchasers. *In re Intel*, 2014 WL 6601941 at *17. Plaintiffs have not met their burden in this regard. Because plaintiffs have failed to demonstrate that there is common proof showing that direct purchasers paid an overcharge, the indirect purchaser class cannot be certified.[11] Nevertheless, the court will address the parties' arguments regarding pass-through.

2. Pass-through analysis

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[11] The court also acknowledges that indirect purchasers may not have standing as direct purchaser plaintiffs have since been dismissed on this issue. (Civ. No. 10-260, D.I. 393 at 6; D.I. 394). However, the court declines to analyze at this juncture whether indirect purchasers have standing since the issue has not been reasserted since the court denied defendants' motion to dismiss in the instant case. (D.I. 60)

Likewise, plaintiffs have failed to identify common evidence that any alleged overcharges were passed on to the indirect purchasers. As discussed above, class certification requires that plaintiffs show the alleged overcharges were passed on to end purchasers in the form of higher prices to consumers. Defendants assert that the complexity of truck pricing and the indirect purchaser distribution chain make it impossible to identify, much less prove, class-wide injury through common proof. (D.I. 233 at 15) Defendants also assert plaintiffs' reliance on Dr. Lamb's pass-through regression is similarly flawed to his overcharge analysis. (*Id.*)

a. Truck pricing and the transmission distribution chain

As discussed above, this litigation primarily concerns plaintiffs' allegation that they had to pay higher prices for transmissions and, in turn, for Class 8 trucks as a result of defendants' anti-competitive conduct. Transmissions, of course, comprise only a part of a Class 8 truck transaction. While the Class 8 trucks here have identical transmissions, each truck is unique and highly customized for use in different applications, meaning manufacturing costs for each truck varies by tens of thousands of dollars. (*Id.* at 6) Moreover, some companies do not simply sell Class 8 trucks, but mount a "significant body," such as a concrete boom, cement mixer, tanker, or refuse loader for a garbage truck. (*Id.* at 18) Those companies then sell a complete package, truck and body together. Determining what portion of the alleged overcharge was passed on to a transmission cannot be determined simply by the overall purchase price of the truck. This is particularly true with respect to "significant bodies," as these components have their own costs, at times more costly than the truck itself. (*Id.* at 7) Additionally, as Dr. Johnson explained, "[t]here are multiple possible intermediaries

between the OEMs and indirect purchasers of Class 8 trucks, such as dealers, body builders, and other resellers, which yields a number of possible distribution chains." (D.I. 234, ex. 1 at ¶ 19) As defendants assert, the proposed IPP class includes leasing companies as well as resellers, potentially resulting in transmissions that have been sold and then resold with no methodology to account for this occurrence. (D.I. 233 at 6) Overall, the complex distribution chain frustrates the process of determining the amount of pass-through on a transmission based on the price of a truck, and "[t]here has been no effort to correlate transmission ... cost to truck price." (Civ. No. 10-260, D.I. 397 at 311:7-9)

Plaintiffs' allegation of anti-competitive conduct involves Eaton's entry into LTAs in the early 2000s with each of the OEMs. While these LTAs were separately negotiated and distinct, each contained sizable and lucrative rebates from Eaton, operating under the assumption that the OEM would utilize a certain percentage of Eaton transmissions annually. These rebates, among other beneficial terms, also present a significant problem for plaintiffs trying to prove, through common evidence, that the alleged overcharges were passed on.[12] In fact, plaintiffs acknowledge that "[t]ruck dealers and fleet purchasers ... sometimes receive special incentives called 'SPIFFs' ..., which effectively **reduce** the net price." (Civ. No. 10-260, D.I. 232, ex. 1 at ¶ 159) (emphasis added) These rebates complicate the damages issue not only because the rebates benefitted some members of the class through price reduction, but also in terms of individualized transactions and the inability to account for them through

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[12] According to defendants, "[c]omponent manufacturers give extended warranties, additional product support, and monetary rebates (SPIFFs) to certain customers, typically large fleets, if the customers will spec their component." (D.I. 233 at 15)

common proof.[13] *See In re Intel*, 2014 WL 6601941, at *14; *In re Photochromic Lens,* 2014 WL 1338605 at *11) ("[A] class cannot be certified when some members of the class benefitted from the alleged wrongful conduct.")).

As to reduction in Class 8 truck pricing in exchange for choosing an Eaton transmission, defendants assert that not all reductions in truck pricing can be reflected on an invoice. (D.I. 233 at 16) For example, a dealer may increase trade-in value, offer preferred buy-back terms, or provide special financing. (*Id.*) More importantly, defendants provided the following examples where the benefits received exceeded the alleged overcharge:

> Cordes, Inc. (Michigan) received a special financing rate from PACCAR in conjunction with one new Class 8 truck purchase. More specifically, Mr. Cordes testified that another customer originally ordered the truck and no longer wanted it, and "they gave me a cheap financing rate on it, because they wanted to dump it. So I can borrow it cheaper than I can borrow money at the bank."
>
> Rodney Jaeger's (Wisconsin) sole new Class 8 truck purchase during the Class Period involved a complicated trade-in transaction including both a used Class 8 truck that he owned and a used Class 8 truck owned by a third party. Mr. Jaeger also purchased the truck under a special sales program that granted a $3,500 discount provided certain components were selected, including an Eaton transmission.
>
> Meunier Enterprises LLC (Florida and North Carolina) typically traded in used trucks in conjunction with new truck purchases and shopped dealers and brands based on who offered the best trade-in values.
>
> Phillip Nix (Kansas) traded in a used truck in conjunction with all of his truck purchases and aggressively negotiated the trade-in values he received. In one case the trade-in value made up nearly 75% of the price of the new truck.

[13] These rebates also present a fundamental intra-class conflict that defeat the adequacy requirement as discussed above.

Paul Prosper (Vermont) traded in a used truck in conjunction with Prosper Trucking, Inc.'s only relevant truck purchase. Prosper also financed the purchase through Daimler Trucks' captive finance company.

Purdy Brothers Trucking Co., Inc. (Tennessee) negotiated trade-back terms, meaning that Purdy received a guaranteed future trade-in value on its new truck purchase. Purdy also sold trucks back to Freightliner via a fleet reduction program and financed certain truck purchases through Daimler Trucks' captive finance company.

Ryan Avenarius (Iowa) did not negotiate the price of his sole purchase during the Class Period. After providing the dealer with his preferred specifications, he simply paid the dealer's first quoted price.

(D.I. 233 at 16-17)[14] Given that eight of the 11 proposed state classes contain examples of unique sales incentives as described above, the court is unpersuaded that plaintiffs can package the evidence such that an individualized inquiry into each transaction is unnecessary. In other words, plaintiffs' claims may not "be proven with evidence common to the class because it fails to account for many of the real-world facts surrounding this complicated market." *In re Intel*, 2014 WL 6601941, at *15. Because plaintiffs have failed to show that common evidence can prove antitrust impact in this complicated truck pricing market without individualized inquiries, class certification is not proper. *Hydrogen Peroxide*, 552 F.3d at 311-12.

b. Dr. Lamb's pass-through analysis

Dr. Lamb's pass-through analysis likewise fails to proffer common proof that the indirect purchasers paid any overcharge. In order to show antitrust impact on the indirect purchasers, class certification requires plaintiffs to "show that the [alleged]

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[14] (Citing D.I. 234, ex 23 at 119:20-121:14; ex. 20 at 65:19-67:2, 43:21-48:12; ex. 41 at PACCAR091994; ex. 26 at 52:9-54:19; ex. 27 at 54:11-55:2, 84:3-16, 99:6-100:2; ex. 38 at ex. B (reflecting negotiated trade-in value of $80,000 applied to base purchase price of $107,908); ex. 40 at 56:21-57:16, 44:13-19; ex. 25 at 30:11-32:18, 29:19-30:10, 45:3-45:21; ex. 39 at 29:1-10)

overcharges are passed on to end purchasers in the form of higher prices to consumers." *In re Intel*, 2014 WL 6601941, at *18. Dr. Lamb calculated that 94.2% of the alleged overcharges were passed-through to indirect purchasers by averaging a fractional amount of data. (D.I. 185 at 31; D.I. 233 at 21) As Dr. Johnson asserts, Dr. Lamb only analyzed 1,833 out of 235,868 truck sales during the relevant Class Period. (D.I. 234, ex. 1 at ¶ 32) Dr. Lamb then applied the rate attained from that regression across the entire proposed IPP class, "based on the assumption that the pass-through rate for the transmission alone is the same as that for the entire truck." (*Id.* at ¶ 37) This amounts to an analysis utilizing less than **one percent** of the relevant truck sale data and fails to account for transmission price in the sale of a truck as a whole. In no way does an analysis of one percent compel the conclusion that plaintiffs can proffer sufficient common evidence to prove the alleged overcharges were passed through to indirect purchasers. Dr. Lamb's analysis merely includes data from two dealers in California, thereby excluding ten of the 11 states for which plaintiffs seek class certification. (D.I. 233 at 21) Dr. Lamb further fails to account for additional factors that can affect the relationship between transmission and truck price as discussed above. As the Supreme Court noted in *Comcast*, "[t]here is no question that the model failed to measure damages resulting from the particular antitrust injury on which [defendants'] liability in this action is premised." *Comcast*, – U.S. –, 133 S. Ct. at 1433. For the reasons discussed above, the court finds plaintiffs have not met their burden to prove that common issues predominate. The court, therefore, declines to grant class certification.

4. Superiority

The superiority requirement asks the court to balance, in terms of fairness and efficiency, the merits of a class action against those of alternative available methods of adjudication. *In re Prudential*, 148 F.3d at 316. Given the court's findings regarding adequacy of class representatives and plaintiffs' failure to show that common issues predominate, class certification under Rule 23(b)(3) would be inappropriate. Hence, the court declines to address this requirement.

V. CONCLUSION

For the reasons stated above, plaintiffs' class certification motion will be denied. Moreover, because the proposed class lacks representation, the case does not present a case or controversy under Article III. *See In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F .3d 283, 306 (3d Cir. 1998) (holding that "whether an action presents a 'case or controversy' under Article III is determined vis-a-vis the named parties"). Accordingly, the case is dismissed. An order shall issue.

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

IN RE CLASS 8 TRANSMISSION INDIRECT PURCHASER ANTITRUST LITIGATION	)))	Civ. No. 11-00009-SLR

ORDER

At Wilmington this 21st day of October, 2015, consistent with the memorandum issued this same date;

IT IS ORDERED that:

1. Plaintiffs' motion for leave to withdraw and substitute class representatives (D.I. 180) is denied as moot.

2. Plaintiffs' motion to certify class (D.I. 184) is denied.

3. The case is dismissed.

[signature]
United States District Judge

EXHIBIT C

1 IN THE UNITED STATES DISTRICT COURT

2 IN AND FOR THE DISTRICT OF DELAWARE

3 - - -

4

MARK S. WALLACH, AS CHAPTER : CIVIL ACTION
5 7 TRUSTEE FOR THE :
BANKRUPTCY ESTATE OF :
6 PERFORMANCE TRANSPORTATION :
SERVICES, INC., and TAURO :
7 BROTHERS TRUCKING COMPANY, :
jointly and on behalf of :
8 the estate and all others :
similarly situated, :
9 Plaintiffs, :
:
10 vs. :
:
11 EATON CORPORATION, et al., :
Defendant. : NO. 10-260 (SLR)
12 --------------------------- :
IN RE CLASS 8 TRANSMISSION : CIVIL ACTION
13 INDIRECT PURCHASER :
ANTITRUST LITIGATION : NO. 11-00009 (SLR)
14

15 - - -

16 Wilmington, Delaware
Tuesday, June 25, 2013
17 3:03 o'clock, p.m.

18 - - -

19 BEFORE: HONORABLE SUE L. ROBINSON, U.S.D.C.J.

20 - - -

21

22

23

24 Valerie J. Gunning
Official Court Reporter

25

2

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1 P R O C E E D I N G S
2
3 (Proceedings commenced in the courtroom,
4 beginning at 3:03 p.m.)
5
6 THE COURT: Good afternoon, everyone. I know
7 there are quite a few people here. If we want to start with
8 introductions, that's always a good place to start and then
9 we can get into the agenda.
10 MS. ZELDIN: Thank you, your Honor. Jessica
11 Zeldin from Rosenthal Monhait.
12 With me at counsel table on behalf of the Direct
13 Purchaser Plaintiff is Glen DeValerio from Berman DeValerio
14 in Boston, and Manuel John Dominguez from Cohen Milstein in
15 Washington, D.C.
16 THE COURT: All right. Thank you very much.
17 MS. ZELDIN: Thank you.
18 MR. DRISCOLL: Good afternoon, your Honor. Tom
19 Driscoll from Bifferato LLC on behalf of the Indirect
20 Plaintiffs, and with me in the courtroom today from Glancy
21 Binkow & Goldberg LLP are Lee Albert and Greg Linkh, and
22 from Gunderson, Sharp & Walke, Joe Gunderson and David
23 Sharp.
24 THE COURT: All right. Welcome.
25 MR. DRISCOLL: Thank you, your Honor.

1 THE COURT: Mr. Reid?
2 MR. REID: Good afternoon, your Honor.
3 THE COURT: Good afternoon.
4 MR. REID: Donald Reid on behalf of Eaton
5 Corporation, and with me today is Erik Koons from Baker
6 Botts firm.
7 THE COURT: Hi. How are you?
8 MR. DiGIOVANNI: Good afternoon, your Honor.
9 Frank DiGiovanni from Novak Druce Connolly Bove for
10 defendants Paccar, Kenworth and Peterbilt. And I'm here
11 with my co-counsel from Weil Gotshal, Carrie Anderson.
12 MS. ANDERSON: Good afternoon, your Honor.
13 MR. REID: And Meaghan Thomas-Kennedy.
14 THE COURT: Welcome.
15 Ms. Farnan?
16 MS. FARNAN: Good afternoon, your Honor. Kelly
17 Farnan on behalf of the Navistar defendants, and I also have
18 with me my co-counsel, Jennifer Cowen, from Kirkland &
19 Ellis.
20 MS. COWEN: Good afternoon.
21 THE COURT: Good afternoon.
22 MS. FARNAN: Thank you, your Honor.
23 MS. PALAPURA: Good afternoon, your Honor.
24 Bindu Palapura from Potter Anderson. Today with me on
25 behalf of Daimler Trucks is Corey Roush from Hogan Lovells.

1 THE COURT: Welcome. Thank you.
2 Mr. Grant?
3 MR. GRANT: Good afternoon, your Honor. A
4 pleasure to be here. Duncan Grant with Pepper Hamilton on
5 behalf of defendants Volvo and Mack, and I'm joined by my
6 partners from our Philadelphia office at counsel table,
7 Daniel Boland.
8 MR. BOLAND: Good afternoon, your Honor.
9 MR. GRANT: And in the gallery, Barak Bassman.
10 THE COURT: Welcome. Thank you.
11 All right. I certainly received the letter
12 from, I believe it was plaintiffs' counsel, and I don't
13 know. I understand that plaintiffs believe that I could
14 benefit from something in writing, but if you saw my office,
15 you can all take a hike up there, you would probably change
16 your mind about that.
17 My concern always is, is that motions that don't
18 have deadlines on them, it's so easy to lose track of them,
19 and I don't want to have this case sitting in the water if
20 these are issues that need to be resolved sooner rather than
21 later.
22 So to the extent that we have time, I don't know
23 whether there are other issues that also need to be
24 addressed, I would like to at least address the discovery
25 disputes.

1 I would like to do as much as I can here today,
2 and if there are some issues that I really could be helped,
3 and I will make it a point to try to review the papers when
4 they come in, I will. But I just think you would be better
5 off if we could try to resolve them today.
6 So I will let plaintiffs' counsel start us off
7 as I usually do with the most important issue and we'll go
8 down the list.
9 MR. DeVALERIO: Thank you, your Honor. Glen
10 DeValerio for the Direct Purchaser Plaintiffs.
11 And I appreciate, and I certainly do not mean to
12 suggest countering anything your Honor just said. I would
13 just like to point out that we have now negotiated for
14 probably some 20 hours and we resolved a very substantial
15 number of the disputes, down to parts of three remaining
16 issues. We had discussions yesterday. Some of plaintiffs
17 and defendants were on the train coming from Washington
18 today and there was some there were some further
19 discussions. I think there's even only one tiny part of one
20 issue still remaining.
21 Recognizing what your Honor said, and I always
22 am careful where to tread when Courts have already spoken
23 its position, we simply suggest that it might be a good idea
24 to let that process continue for -- and I recognize that you
25 want specific time frames and not let things hang out

1 there -- but, for example, for ten days, and if we can't
2 resolve the remaining issues in the next ten days, we would
3 then, as our proposed agenda suggests, limit ourselves to
4 five pages and three pages, two for responses, and then
5 potentially come back to your Honor if, in fact, we actually
6 have any more disputes, say in early August for your Honor
7 to consider.
8 But I understand what you said and I just wanted
9 that to be clear, that we think that we've done a lot. We
10 have, for example, resolved all the issues with regard to
11 the plaintiffs' production, and of the dozens of requests,
12 we're down to just this little handful of items. So I do
13 think it has been productive and I think it could be
14 continue to be productive to a final resolution.
15 THE COURT: All right. Well, let's hear --
16 MR. DeVALERIO: Mr. Dominguez will address the
17 Court with regard to the specific issues that we believe are
18 still outstanding.
19 THE COURT: Okay. Well, why don't I have kind
20 of an introductory summary from someone from defendants'
21 side to let me now how things are going from their
22 perspective and then we'll get to those.
23 MR. SHARP: Your Honor, for the Indirects,
24 we've got two cases here. We don't really have anything to
25 add.

1 THE COURT: Okay.
2 MR. SHARP: But I thought we should make that
3 clear.
4 THE COURT: All right. Thank you very much.
5 MR. ROUSH: Good afternoon, your Honor. Corey
6 Roush, speaking on behalf of the OEM defendants. And I
7 think on this issue also for Eaton, we have made our best
8 and final offer on the outstanding major issues and it has
9 been rejected. We don't think there's going to be any
10 movement in the next ten days unless they think they're
11 going to compromise to the point where we already are.
12 So on the major issues, we'd like to have the
13 Court hear today, and it's a little bit of an overstatement
14 to say that we've resolved everything. The dispute that we
15 have with regard to timing affects 67 of their 101 requests.
16 So right now we still have a dispute on 67 of the their 101
17 requests, and they even have some small things. But I do
18 agree with Mr. DeValerio, that on those small things, to the
19 extent we have not made progress, we're confident we'll be
20 able to.
21 THE COURT: All right. Well, since I brought
22 you all here, and since I know my failures as a judge, which
23 is I can't keep up with every piece of paper that comes
24 across my desk unless I've got someone there telling me it
25 needs to be resolved, I think we ought to start.

1 You tell me from plaintiffs' perspective, are we
2 just going to start with the geographic limits?
3 MR. DOMINGUEZ: Your Honor, I would like to
4 start with the time period, if that's okay.
5 THE COURT: Okay.
6 MR. DOMINGUEZ: Because, as he said, that's the
7 most significant one.
8 THE COURT: Okay.
9 MR. DOMINGUEZ: Your Honor, John Dominguez for
10 the Direct Purchaser Plaintiffs.
11 As you know, we filed -- well, we filed this
12 case back in March of 2010, and as part of their initial
13 offer or their final offer, they were willing to produce
14 documents relating to ATA negotiations up to March 2010
15 and they were also willing to give us data up until
16 March 2010.
17 Am I right, Corey? I just want to make sure.
18 Okay.
19 So basically, the way we look at it is, our
20 class period runs from October 1st, 2002, through the
21 present. So I think some of the arguments that I've heard
22 from the defendants so far have said that, you know, listen,
23 in 2007, the conspiracy was complete. You don't need any
24 additional documentation, but they failed to understand
25 there are a couple of things that were still outstanding.

1 Number one, we're still going to have to prove
2 impact. We're still going to have to prove damages to the
3 class throughout the class period. In order to do that,
4 we'll need data till the end of the class period. We will
5 also need documents to the end of the class period to show,
6 you know, in other words, if we get the data information
7 that tells us prices are higher, that only solves one
8 question.
9 The question will still be whether the impact or
10 the increased process were from the conduct of the
11 defendants or was it from some other outside source, the
12 impact to the class, and we'll need the documents in order
13 to decipher that.
14 The other thing that's interesting here is this
15 conspiracy was not just about the exclusion of ZF and
16 Meritor. It was also about the splitting of monopoly rents.
17 Those rents continue to be split in our after 2007. So
18 documents about that would still be relevant to our case.
19 In order to try to meet a resolution with the
20 defendants, you know, we have pared back a lot of our, the
21 scope of a lot of our, of our requests in order to try to
22 meet common ground with them. Unfortunately, that hasn't
23 really worked.
24 With regard to Eaton and their request for
25 production, we're still in negotiation with them, and I will

1 let Erik and Corey address that, if they want.
2 I also wanted to talk about that with regard to
3 the LTAs themselves, right now they want to limit us to
4 March 2010 for the LTA negotiations, yet we know from the
5 document review that we've done so far that the Freightliner
6 LTA was renegotiated some time in 2010. We don't know if
7 that was after March 2010 or before March 2010. And we also
8 know from the documents that we reviewed that the
9 International or Navistar LTA was terminated or would
10 terminate at the end of 2011, so we wouldn't even be privy
11 to those documents or the renegotiation of the LTA or
12 whether there's an LTA post in 2011.
13 Our proposal to them was that we would take
14 documents and data up until the end of December 31st, 2012,
15 or the end of 2012, and we were hoping that that would
16 produce some efficiencies for the defendants as they
17 wouldn't have to recollect, would kind of put an end and
18 final date to everything, and also cover a large portion of
19 the class period. But what they would do now would actually
20 force the class period to be cut short by almost two years
21 and therefore there would be less damages for them during
22 that period.
23 I was going to let Corey come up now, if he
24 wants to address it, your Honor.
25 THE COURT: All right.

1 MR. DOMINGUEZ: I'm sorry. Mr. Sharp.
2 THE COURT: So before you sit down --
3 MR. DOMINGUEZ: Yes?
4 THE COURT: -- so although the class period is
5 said to be from October 2002 to the present, the outstanding
6 position of the direct plaintiff is that you would be
7 satisfied with basically closing discovery as of --
8 MR. DOMINGUEZ: 2012.
9 THE COURT: 2012?
10 MR. DOMINGUEZ: The end of 2012.
11 THE COURT: Thank you very much.
12 MR. SHARP: Your Honor, David Sharp for the
13 Indirect Plaintiffs. And the reason I need to speak is
14 because we don't think closing discovery with, at the end of
15 2012 is what should be done. We think the present means the
16 present. We have offered that as long as we can come back
17 for things that are pertinent to damages and get data in or
18 documents for class certification purposes, as long as we
19 can work out with defendants that there won't be some
20 argument that cutting off discovery lets them make arguments
21 where we didn't have documents. Then for those purposes,
22 we'd be happy with the Direct's position, but we think we
23 need to have full discovery for the class period for the
24 reasons that Mr. Dominguez indicated.
25 THE COURT: All right. Well, certainly, damages

1 discovery is generally an ongoing open book in most cases.
2 I have to say, though, that merits discovery, I've never had
3 it going on and on and on. At some point there has to be an
4 end, and so when you say to the present, you're talking to
5 someone who isn't welcoming of that. So --
6 MR. SHARP: I think part of our concern, and
7 we've heard it as recently as just before we came in, is
8 that defendants have taken, some of them, the position that
9 there can only be one document request in this case. That
10 position would exclude what your Honor just said. We don't
11 think that's what your Honor has ever intended, but we've
12 heard that argument and we want to make sure that that does
13 not happen.
14 THE COURT: Well, I'm --
15 MR. SHARP: And I think your Honor has really
16 spoken to that already.
17 THE COURT: I'm interested in hearing that
18 argument and hearing the defendants' position. And my goal
19 usually is to find some middle ground because issue aren't
20 right or wrong.
21 MR. SHARP: Right. We'd appreciate that, your
22 Honor.
23 THE COURT: All right.
24 MR. SHARP: I don't have anything else to add.
25 THE COURT: All right. Thank you.

1 MR. ROUSH: Your Honor, speaking on behalf of
2 the OEM defendants now?
3 THE COURT: Yes.
4 MR. ROUSH: I think Mr. Koons will have some
5 more to say after I'm done.
6 The original request for documents include
7 101 requests and covered a 17-year time span. That has
8 since been reduced for many of the requests and it is now
9 reduced -- but left open are 14 years of proposed discovery
10 for 67 requests. That is from January 1, 1999, through
11 12/31 2012, for 67 document and data requests. We don't
12 think that is relevant and we've agreed to the front end.
13 That is an agreement we reached. But going through
14 December 31st, 2012, we don't think it is relevant and we
15 think it's highly overburdensome.
16 In terms of relevance, the complaint is replete
17 with the fact that this case is modeled after the ZF Meritor
18 case that you're very familiar with. The underlying
19 purported conspiracy was originally designed, according to
20 the complaint, to put ZF Meritor out of business.
21 ZF Meritor existed in the market in 2003, over a
22 decade ago. The Meritor entity that continued in the market
23 at that time exited the market in 2007, six years ago.
24 Our position is that anything after 2007, or
25 actually as of January 1, 2007, is irrelevant, and that

1 mirrors the discovery that was taken in ZF Meritor.
2 Now, I heard you, that you often seek compromise
3 here and we did propose a compromise. We propose to give
4 documents related to all of the requests except for those
5 pertaining to the agreements for 18 months after Meritor
6 exited the market. So 18 additional months for them to, I
7 guess, look for impact documents.
8 We also proposed to provide data up through the
9 filing of the complaint as well as documents related to the
10 LTAs and the negotiations of the LTAs up through the filing
11 of the complaint. We view that as the date that there
12 should be a cutoff on discovery on these issues that they've
13 pointed out are more important to them, and that we think
14 that the compromise here is the middle of 2008, 18 months
15 after the final act that they really pointed to.
16 Additionally, there's an extreme burden issue,
17 your Honor, and obviously Rule 26 makes clear that where you
18 find that it is relevant, but only minimally so, you should
19 consider the burden associated and providing documents for
20 an additional five years on a conspiracy and damages period
21 that started in 2002 and the fundamental act that they claim
22 occurred, the elimination of ZF Meritor happened in 2003.
23 So having discovery go on for ten years past that is an
24 extreme burden and obviously with a lot of corresponding
25 costs.

1 And the idea that we should go through and
2 continue to produce documents as the case continues. Do
3 you need to hear me on that? Obviously, we disagree with
4 that.
5 THE COURT: Right. Well, I guess I'm not even
6 sure, and it would be helpful if you gave me some
7 background, about what kind of documents are being sought,
8 because I hear two things going on. Number one, it's the
9 breadth of the discovery and the length of, you know, going
10 back on the discovery.
11 So the question is whether there are one or two
12 categories of documents that it really does make sense to
13 come forward more, but certainly not all 67 categories. So
14 when you say impact documents, that does not mean anything
15 to me. I don't know what that means. That's different than
16 you said, different -- you distinguish between impact
17 documents and data. I don't know what you mean by either of
18 those.
19 MR. ROUSH: Well, actually, I was trying to pick
20 up on what --
21 THE COURT: Oh.
22 MR. ROUSH: -- Mr. Dominguez said.
23 In terms of impact documents, I will let him
24 speak to that. In terms of data, we view data as sort of
25 the crux of what they would need to establish damages, if

1 there's ever a time when damages come into play here. And
2 we understand that as this case proceeds, if there comes a
3 time when damages come into play, they may need more data
4 with regard to damages. But the real burden is when you --
5 we have to go and collect documents, and based on a letter
6 that we received yesterday that outlined the, basically 67
7 requests for which they're seeking data through
8 December 31st, 2012, there's the data.
9 Also, this is -- this is your letter. Data,
10 financial documents, structural organizational documents,
11 and communications. And so that last category in particular
12 is what has significant burden, and that is potentially
13 additional custodians. It's a lot more documents to review
14 from those custodians to determine relevance and
15 responsiveness to the subpoena. And we don't think there's
16 going to be relevance and responsiveness in a lot of that,
17 so it's an extreme burden to get to very little that could
18 potentially impact anything in this case.
19 THE COURT: All right. Thank you.
20 MR. KOONS: Erik Koons for Eaton.
21 Our position is only slightly different than
22 that. One thing that I did want to present to the Court is
23 some background I think is useful as far as burden, which
24 then relates to relevance.
25 Eaton is in a somewhat different position in

1 that we produced a lot of stuff already, and to that, the
2 90 -- and there's a separate set of document requests, the
3 OEMs to Eaton, although the overlap subject matter-wise is
4 very significant. But 90 of 107 document requests served by
5 the Direct Plaintiffs to Eaton are verbatim identical to
6 what ZFM served in the underlying case.
7 Eaton produced 94,000 documents, I don't know
8 how many pages that is, but in the underlying production,
9 there are over 200,000 documents, so maybe a million pages.
10 I don't know what it is, but a significant amount.
11 We've produced all of that to both Plaintiffs,
12 Indirects and Directs. They have the trial transcripts, all
13 the trial exhibits. Eaton also has deposed 26 different
14 deponents from the Eaton case. So the record as to us is,
15 there really aren't any secrets.
16 And following up on what your point is, I think
17 finding a middle ground, we think that producing, having
18 produced documents from 1999 to 2007 already is a very
19 significant time period, and if we were to produce, as the
20 plaintiffs now request, from '99 until 2013, that's
21 14 years, we're content with relying on the documents we
22 produced. We think both the complaint and your Honor's
23 order on the motions to dismiss recognize, the complaint
24 alleges, and I think your Honor recognized, that this is --
25 we're talking about history at this point. It was the

1 inclusion of a competitor which happened in 2003, allegedly.
2 And to the extent that the plaintiffs need documents, and
3 this relates to both what the plaintiff said and what
4 your Honor said, and have to be realistic about, including
5 Eaton produced a lot of documents, one of the categories of
6 the 107 requests to us that we think, yes, we can't just be
7 so pigheaded and say 2007, nothing else.
8 And while we think that the 2007 and after LTAs
9 are not relevant because this is looking at history and
10 we're talking about old LTAs and whether they successfully
11 excluded ZFM, we are willing to give LTAs and documents
12 related to the negotiation of those LTAs up until three
13 years later, the filing of the complaint, and we're also
14 willing to give data because I don't think anybody can say
15 in a class case like this that data should stop, for
16 example, in 2003. So we also are willing to go until 2010
17 on the data.
18 So I guess the biggest difference between Eaton
19 and the OEMs aside from we've produced a bunch of stuff
20 already is that we don't think the LTAs or documents besides
21 the LTAs and the data beyond 2007 should be produced, but we
22 do think it's reasonable to have to produce some of the
23 LTA's negotiation documents and data up until 2010.
24 THE COURT: All right. Thank you.
25 MR. KOONS: Thank you, your Honor.

1 THE COURT: All right. Let's hear from counsel
2 for plaintiffs.
3 And I guess I don't know what you mean by
4 "impact document," and it strikes me that when you are
5 talking about the costs of litigation, that somewhere along
6 the line, especially -- you need to prioritize, and maybe it
7 isn't a good idea to come to me and ask for all 67 document
8 categories and requests to span 14 years when this really is
9 an historical conspiracy and that's what you've got, that's
10 what you've pled; right?
11 MR. DOMINGUEZ: Well, your Honor, I wanted to
12 address the issue about the impact. That's an important
13 aspect of this case.
14 As I tried to -- as I tried to describe the
15 first time, you know, we have the price increases that will
16 come from the data, if we can show it, but we still need to
17 show that the price increases were a product of their
18 conduct. So with regard to impact, communications between
19 the OEMs and Eaton and themselves, talking about the price
20 increases for transmissions and the reasons for those price
21 increases are important for determining impact for the
22 class.
23 Also, discussions about the profitability of the
24 LTA, of the LTAs themselves, even post-2007, because this
25 case is just not only about the exclusion of Meritor and ZF

1 or ZF Meritor. This case is also about the splitting of
2 monopoly rents, and that monopoly continues today and those
3 rents continue to be split by the defendants through the
4 LTA.
5 So those issues that regard the LTA, the
6 performance of the LTA, the fact that the profitability of
7 the LTA and those different type of issues are all issues
8 that are important for showing impact and the splitting of
9 monopoly rents in this conspiracy, your Honor.
10 THE COURT: So you're saying that there are LTAs
11 that are still extant, that incorporate the alleged
12 conspiracy? I mean, they have not been renewed with
13 different terms or anything else?
14 MR. DOMINGUEZ: Your Honor, we only have the
15 LTAs up until 2007. We know that the Freightliner LTA
16 happened in 2010. We think that it got renegotiated at that
17 time. We know through the document production that has been
18 given to us so far that, for instance, the international or
19 Navistar LTA terminated, or at least on the LTA that we have
20 was supposed to end in December 2011. But now we don't know
21 anything about that and actually the document production
22 they want to give us, we wouldn't even know anything about
23 what happened to that LTA or whether there was a new LTA
24 continued. You know, they continued to use the LTA to
25 exclude competitors from the market and split those monopoly

1 rents. We wouldn't know any of that information.
2 THE COURT: So at this point in time, with the
3 OEMs that you have sued, you don't know what LTA they're
4 operating under?
5 MR. DOMINGUEZ: I have an idea. They could have
6 just said -- many times in the other LTAs, your Honor, they
7 would just say, we'll just extend it by another three years
8 and they just extend it. So I don't know if they're still
9 operating under the first LTA they entered into in the
10 various time periods in this case or whether there are new
11 LTAs that have been entered into that are completely
12 different.
13 THE COURT: Well, and your interest from what,
14 unless I'm missing something, your interest could only be as
15 a matter of law, your interest could only be LTAs that have
16 a connection to the LTAs that have already been reviewed by
17 the Court. Is that correct? Otherwise, you're just in a
18 whole new class and a whole new issue, which I don't know
19 that you are -- that's not why you are here, are you?
20 MR. DOMINGUEZ: I believe, your Honor, I hope I
21 understand your question, but I believe that what we're
22 looking for is just to see what the new LTAs look like.
23 Obviously, if they are completely different, allow for ZF
24 Meritor to come back into the market because the penetration
25 targets are less, you know, those are things that we need to

1 know. That would also tell us what the end of the
2 conspiracy would be, the end of the class.
3 MR. DeVALERIO: Your Honor, can I make a
4 suggestion?
5 THE COURT: Yes.
6 MR. DeVALERIO: If, in fact, as Mr. Dominguez
7 has pointed out, we don't know for sure, although we, from
8 the documents we've seen, we have reasons to believe that
9 the LTAs that were in existence that were the subject of the
10 litigation that your Honor tried continued through, at least
11 through 2012. Maybe they didn't.
12 Suppose we send an interrogatory to the
13 defendants and said, answer the question. Are there LTAs
14 still in existence that you negotiated OEMs with -- with
15 Eaton, and then we can come back to the Court and say, okay.
16 We now know there are or aren't LTAs. We now know what they
17 are. And these are the documents that we would like with
18 regard to the ones that are still in existence.
19 And your Honor asked the question about, you
20 know, what documents are we looking for. Essentially, we're
21 looking for the same kind of documents that your Honor heard
22 during the trial, which are the communications back and
23 forth between Eaton and the OEMs, and now, of course, we
24 don't know whether they're also -- documents with regard to
25 the OEMs talking to each other. We don't know that because

1 that wasn't part of the case before your Honor.
2 But there was a finite number of custodians who
3 had anything to do with either the negotiations of the LTAs
4 or the implementation of the LTAs. If your Honor will
5 recall, there were a number of witnesses who talked about
6 questions about market penetration and keeping certain, the
7 Meritor, excuse me -- yes, the Meritor transmissions out of
8 the data books, and so on.
9 We are not talking about hundreds of people
10 which documents have to be searched. We are talking about a
11 finite number of people. In fact, that was one of the
12 discussions we had with the defendants, is we said, we'll
13 work with you to limit the number of custodians that you
14 have to search, because we're not looking for low level
15 people who may have had very minor roles with regard to the
16 LTAs. We're talking about the principals in the OEMs and
17 the principals in the -- in Eaton who negotiated and then
18 who were communicating with each other about the
19 implementation of the LTAs.
20 So we do not think that because there are a
21 large number of requests with regard to the LTAs, it is not
22 a broad time -- it's not a broad request in terms of
23 multiple people that documents have to be searched. It's
24 that same genre of documents that your Honor saw during the
25 trial.

1 THE COURT: But I have found that when I am
2 presented with discovery disputes and the parties say there
3 are 67 requests over a 14-year span and it's irrelevant and
4 overbroad and burdensome, et cetera, et cetera, that if
5 there's -- if there, in fact, are classes of documents
6 that truly are relevant, that that is where you start, and
7 if that class leads you to believe that there are truly
8 other relevant documents, then we can go to step B. But
9 to start with everything, as I said, I don't think that's a
10 helpful exercise. So I guess the LTAs are where you would
11 start.
12 MR. DeVALERIO: Yes. Yes. And the fact of the
13 matter is that in the negotiations, in these 15 hours of
14 discussions, the discussions haven't been about, well, this
15 request is too broad, this request -- it was just what we've
16 been discussing. We've narrowed it down to that time period
17 question and we have narrowed it down to a distinct number
18 of custodians whose documents would have to be searched.
19 And we had specific discussions about just what I just said,
20 about just those people who had the roles in the
21 negotiations of the LTAs and then with regard to the
22 implementation, which is a handful of people within each of
23 the defendants and a handful of people within Eaton. It's
24 not, you know, multitudes of people whose documents have to
25 be searched.

1 THE COURT: All right.
2 MR. DeVALERIO: And, again, as I said, if it
3 would help, we can ask the interrogatory and then we can
4 find out whether, in fact, there are LTAs that were, that
5 are still in issue here.
6 THE COURT: Well, let me talk to defendants'
7 counsel, if I could.
8 MR. KOONS: Your Honor, may I?
9 THE COURT: Yes. I mean, I'm curious. If, in
10 fact, the same business practices are in place, and at this
11 point the class period doesn't have a definite ending, I
12 guess I'm curious as to how defendants believe it's not
13 relevant that they have not changed their business practices
14 at all.
15 MR. KOONS: Well, a few things to that point,
16 your Honor. The notion that any of the LTAs even back in
17 2000 or the first generation LTAs were just renewed and they
18 continued is just not accurate. The documents that we
19 produced, documents that were before this Court in trial in
20 2009 were frequently -- frequently renegotiated, the price
21 terms. They're wildly different. They couldn't be more
22 different.
23 I know of no single LTA that ever existed in
24 this case from 1999 until today that has never had a
25 provision that just said, it has to go on for 10 to

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1 12 years. To my knowledge, all of the LTAs that were
2 executed in 2002 and after have gone through massive change.
3 I don't know that any of the LTAs, and I don't believe that
4 they do, have a provision that say they're going on until
5 2013, for example. But that's not the conspiracy that the
6 plaintiffs alleged anyway.
7 So Mr. DeValerio said he thinks he should be
8 entitled to a 2013 LTA that might have a term that goes 5 or
9 10 years. Now we're talking about discovery that's going on
10 18, 15 -- 18, 25 years. That's not what they alleged. What
11 they alleged was a conspiracy based on the LTAs that have
12 already been in front of your Honor, that they have had for
13 many months now, that allegedly excluded ZFM in 2003.
14 But even what I'm hearing from what they are
15 saying about LTAs, that they want LTAs that go out what I
16 think is too long, at least we're talking about in the realm
17 of possibility of LTAs.
18 They said there were 67 document requests. Your
19 Honor has recognized that, talking about impact and other
20 amorphous things that may still be outgoing. There are 107
21 related to Eaton that are outgoing. So it's not that we've
22 pared this back in any way.
23 If we want to talk about just LTAs, I can
24 continue on why I think the 2012 LTAs are no longer
25 relevant, but I think I've made that point.

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1 One other thing that I think is worth pointing
2 out, your Honor, is as to the renewal of the LTAs and
3 whether or not the conspiracy is continuing, that your
4 Honor's motion to dismiss argument recognized that, as you
5 said a few minutes ago, and I agree with, that this is a
6 historical exercise. They did not plead anything in the
7 complaint to suggest that 2017 LTAs are relevant to the
8 exclusion of ZFM in 2003, nor could they. And because of
9 those, what they pled, I think they should be foreclosed
10 from going that far.
11 But even with what I heard on the LTA
12 discussion, your Honor, that relates to maybe one out of 107
13 of the requests that relates to Eaton, and the other 106 are
14 asking Eaton to do the same thing that they already did, and
15 to a large degree, the OEMs, too. But what Eaton already
16 did from 1999 until 2007, which is a fairly generous
17 discovery period to begin with, and now they are asking me
18 to do the same thing for 107 requests in 2013.
19 As I said earlier, data, I think we kind of all
20 agree on. LTAs, maybe we kind of agree on with the
21 exception of the limitations we just said now. But beyond
22 data and LTAs, I hope we're done talking about that stuff,
23 because that just seems like a real far cry from what their
24 allegations are and just an enormous burden, and I will
25 leave it at that.

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1 Thank you.
2 THE COURT: Thank you.
3 MR. ROUSH: Just a couple things to add, your
4 Honor. What I heard Mr. Dominguez describe as impact was
5 that he wanted to determine whether the data that we agree
6 should go on beyond the time frame of the other requests,
7 and obviously there's a debate about how far. But the
8 impact was to see if the data was the product of our
9 conduct. But as Mr. Koons just pointed out and as you said,
10 your Honor, the conduct that's really at issue is over a
11 decade old, and so getting documents that postdate 2007 or
12 are compromised in 2008 really is not going to do what he is
13 talking about.
14 The other things I heard him describe were
15 damages, profitability, splitting of monopoly rents. Those
16 are all things that can be gotten from the data, not from
17 the burdensome collection of documents from custodians.
18 And I do appreciate Mr. DeValerio's
19 acknowledgment that they're not going to look for low level
20 people, they're only going to look for primary people. I
21 know that that discussion has not occurred with me regarding
22 my client, and I've talked to the other OEMs. None of us
23 have had that discussion, and it really does not impact the
24 burden on collecting and reviewing documents in time, but we
25 appreciate that we hopefully will have that discussion when

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1 it comes time to talk about custodians. But if 101 requests
2 compromised the 67 is an indication of, you know, the kind
3 of scope that we are looking, we don't anticipate that it's
4 going to be an easy conversation on the custodian list
5 either.
6 THE COURT: And could you just comment on the
7 relevance and on the burden of producing the LTAs that were
8 at least, under which the OEMs were operating, at least as
9 of the time of the filing of the complaint, but not to the
10 end of 2012?
11 MR. ROUSH: We think the LTAs that are really at
12 issue here are those that are in the same time frame as when
13 the original supposed damages and injury happened. That
14 said, as a compromise position, we have agreed, all of the
15 defendants, including Eaton, have agreed that this is a high
16 priority category of documents for them. So we've already
17 agreed to produce them up through the date of the complaint,
18 not just the LTAs, but the negotiation communications
19 regarding the LTAs.
20 THE COURT: Okay. Thank you.
21 MR. ROUSH: And I would, if your Honor would
22 indulge me?
23 THE COURT: Sure.
24 MR. ROUSH: I wrote down a couple things. You
25 know, when plaintiffs' counsel started talking about we

1 don't know anything, we don't know, we don't know, that's
2 exactly the kind of fishing expedition that the discovery
3 rules are supposed to protect defendants against. It's
4 already a very expensive process for us to go through
5 discovery, and to produce documents because they don't know
6 what they think may be sort of defeats the purpose of having
7 discovery where the burden is supposed to somewhat match the
8 relevance.
9 THE COURT: All right. Let's hear from
10 plaintiffs' counsel. I mean, I have to say that without
11 knowing exactly what you are looking for, that my
12 understanding of this suit and the complaint, that if you
13 get the LTAs and the documents regarding the negotiation of
14 the LTAs up to the date of filing, I'm not exactly sure what
15 relevance there is. And as I understand it, ongoing data,
16 like damages data, because that is something that is usually
17 up to the end of discovery anyway. I mean, I'm not exactly
18 sure what else you are looking for or why you would think
19 the burden doesn't outweigh the benefit.
20 MR. DOMINGUEZ: Sure, your Honor. Number one,
21 when we talk about the impact and, you know, having to
22 figure out damages. So what they basically want to do is,
23 they want to give us the impact and damages documents up
24 until June of 2008, those documents that we talked about,
25 which are issues about profitability, issues about the cost,

1 the reasons for their increases for their transmissions.
2 I don't want to give them their case, but
3 obviously if they said, in 2010 we raised the price of
4 transmissions because of the cost of steel, well, then, that
5 might be something that would be relevant for us to know
6 rather than we increased our costs of transmissions because
7 of the LTAs. That's why we need those documents.
8 THE COURT: But you are asking basically if that
9 is your theory, then you would be requesting every document
10 that the OEMs produced in the course of their business to
11 explain every price increase or change. I mean, that
12 certainly isn't appropriate I don't think under the
13 framework of this case.
14 MR. DOMINGUEZ: I understand, your Honor, but I
15 don't think we're quite that broad. I would respectfully
16 tell you that what we're really looking for are just those
17 things with regard to transmissions. Those are the kind of
18 financial documents. And from what we've seen so far, there
19 is a limited group of people that deal with the transmission
20 issues. There are a limited number of custodians that do do
21 that. There are a limited number of custodians that deal
22 with the LTAs. This is just from our review of the previous
23 production. You know, we've come to the understanding that
24 there's a limited number of people that we're really looking
25 at here.

1 So I understand that Corey is saying that, you
2 know, he hasn't heard from us we're not going to look for
3 other people. I'm really not sure what he means. These
4 people are pretty well described. And I also want to point
5 out that I think somewhere, and I can't put a precise number
6 on this, but of the 67 requests that are open, a lot of
7 those deal with data. I'm going to say probably between 10
8 and 15 of those requests are for data.
9 So when they call out that number, also some of
10 our requests have to do with structural things, just to know
11 who was in charge of transmissions in 2011 through
12 structural charts. Whether they give us that through an
13 interrogatory or they give us a chart, that's helpful for us
14 to determine, okay. This is the custodian that we're
15 looking for, just this one person.
16 And we've had those conversations and I thought
17 they were productive, but, you know, we at least talked to
18 some of the defendants. Said, look, we would look at your
19 charts, and we would really get down to make sure that we
20 are requesting for the number of people that we need to be
21 requesting from, and also we're sensitive to the burden
22 issue as well.
23 THE COURT: So I mean to make sure I understand,
24 you want to focus on documents in different iterations, but
25 what you are looking for is, are documents that relate to

1 the pricing of transmissions, just in case there's a link
2 between conduct that took place back in 2003 and the price
3 today?
4 MR. DOMINGUEZ: No. I understand what you are
5 saying, your Honor, but the conduct that took place actually
6 continued to take place up until 2007, and we argue that the
7 impact that we have to show past 2007 because of the
8 elimination of competition from this market, those documents
9 are still relevant for showing impact.
10 Unless they are going to stipulate that the
11 prices that were charged past -- post 2007 were a result of
12 the LTAs and their conspiracy, which I don't think they're
13 going to do, your Honor, I think that we'll still need those
14 documents to ensure that impact to the class came from the
15 LTAs. The fact that they eliminated competition and the
16 elimination of competition, their reward for that was the
17 splitting of the monopoly rents.
18 THE COURT: I understand your argument. And
19 when you say "impact," you are really talking about
20 causation. I mean --
21 MR. DOMINGUEZ: Impact to the class, your Honor.
22 Yes.
23 THE COURT: It still sounds too broad, though.
24 I mean, it just sounds too broad to me, that we want
25 everything that you have about the cost and pricing of

1 transmissions up through the end of 2012. I just, that just
2 sounds like you are asking for too much and I don't know how
3 to, rather than just say no, I'm trying to figure out what
4 it is you really need to see if there is a compromise, and
5 I'm not sure it would be 2012, but certainly up to the
6 filing of the suit in 2010.
7 MR. DOMINGUEZ: Your Honor, I just wanted to
8 address one thing. You had talked about categories of
9 documents and that you wanted to get down to the categories
10 of documents. Corey addressed it in the letter that we
11 wrote to him yesterday. And I think we did try to say, and
12 gave them the priority of the documents.
13 In our letter we talked about the data were
14 important, financial documents to show impact and
15 profitability were important, structural and organizational
16 documents. These are just the or charts, just so we
17 understand who is in charge of talking about LTAs and
18 pricing transmissions was important, your Honor, and the
19 fact that there were communications concerning the LTAs.
20 Those are just the negotiations, which they've already
21 offered us up to 2010.
22 THE COURT: Well, data apparently is not
23 necessarily the problem. I mean -- well, I thought I heard
24 them say they understood that data --
25 MR. DOMINGUEZ: I agree that they have less of

1 an angle on the data.
2 THE COURT: And the structure I'm not confident
3 is the big problem.
4 The third thing you said, I don't even know what
5 that means and what that covers. What is it?
6 MR. DOMINGUEZ: The financial documents. I talk
7 about the profitability of the LTA. That's really
8 important, your Honor, for showing both what we would want
9 to call here their conspiratorial conduct or their ability
10 to agree to the terms of the LTA. It's important to show
11 the profitability for them.
12 And then the issues regarding the data would be
13 important for us to know some of this data in order to make
14 sure that, you know, that the LTA is causing an increase in
15 the price of the transmissions, your Honor, whether that
16 caused less trucks to be sold.
17 But this is, we're trying to get very pointed
18 with them, and many of those things can be addressed with
19 the data, but we still need some documents, and that's what
20 we're trying to narrow this down to, what are the some
21 documents.
22 THE COURT: Doesn't it make sense, I mean, if
23 we've got two categories of documents that we have some
24 agreement on, and that is the negotiations and the LTAs up
25 to the filing of the complaint, and we've got some agreement

1 that data -- if you know what it means, God bless you. I'm
2 not exactly sure what it means. It seems like a pretty
3 broad word for such a small one, then that's great.
4 It just strikes me that if we start with those
5 two things, that it would help you and me at some later
6 point, if we need to, come back and tell me what it is the
7 data says that you need explained and what kind of documents
8 you think are going to explain it. And maybe the
9 structural, you know, who has what responsibility in your
10 business organization, if that's what you are looking for.
11 That doesn't strike me as terribly burdensome. But your
12 financial documents and profitability and the discussions
13 related to those, you know, it starts out narrow and then it
14 kind of goes out. I don't know what that means. It strikes
15 me that that might be potentially problematic when it comes
16 to agreeing to the parameters of that group.
17 MR. DOMINGUEZ: I would only add, your Honor,
18 and then I have to speak to my co-counsel for a second.
19 THE COURT: Right.
20 MR. DOMINGUEZ: I would only want to add that
21 the fact is, you know, this case has come down to experts.
22 These experts are going to use those kind of financial
23 documents and they're going to basically be able to opine
24 and make determinations about what that data says.
25 You know, unfortunately --

1 THE COURT: The inferences on an inference on an
2 inference. I know what kind of experts you get in antitrust
3 cases.
4 MR. DOMINGUEZ: And I'm just worried that if
5 we're put in that position, we're going to be a little bit
6 caught off guard by potentially what their experts can do,
7 and we're going to need those documents for our experts to
8 interpret the data, be able to show impact, liability in
9 this case, and to also show damages, your Honor. That's why
10 I think these documents are so critical and why I'm up here
11 arguing with you now, or arguing with --
12 THE COURT: Right.
13 MR. DOMINGUEZ: -- the defense side, because
14 we're trying to -- these are not unimportant documents to
15 us. They're significant to us.
16 THE COURT: Right. Just the third category
17 doesn't mean anything to me, and so either the financial --
18 the profitability, et cetera, I mean, certainly, if there
19 are -- I don't know whether that's one category of documents
20 or whether it includes a whole group of documents and what
21 you would be looking for afterwards. I mean, it seems to me
22 as though the kinds of information we have don't require
23 custodians at all. I mean, we're not going into any
24 custodian's e-mail. So I don't exactly know -- I'm trying
25 to find out whether what you are saying is really what you

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1 mean in terms of what you're looking for.
2 So let me hear from defense counsel.
3 MR. DOMINGUEZ: Okay.
4 THE COURT: And you can talk to your folks while
5 I'm talking to them and then we can find out whether the
6 defendants understand your requests more than I do.
7 MR. DOMINGUEZ: Thank you, your Honor.
8 MR. ROUSH: Your Honor, I am not sure we have
9 that much more to add. If you have a question, I would be
10 happy to answer it.
11 I don't think this case comes down to experts.
12 Expert testimony is not evidence. Causation comes down to a
13 lot of other things. The expert merely interprets evidence.
14 So in terms of documents, saying that their expert might
15 need them to, you know, analyze data really to me, it does
16 not increase the relevance of those documents or justify the
17 burden that they are requesting.
18 THE COURT: Well, just start with the premise
19 that I've decided, that perhaps some supplementation of
20 discovery up to the date of filing of the complaint makes
21 sense, but very limited supplementation, and that we've
22 talked about the negotiations and the LTAs that were in
23 place as of the filing of the complaint. We've talked about
24 data, whatever the heck that means, but I thought there was
25 some agreement that there would be kind of an ongoing

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1 production of data.
2 The structure, I don't know what that means, but
3 it does not sound like it's overly burdensome to let
4 plaintiffs know who was in charge of the relevant parts of
5 your company up until the date of the filing of the
6 complaint.
7 Anything else I'm not really sure what they
8 are looking for and that's where the burden might come in,
9 but -- so I would like you to address that. It does not
10 sound like custodians have to be capped. It does not
11 necessarily -- I mean, it sounds as though this is a
12 companywide production that's pretty finite, unless I'm
13 missing something, which is very positive.
14 MR. ROUSH: No, your Honor, you're not. That is
15 one of the 67 requests that I'm talking about. And to
16 Mr. Dominguez's point, my counting might be a little off,
17 but I counted 18 document requests out of those 67 and
18 probably another that were sufficient to show document
19 requests, which I don't view as quite as burdensome.
20 So I wasn't overstating when I said there were
21 67. I mean, there are 67 requests that they've asked for,
22 and even if you take out the ones he wants to exclude,
23 you're still looking at 47.
24 THE COURT: Well, forget the 67 or the 42 or the
25 10 or the 15. Forget that. I'm just trying to look at,

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1 because lawyers talk past each other, and they're so intent
2 to getting every word they can possibly fit in to a request
3 to make sure they have not missed anything so nobody can
4 come back to some poor associate and say, you missed that
5 category of documents, that it's not even helpful at some
6 point in time, which is why I like to talk to you all as
7 opposed to getting paper.
8 So forget the 67. All I'm saying is, I think we
9 kind of have a structure to go forward on everything but
10 that third category of, or the fourth category of documents
11 that the plaintiff wanted, which I don't really understand,
12 which is profitability statements or something.
13 Again, it sounds like corporate documentation,
14 not custodians. I, frankly, don't think at this point in
15 time, that -- well, that any communications between -- I
16 don't know what they are looking for and I don't know
17 whether you know what they are looking for in terms of the
18 rest.
19 MR. ROUSH: Well, speaking for my client, the
20 structural, that one request is not -- obviously, we'll do
21 whatever your Honor says. We would have agreed to that
22 beforehand.
23 THE COURT: Okay.
24 MR. ROUSH: With regard to the profitability
25 issue, and profitability is typically your price minus cost,

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1 and that's, to me, that's a data issue again. I don't
2 understand why that would come into documents, and I mean
3 that's just another one of these categories where I think
4 you've already said you don't think that at this point, that
5 we should incur the burden for the lack of relevance or
6 minimal relevance it might have to their case.
7 THE COURT: Well, I think I've already said you
8 might need to up to the time of filing of the complaint.
9 I'm trying to move this along here.
10 But you say that's a data point, not necessarily
11 anything else?
12 MR. ROUSH: That's how you determine
13 profitability.
14 THE COURT: Right.
15 MR. ROUSH: Yes, your Honor.
16 THE COURT: Right. And you've already agreed to
17 provide that sort of information.
18 MR. ROUSH: Up through the date of the
19 complaint. Yes, your Honor.
20 THE COURT: Okay.
21 MR. ROUSH: And with regard to the ongoing point
22 you made, to me, if, again, if this case reaches a stage
23 where damages become relevant, then that is the time to
24 produce data that goes beyond the date of the complaint.
25 THE COURT: All right. Anything from counsel

1 for Eaton on this?
2 MR. KOONS: Nothing further, your Honor.
3 THE COURT: All right. So I'm not sure how
4 much -- I don't know what the plaintiffs are looking for.
5 Beyond that, I want to hear about the 67.
6 If there is a category of documents besides what
7 I think we've already agreed to, you need to let me know,
8 because otherwise I'm letting it go. That's not to say that
9 once you get this production, that you can't come back and
10 say, based on this, I have a focused reason to believe that
11 there are relevant documents and this is how we can get
12 them, but at this point I'm not -- I'm not sure what you are
13 looking for or whether it's relevant.
14 So all right. So I don't know. We kind of got
15 past the geographic limits, but I think we actually answered
16 these in an hour. Great. Time period.
17 So product scope and geographic limits, I guess
18 they have not been addressed at all yet. I'd like to move
19 that along, if there are still issues.
20 MR. ROUSH: I would be happy to go first.
21 MR. DOMINGUEZ: You can go first.
22 MR. ROUSH: Your Honor, with regard to the
23 product scope, with the exception of some comments that were
24 made right outside, I think we've reached agreement on that,
25 so I will leave that and let Mr. Dominguez or Mr. DeValerio

1 speak to that and respond if we do have issues.
2 THE COURT: All right.
3 MR. ROUSH: So with regard to geographic scope,
4 they have asked for data and documents from around the
5 world. The Amended Complaint at Paragraph 154 makes very
6 clear that when they've alleged here is a market that is
7 U.S. Class 8 trucks. They go on -- excuse me. Paragraph
8 154 to explain why the market that they've alleged is
9 different from any market than the rest of the world.
10 The idea of producing documents and data from
11 around the world is, again, both irrelevant and highly
12 overburdensome. The other reason that they've said they
13 need the data is they said they -- I want to quote it so I'm
14 not taking it out of context. "The sales of HD
15 transmissions in other geographic markets may be necessary
16 to establish a competitive baseline from which to measure
17 damages."
18 The notion that we need to produce documents and
19 data from around the world or even from a few select places
20 in the world, which is a proposed compromise they made,
21 because their expert may want to do some benchmarking,
22 again, is irrelevant and is really an extreme burden to
23 place for something that they don't even know if they want
24 or need yet. That's it.
25 THE COURT: Well, I would tend to agree, so

1 you've got an uphill battle, counsel for plaintiff. This
2 case has never been anything other than a U.S. market.
3 MR. DOMINGUEZ: Yes, your Honor, if I may.
4 Exactly what had happened, we made that document request,
5 but after hearing from them, we then told them, look. Why
6 don't we table that for now. Let us go do our homework and
7 then we will come back to you for purposes of telling you
8 what geographic markets we're looking for and give you a
9 very narrow tailored request.
10 They said, they rejected that and they said they
11 wanted to resolve it here. So that was the agreement and we
12 wanted to try to tailor it down, but they weren't willing to
13 accept it.
14 So the other aspect of this, your Honor, is
15 there are two things that we need to do for this case. In
16 order to prove impact, we need to have a benchmark, and also
17 to prove damages, you have to have a yardstick. There have
18 been cases that use yardsticks and show that an economist
19 can use another geographic market and then compare that
20 geographic market to the prices that are being charged here
21 in the United States, to therefore create a benchmark, I'm
22 sorry, a yardstick for damages. That's one of the
23 methodologies that we could use to show damages to the
24 class.
25 The second aspect of this is also the benchmark

1 where we could also try to create a benchmark. And so one
2 of the benchmarks that we could use for damages, one of the
3 but-for worlds we could use if we're able to find another
4 geographic market that is competitive and does not have
5 these sort of, I want to say, competitive limitations that
6 we are arguing exist here today, what we would do is then be
7 able to create a benchmark for us to be able to show not
8 only impact, but also damages.
9 And we believe that we're able, that if we're
10 given the opportunity to do the homework and you put us on a
11 very short leash, like get back to defendant by X day, then
12 we could have a more fruitful discussion about what are the
13 geographic markets that we're looking for and whether it's
14 burdensome on them or not.
15 THE COURT: Well, today I certainly would not
16 allow this discovery to go forward. That's not to say that
17 at any time in the future, if you believe not that it's just
18 an option, but that it -- that you have an appropriate
19 market to use as a benchmark, and that it's limited enough
20 to make me think that discovery with respect to that is at
21 all reasonable, you can certainly come back. I'm not going
22 to put you on a leash or anything. It's up to you to do
23 your homework and confer with the defendants and if you're
24 convinced that you have a good argument, to take my time to
25 present it. All right?

1 MR. DOMINGUEZ: Thank you, your Honor.
2 THE COURT: Are there any other issues that we
3 need to address yet?
4 MR. SHARP: Your Honor, just one point of
5 clarification.
6 THE COURT: Yes?
7 MR. SHARP: There has been some talk about the
8 complaint, but there are actually two complaints. There's a
9 direct complaint and then there's a later indirect
10 complaint. And we at least would think that the things
11 ought to run, your Honor's ruling is, I think I understand,
12 to the filing of the indirect complaint.
13 THE COURT: Well, when is that?
14 MR. SHARP: I think it's late 2010. Does
15 anybody know for sure? I believe it was filed in Kansas in
16 2010, in December?
17 MR. KOONS: I'm sorry? Can you restate that?
18 MR. SHARP: The indirect complaint, the first
19 one.
20 MS. ANDERSON: November 30th, 2012. I'm sorry.
21 That's the second amended.
22 MR. SHARP: No. That's an Amended Complaint.
23 MS. ANDERSON: I'm sorry.
24 MR. SHARP: We think that's when it was and that
25 probably makes better sense than picking some midstream

1 point in 2010 that's closer to the end of the year and sort
2 of more natural.
3 THE COURT: You're suggesting that the date that
4 I'm suggesting should be December or whatever? I don't
5 know.
6 MR. SHARP: Yes. The end of the year 2010 is
7 probably the simplest rather than picking some date within a
8 month. I think the first indirect complaint was filed in
9 December 2010, but I'm not certain.
10 THE COURT: Well, it was transferred from Kansas
11 on January 5th, 2011. It says October 4th, 2010.
12 MR. SHARP: Then I stand corrected.
13 THE COURT: Rather than March 2010, then we'll
14 do October 1st of 2010.
15 MR. ROUSH: Your Honor, that's an additional
16 eight months of discovery or six months of discovery,
17 because they filed a tagalong suit of indirect purchasers.
18 I don't understand why that would increase our burden. I
19 mean, all the arguments that we made up to this point --
20 THE COURT: Within March. Yes.
21 MR. ROUSH: By that notion, they could file
22 another complaint tomorrow and that would change the
23 discovery cutoff.
24 THE COURT: Well, it wouldn't. So tell me why
25 what I just said is compelling. Why should we be compelled

1 when this is a second suit, not the first suit?
2 MR. SHARP: Well, I think the logic was, that
3 they've advanced was the filing of the suit. We're a
4 different suit representing a different class. That's
5 number one.
6 Number two, there has been no evidence or any
7 showing that an additional period of time would be some sort
8 of huge additional burden.
9 THE COURT: Well, that is not a compelling
10 reason.
11 All right. I think we will stick with March of
12 2010. I'm sorry, but we'll stick with that.
13 Is there anything else we need to address yet
14 this afternoon?
15 MR. ROUSH: I have one question, although I have
16 to ask counsel.
17 THE COURT: Yes?
18 MR. ROUSH: Outside the courtroom they said they
19 might ask for an additional set of documents related to
20 additional set of trucks that are not in the first 101
21 requests, and if that is something they plan to do, we'd
22 like to address it while we have you here as opposed to
23 walking away and getting another however many requests
24 regarding this other set of class seven trucks.
25 MR. DOMINGUEZ: Well, your Honor, I wanted to

1 try to resolve it outside the Court, but if Mr. Roush
2 insists, then we can have this discussion now. It's up to
3 him.
4 THE COURT: Well, are you looking for more?
5 MR. DOMINGUEZ: No. I am just trying -- your
6 Honor, we have to define a product market, and one of the
7 issues becomes whether a Class 7 transmission can therefore
8 be an HD transmission.
9 So all I was trying to get from them is an
10 agreement that a Class 7 transmission can't be a heavy duty
11 truck transmission. It's very simple. That's all we wanted
12 to come to an agreement on. I didn't understand we needed
13 to bring it before your Honor, but we're trying.
14 You know, as you said, your Honor, this is a
15 dynamic process. We've been working really hard. I don't
16 think any of the defendants have not been working hard. We
17 have been. We just wanted to reach compromise. These are
18 just one of the kind of things that slipped out from under
19 us.
20 THE COURT: Is there an answer to that?
21 MR. ROUSH: We're not willing to stipulate to a
22 market in an antitrust case based on discovery. We don't
23 know what markets our experts or their experts or your Honor
24 will find. What we know is we have 101 requests and another
25 14 or 15 from the Indirects. Those requests specifically do

1 not ask for anything regarding any other class of
2 transmissions. They relate solely to Class 8 transmissions,
3 and our intent is to produce documents related to Class 8
4 transmissions.
5 If we ever were to argue the Class 7
6 transmissions should be in the market, then we would have to
7 produce the documents that underlying that argument or,
8 respectfully, I don't think the Court would accept our
9 arguments. So we don't want to stipulate to market to
10 create a discovery agreement where we didn't even know we
11 had disagreement until we were standing outside the
12 courtroom because they never asked for it and so we were
13 never planning to produce it.
14 MR. DOMINGUEZ: Your Honor, the document
15 requests, when we defined them, we defined them as
16 transmissions that would go into an HD truck, which implies
17 that -- I can see where his argument is. It implies it
18 would be a Class 8 transmission. We just are being overly
19 careful, as we do have to show a product definition or a
20 product market, that we're talking solely about Class 8
21 transmissions. That's the only thing I'm asking them to
22 concede.
23 And then they're saying, well, you know, I don't
24 know if that's -- you know, we're not going to stipulate to
25 that now because it could be later. I'm just trying to say,

1 if you are going to say it's an issue, then produce the
2 documents now. If it's not going to be an issue, then don't
3 produce the documents.
4 MR. ROUSH: If I can respond really quickly, we
5 are not playing games, your Honor. HD trucks is a defined
6 term in their document request. It is defined as, referring
7 to all Class 8 trucks.
8 THE COURT: Yes. Let me just say that I don't
9 want, like I do periodically at the summary judgment
10 stage, for you all to say that the market is wrong because
11 Class 7 trucks should have been included as well as all
12 the data. If this is an important point, then there needs
13 to be some agreement, some discussion about it before we
14 get to the summary judgment stage, because I will reject
15 that argument, by the way, because it hasn't been vetted
16 through discovery.
17 So maybe you're not prepared to stipulate to it,
18 but you and your cohort have to understand that if there's a
19 disagreement with the definition, then you need to bring it
20 forward or you will be precluded from doing so when it
21 counts. Okay?
22 MR. ROUSH: Understood, your Honor. Thank you.
23 THE COURT: All right. All right. Thank you
24 for your patience, counsel. I'm sorry I didn't move this
25 along more quickly. I hope we have made progress, though.

1 Do we have another discovery conference or are
2 we just going to wait for another, at this point, issue to
3 arise?
4 MR. KOONS: We do in October.
5 MR. DOMINGUEZ: I was going to suggest if we
6 could move it up to September, just to move things forward,
7 if it's possible, your Honor.
8 THE COURT: It probably is. My computer isn't
9 on and I never turned this particular one on before, so I
10 don't think you want to wait for me to do that.
11 If you can discuss and have some agreement that
12 it might be more helpful to have it sooner rather than
13 later, you just need to contact my staff about that. Okay?
14 MR. DOMINGUEZ: Thank you, your Honor.
15 THE COURT: Thank you.
16 (Counsel respond, "Thank you, your Honor.")
17 (Hearing concluded at 4:15 p.m.)
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CERTIFICATE OF SERVICE

I, Thomas F. Driscoll III, hereby certify that on the 17th day of November, 2015, a copy of the foregoing *Notice of Appeal* was served via CM/ECF upon all counsel of record.

/s/ Thomas F. Driscoll III
Thomas F. Driscoll III (#4703)

CERTIFICATE OF FILING AND SERVICE

I, Melissa Pickett, hereby certify pursuant to Fed. R. App. P. 25(d) that, on February 10, 2016 the foregoing Redacted Brief and Appendix Volume 1 of 7 for Plaintiff-Appellant was filed through the CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

The required copies have been sent to the court on the same date as above.

/s/ Melissa Pickett

Melissa Pickett