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[ORAL ARGUMENT NOT YET SCHEDULED]

No. 12-7085

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

IN RE: RAIL FREIGHT FUEL SURCHARGE ANTITRUST LITIGATION

On Petition for Permission to Appeal Pursuant to Federal Rule of Civil Procedure 23(f) from an Order of the United States District Court for the District of Columbia, Hon. Paul L. Friedman, District Judge

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

A. **Parties and Amici**. Except for the following, all parties, intervenors and amici appearing before the district court and in this Court are listed in Petitioners' Opening Brief: Amicus curiae Chamber of Commerce of the United States of America.

B. **Rulings under Review**. References to the ruling at issue appear in Petitioners' Opening Brief.

C. **Related Cases**. The pertinent related case is listed in Petitioners' Opening Brief.

STATUTES AND REGULATIONS

All applicable statutes and rules are contained in Petitioners' Opening Brief.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Respondents' undersigned counsel state:

Dust Pro, Inc., an Arizona corporation, has no parent corporation, and no publicly held corporation owns 10% or more of its stock. During the Class Period, Dust Pro, Inc. primarily manufactured and distributed soil stabilizers used to inhibit dust on dirt surfaces.

Olin Corporation, a Virginia corporation, has no parent corporation. As of February 2012, BlackRock, Inc., a publicly held corporation, reported owning 10% or more of Olin Corporation's stock. During the Class Period, Olin Corporation, through its Olin Chlor Alkali Products Division, manufactured and distributed various chemicals and chemical products.

Dakota Granite Company, a South Dakota corporation, has no parent corporation, and no publicly held corporation owns 10% or more of its stock. During the Class Period, Dakota Granite Company quarried, manufactured and sold granite slabs, tile, monuments, mausoleums, columbariums, civic memorials and blocks, and fabricated custom granite countertops, feature pieces and building components.

Nyrstar Taylor Chemicals, Inc., formerly known as Zinifex Taylor Chemicals, Inc., is a Tennessee corporation. Nyrstar Taylor Chemicals, Inc.'s

parent corporation is Nyrstar Holdings Inc., which is a wholly owned subsidiary of Nyrstar US Inc., which is a wholly owned subsidiary of Nyrstar NV, a Belgian company publicly traded on the Euronext exchange. During the Class Period, Nyrstar Taylor Chemicals, Inc. marketed and sold sulfuric acid.

U.S. Magnesium LLC is a Delaware limited liability company. U.S. Magnesium LLC's parent corporation is Renco, Inc., a privately owned corporation. No publicly held corporation owns 10% or more of the stock of U.S. Magnesium LLC. During the Class Period, U.S. Magnesium LLC manufactured magnesium, chlorine, ferric chloride, and other products.

Carter Distributing Company, a Tennessee corporation, has no parent corporation, and no publicly held corporation owns 10% or more of its stock. During the Class Period, Carter Distributing Company distributed beer.

Strates Shows, Inc. is a Delaware corporation. Strates Shows, Inc.'s parent corporation is Strates Enterprises, Inc., a privately owned corporation. No publicly held corporation owns 10% or more of Strates Shows, Inc.'s stock. During the Class Period, Strates Shows, Inc. operated a traveling carnival that provided entertainment, amusement rides, games, and various food and merchandise concessions to festivals and fairs in the eastern United States.

Donnelly Commodities Incorporated, a New York corporation, has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

During the Class Period, Donnelly Commodities Incorporated was a freight consolidator.

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*Authorities chiefly relied upon are marked with asterisks

Statutes and Rules

GLOSSARY

AAR	Association of American Railroads
AIILF	All-Inclusive Index Less Fuel, a cost-escalation index created at the AAR in December 2003 that excludes fuel as a cost-escalation factor
BNSF	BNSF Railway Company
CSX	CSX Transportation, Inc.
HDF	On-Highway Diesel Fuel index
NS	Norfolk Southern Railway Company
RCAF	Rail Cost Adjustment Factor, a cost-escalation index maintained by the AAR
STB	Surface Transportation Board
UP	Union Pacific Railway Company
WTI	West Texas Intermediate index

PRELIMINARY STATEMENT

Defendants cannot satisfy the exacting standards for appellate review of class certification under Fed. R. Civ. P. 23(f). Nor could they prevail on the merits of their appeal, if permitted. In their attempt to convince this Court otherwise, Defendants assert that the district court employed a "lax" legal standard, even though the district court applied the rigorous analysis mandated by the Supreme Court and recent decisions in other Circuits—the very standard Defendants themselves requested. Over the course of 145 pages, the district court carefully assessed one of the largest evidentiary records ever compiled in connection with a certification motion. Based on that extensive record, the district court made numerous factual determinations before concluding that Plaintiffs had satisfied each requirement of Rule 23.

Although Defendants now purport to rely on facts that "are largely undisputed," *see* Initial Opening Brief of Petitioners ("Br.") 6, every issue they present involves disputed factual contentions that the district court assessed and resolved in Plaintiffs' favor, after detailed consideration of the documents, testimony, and expert analysis. Applying a rigorous preponderance-of-the-evidence standard advocated by all parties, the district court found:

> that the fuel surcharge programs applied by defendants before the class period were *nothing like* the widespread application of defendants' more aggressive, standardized fuel surcharge programs during the class period; that these standardized fuel surcharges were

> applied uniformly, *to all or virtually all class members*; and that there is *no evidence of widespread discounting of base rates* in exchange for application of fuel surcharges, and that any such discounting in the record is an anomaly that does not preclude a finding of predominance. Furthermore, the Court credits [plaintiffs' expert] Dr. Rausser's conclusion that impact and damages are capable of proof at trial with common evidence. The Court finds that Dr. Rausser's economic regression analysis is workable, and that he presents a theory of proof that is plausible and susceptible to proof at trial through available evidence common to the class.

(Op.41 (emphasis added); *see also* Op.116-42 (resolving experts' disputes).)

Defendants now seek to repackage their losing factual arguments as "legal" issues, asserting that the district court departed from decisions of other Circuits by certifying the Class based on a showing of "widespread injury," rather than injury to "all or virtually all" Class members. While the authorities from those Circuits do not demonstrate a split, any such split is irrelevant here in any event: the district court, based on its rigorous review, expressly found that evidence common to the Class is available to demonstrate that all or virtually all Class members were injured and that Defendants failed to establish any categories of uninjured Class members.

Equally unpersuasive is Defendants' argument that the district court applied something "akin to a pleading standard" in assessing expert evidence. The district court jettisoned earlier, less stringent standards and adopted and applied the very "rigorous analysis" standard that Defendants sought. Likewise untenable is Defendants' new suggestion that the district court should have conducted a formal

analysis under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), notwithstanding Defendants' express decision not to pursue such a challenge. In any event, even without a *Daubert* motion, the district court evaluated the experts' qualifications; considered the experts' credibility and reliability; found that Plaintiffs' economic expert had "established the key logical steps behind [his] theory"; and rejected Defendants' criticisms of the expert's methodology.

Defendants' petition neither satisfies the Rule 23(f) criteria for interlocutory review nor shows that the district court abused its discretion or otherwise clearly erred.

COUNTERSTATEMENT OF ISSUES PRESENTED

Whether interlocutory review should be denied or, if granted, whether the district court's order certifying a class should be affirmed, where:

a. the class-certification order does not turn on any unsettled legal issue, but rather on well-supported factual findings that are not "manifestly erroneous" or "questionable," and class certification will not likely terminate the litigation;

b. the district court found, based on its rigorous analysis of the massive record of evidence and expert analysis, that impact on Class members can be proved with common evidence; that evidence common to the Class is available to

demonstrate that "all or virtually all" Class members were injured; and that Defendants failed to establish *any* categories of uninjured Class members; and

c. the district court concluded, based on its rigorous review of the competing expert evidence, that the theories and analyses of Plaintiffs' expert were "viable," "plausible," and "persuasive"; that Defendants' challenges to the methodologies employed by Plaintiffs' expert were meritless; and that Plaintiffs' expert had advanced "workable" and "persuasive" regression analyses.

COUNTERSTATEMENT OF THE CASE

This case began over five years ago when Plaintiffs, businesses that ship products by rail, filed suit alleging that Defendants had engaged in price-fixing in violation of Section 1 of the Sherman Act. The named Plaintiffs range from very large rail-freight shippers like Olin Corporation, to mid-size shippers such as Nyrstar and U.S. Magnesium, to smaller shippers. They alleged that Defendants colluded to impose aggressive fuel surcharges as a "means to implement what effectively operate as across-the-board rate increases." (CAC-¶54.) Discovery spanned class certification and the merits (Dkt.Nos.290-91), and by the class-certification hearing, Defendants had produced their entire set of transactional data and millions of pages of documents, and more than 45 depositions had been taken.

In March 2010, Plaintiffs filed their opening class-certification papers. Through September 2011, there followed multiple opposing, reply, and

supplemental submissions, including voluminous reports by Plaintiffs' and Defendants' respective economic experts, Drs. Rausser and Willig.

The district court specifically requested supplemental briefing on the standard of proof for class certification and on whether it could resolve factual disputes bearing on Rule 23 if those disputes overlap with the merits. (Dkt.No.423.) The parties effectively agreed the district court must conduct a "rigorous analysis" and resolve factual disputes relevant to Rule 23—even if those disputes overlap with the merits. *See, e.g.*, *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305 (3d Cir. 2008). Because this "rigorous analysis" applies to expert testimony as well, expert disputes bearing on Rule 23 must be resolved at class certification, even those that implicate the credibility of a party's expert. The parties also agreed that, under this standard, the court must find that Plaintiffs satisfy Rule 23's requirements by a preponderance of the evidence. (Pls'-ClassCertSuppBr.3; Defs'-ClassCertSuppBr.2)

The district court's grant of class certification in June 2012 was the culmination of this lengthy process, entailing the review of: (1) ten class-certification briefs, addressing, among other things, the four principal factual disputes advanced by Defendants and the Supreme Court's decision in *Wal-Mart* (which was the subject of separate briefing by the parties); (2) 378 exhibits submitted by Plaintiffs; (3) 129 exhibits submitted by Defendants; (4) three expert

reports—including two from Rausser, reflecting analysis of Defendants' *entire* transactional data set; (5) portions of over twenty depositions, including those of nearly all the declarants who opposed certification; (6) two days of oral argument; and (7) four large binders submitted by the parties at the argument—including one (Pls'-HrgTabs.1-162) summarizing Plaintiffs' class-certification evidence. (Op.2-4 n.1.)

The district court noted that past decisions in this Circuit had suggested that a "threshold showing" or "colorable method" might satisfy Rule 23. (Op.33 (quotation marks omitted).) But in accordance with the standards to which the parties essentially stipulated, the district court conducted a rigorous analysis of the evidence (Op.42-143), found by a "preponderance of the evidence that injury-in-fact is capable of proof at trial through evidence that is common to the class" (Op.118), resolved Defendants' "factual disputes" in Plaintiffs' favor (Op.70-116), and found that Rausser's analyses—and not Willig's—were credible, persuasive, and workable (Op.116-42).

COUNTERSTATEMENT OF THE FACTS

A. Pre-Conspiracy Price Competition And Fuel-Surcharge Attempts

For decades before the alleged conspiracy, Defendants confronted a persistent decline in rail-freight rates. (RDEx-177.p1-2.) While they now purport to be virtual non-competitors (Br. 6), Defendants previously acknowledged that the

historic rate decline was attributable to "destructive pricing for rail share" and "some very vicious historical price wars." (RDEx-7.CSXFSC000199149; Giftos-Dep-Tr.86-87.) According to a 2002 BNSF "risk assessment": "We need to be able to achieve price rate improvement. How can we do this if the other competing railroads do not do this at the same time? We are still not together as an industry. We are fighting for revenue share as opposed to rate adequacy." (HDEx-24.BNSF0574531.)

Between 2000 and 2003, Defendants unilaterally attempted to increase revenues, including by imposing fuel surcharges tied to freight rates—and failed. (Pls'-HrgTabs.5-13.) These surcharges were not precipitated by inter-Defendant coordination or discussion. (Giftos-Dep-Tr.31; Seale-Dep-Tr.107-09.)

The problem, as the district court found, was that the pre-conspiracy "differentiated fuel surcharges were subject to competition and negotiation with shippers, were less aggressive, and were applied only sporadically." (Op.86.)

As BNSF observed in 2002, "[t]he trucking industry uses fuel surcharges but our rail competitors do not and we therefore are hard pressed to achieve it." (RDEx-5.BNSF-0574617.)

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Defendants further recognized that increased customer resistance would follow from higher fuel surcharges.

The data show that by early 2003, Defendants were able to impose fuel surcharges on of their revenue base. (RausserRpt-Reply.34.) And these uncoordinated fuel surcharges were only "theoretically billable," in that they often were not triggered or were triggered only at minimal levels. (Op.86; *see also* (Glennon-Dep-Tr.26 (it was "easier in the period from 2001 to 2002" to impose fuel surcharges, because they were only "theoretically billable, so … customers might not resist it as much").) Defendants' executives were dissatisfied, by their inability to achieve broader revenue-enhancing coverage of fuel surcharges before the alleged conspiracy.

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B. The Alleged Conspiracy

1. Defendants' Conspiracy To Impose "Uniform" Fuel Surcharges

In early 2003, Defendants' senior executives engaged in a series of extraordinary meetings to discuss, and agree upon, coordinated programs and practices to impose an across-the-board price increase through pretextual fuel surcharges. (Pls'-HrgTabs.16-36.) At these meetings, Defendants' senior executives openly discussed "fuel surcharge methodology" (RDEx-210.CSXFSC000165104) and their desire to "synchronize" (RDEx-208.BNSF-FSC000643) and develop an "industry position" on fuel surcharges (RDEx-59.NS001000424).

[1]

Under their agreement, Defendants jointly implemented aggressive fuel surcharges that would be applied uniformly throughout the Class Period. On March 20, 2003, CSX modified its fuel surcharge formula to assess a 0.4%

[1] In the district court, the parties agreed that the conspiracy element would be subject to common proof. (Op.58-59.) The court thus did not rely on this evidence of conspiratorial communications, nor was there any reason to reach Defendants' contention that some of Plaintiffs' evidence is inadmissible under 49 U.S.C. § 10706(a)(3)(B)(ii)(II) (Op.21-22), a narrow and inapplicable statutory exclusion that applies only to evidence that "concern[s] an interline movement of the rail carrier."

surcharge when the price of oil on the West Texas Intermediate index ("WTI") exceeded $23 per barrel (rather than $28 per barrel as per the old program), and an additional 0.4% for every dollar the WTI exceeded $23. (RDEx-26; RDEx-24.CSXFSC000000363.) Whereas CSX's old program required the price of oil to exceed the trigger price for 30 consecutive days, CSX's new program permitted increases based on the average price of oil from the preceding month. (*Id.*; RDEx-23.) Two weeks later, UP announced that it was adopting the same formula as CSX. (RDExs-30-31; RDEx-38.UPFSC0000840.)

And, in May 2003, BNSF dropped the trigger price of its fuel surcharge from $1.30 to $1.25 per gallon of diesel fuel on the On-Highway Diesel Fuel index ("HDF"), a threshold that matched the $23 WTI price that UP and CSX had adopted. (RDEx-57; RDEx-3.) Within days of BNSF's announcement, UP effectively adopted the BNSF formula. (RDEx-47.UPFSC0183975-81.)[2]

NS delayed implementation of the new fuel-surcharge program

NS announced in January 2004 that it was adopting the CSX formula and

[2] UP's formula had a higher trigger price than BNSF's ($1.35 versus $1.25), but was designed such that

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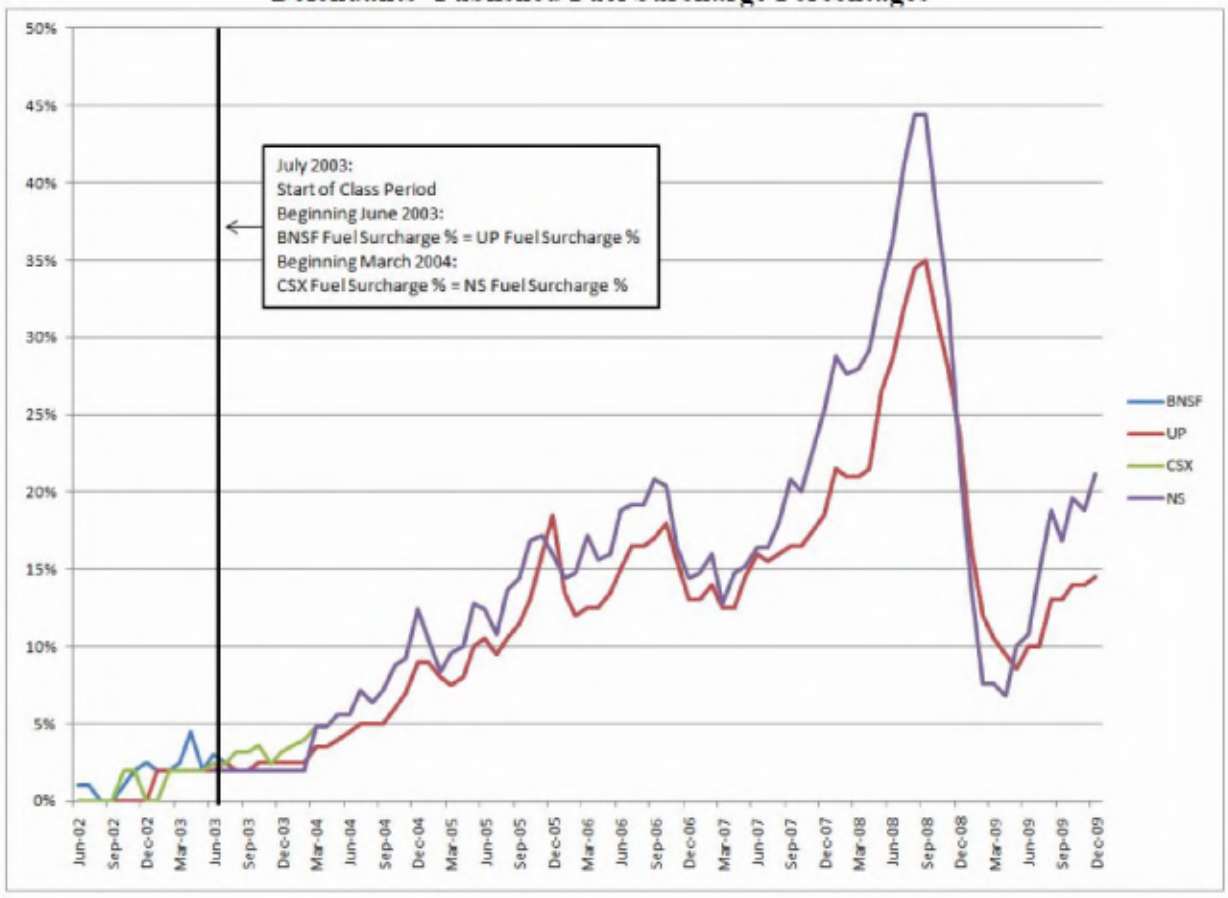
Thereafter, Defendants' new fuel surcharges moved in lockstep throughout the Class Period:

Figure 16:
Defendants' Published Fuel Surcharge Percentages[137]



(RausserRpt.60.)

2. Defendants' Coordinated Application Of Fuel Surcharges

Defendants' new fuel-surcharge programs were, in their own words, "more aggressive" and "definitely yielded more revenue" than their predecessors. (Glennon-Dep-Tr.42, 67; HDEx-14.NS_010026785; Neikirk-Dep-Tr.89-92.) Indeed, Defendants acknowledged that "[b]y dropping the base to $23 per barrel,

raising the percentage yield and taking it sooner, the change is in fact a blatant general rate increase" (Op.87 (quoting HDEx-30.NS_010004522)), yielding "a large increase in fuel surcharge billings—maybe as much as 100%." (RDEx-23.)

Defendants collectively enforced policies ensuring across-the-board application. BNSF's CEO, for instance, issued a "[m]andate" that "[e]very price authority should have a fuel surcharge applied" and dictated that "contracts requiring his signature but excluding full fuel surcharge provisions will not be signed." (RDExs-91.BNSF-0325449, 223, 224.) CSX, NS, and UP adopted similar policies. (RDEx-86.CSX00000574; RDEx-141.CSXFSC000086200; Lawson-Dep-Tr.38; HDEx-11; Glennon-Dep-Tr.56-58; RDEx-72; RDExs-106.UPFSC 0274880; Pls'-HrgTabs.39-45.) Defendants likewise carefully monitored the ever-increasing coverage of their coordinated fuel surcharges during the Class Period. (RDEx-121; RDEx-86.CSXFSC000000574; RDEx-111.NS_010047460; RDEx-113.UPFSC02750003; Pls'-HrgTabs.50-52.) The district court found that while fuel surcharges were previously "subject to competition and negotiation" (Op.86), the new fuel surcharges were "non-negotiable," "standardized," "uniformly applied" (Op.88-92), and that "each defendant enforced strict policies ensuring

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across-the-board application of these standardized fuel surcharge programs on all of their shippers" (Op.91).

Defendants, moreover, made no exceptions for so-called "legacy" shippers[3] and "sole-served" (or "captive") shippers.[4] (HDEx-9.p272 (STB testimony of BNSF CFO that BNSF's "surcharge program is the same for all customers"); HDEx-149.UPFSC0342883 (UP rejecting customer request for discounted fuel surcharge because "we are uniformly requiring of all of our customers" payment of the standard fuel surcharge).) In fact, Defendants made special efforts to impose their fuel surcharges on legacy shippers renewing a contract during the Class Period. (RDEx-72 ("As a company policy, all contracts without fuel language will have fuel language upon renewal. This is a mandate by UP management, I have no choice.").) And

; *see also* Rose-Dep-Tr.232 (it "violates [BNSF] principle" to have a higher fuel surcharge for captive shippers, and BNSF never considered it an option); Knight-Dep-Tr.64.)

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[3] A "legacy" shipper is a Class member who had at least one rail-freight contract before the Class Period that contained a fuel-surcharge provision, and then entered a separate contract containing a fuel-surcharge provision during the Class Period. (Op.80.) Pre-Class Period "legacy" shipments are outside of the Class.

[4] A "captive" shipper is one served by a single railroad at a particular location.

Defendants instituted strict mandates proscribing fuel-surcharge discounts and exceptions. (Pls'-HrgTabs.42-43.) As a NS senior executive summarized the mandate: "'I expect market based price increases to be applied independent of the [fuel surcharge], and we should *absolutely not* be deferring any rate increases because we are applying the [fuel surcharge].'" (Op.110 (citation omitted and emphasis in original).) CSX's policy was similarly absolute: "NO ONE is authorized to approve a renewal with an increase of less than 10%" and "NO ONE is authorized to approve a deal WITHOUT Fuel Surcharge." (HDEx-22; *see also* Op.111 n.20 (quoting BNSF "'[m]andate'" that "'Marketing Team should not discount a fuel surcharge to raise price'").) Indeed, Defendants viewed a prohibition on base-rate discounting as an "inseparable" companion to their policies proscribing fuel-surcharge discounting and exceptions. (Seale-Dep-Tr.299-301.) Based on such evidence, the district court found that Defendants had strict mandates "not to discount base rates" to offset the fuel surcharge's effect on total prices. (Op.110-11.)

3. Defendants' Adoption Of The "All Inclusive Index Less Fuel"

In late 2003, Defendants sought to remove a remaining impediment to widespread fuel-surcharge application: a cost-escalation index known as the Rail Cost Adjustment Factor ("RCAF"), which weighted various cost factors, *including fuel*, to calculate the cost escalation for long-term freight contracts. The RCAF

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was included in many of Defendants' multi-year contracts and permitted mid-contract price adjustments. Because the RCAF enabled recovery of actual fuel-cost increases (Giftos-Dep-Tr.48), applying a fuel surcharge on top of the RCAF constituted "double-dipping" (RDEx-147.p10; RDEx-85.NS-010074364; RDEx-143; RDEx-44) that would be "hard to defend" (RDEx-200; Kyei-Dep-Tr.134, 205).

Defendants recognized that their pretextual fuel surcharges generated substantially more revenue than the RCAF

Accordingly, Defendants agreed at the December 2003 meeting of the Association of American Railroads ("AAR") to create a new index—the All Inclusive Index Less Fuel ("AIILF")—that removed RCAF's fuel-escalation component. (RDEx-69.AAR-000166.) BNSF's chief economist congratulated BNSF's CEO for his role in this significant development: "[T]he combination of sound price escalation using this index and a fuel surcharge should tremendously help our bottom-line for years to come. In fact, … the entire rail industry should benefit from the escalation options the new index provides." (RDEx-122.BNSF-0070502.)

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4. The Post-Collusion Rate Increases

While Defendants publicly asserted that the coordinated fuel surcharges were intended only to recoup fuel cost increases,[5]

And massive over-recovery ensued.

see

also RDEx-90.NS_010027582 (NS's senior marketing executive would not be "in agreement" with having it "widely known" that NS's revenue "increases are coming from fuel surcharges").)

[5] (RDEx-26.CSXFSC000084489 (CSX describing new program as "fuel cost recovery program"); RDEx-128.p2 (similar as to NS); HDEx-99.pp258, 61 (similar as to BNSF); *id.* at 325-26 (similar as to UP).)

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Numerous independent studies have confirmed Defendants' over-recovery of fuel-cost increases. (HDEx-52.p.ix (U.S. Dept. of Agriculture & U.S. Dept. of Transportation) ("There is considerable evidence that railroad fuel surcharges recovered more than the additional cost of fuel, artificially boosting railroad profits. From 2001 to 2007, surcharges were 55 percent higher than the incremental increase in the cost of fuel."); HDEx-53 (Snavely King Majoros O'Connor & Lee, Inc.).) This over-recovery was assured—as Rausser explained—by the structure of Defendants' rate-based fuel surcharges:

By applying these rate-based fuel surcharges uniformly, Defendants effected a general rate increase, sharply reversing the historic downward trend in rates:

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(RausserRpt.77.)

As rates climbed, Defendants reported record revenues and profits, attributing them largely to fuel surcharges. (RDEx-164.pK20 (NS 2006 10-K reporting that its "[r]ailway operating revenues increased $880 million, reflecting higher rates, including fuel surcharges that accounted for about 40% of the increase and modestly higher traffic volume"); RDEx-161.pp16, 18 (similar as to BNSF); RDEx-167.p17 (similar as to UP); RDEx-162.p25 (similar as to CSX).)

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5. The Surface Transportation Board's Condemnation Of Defendants' Rate-Based Fuel Surcharges

After receiving complaints from shippers nationwide, the Surface Transportation Board ("STB") investigated Defendants' use of fuel surcharges "purportedly to recoup increases in … fuel costs." (RDEx-147.p1.) Shippers emphasized that Defendants' fuel surcharges had become "non-negotiable," "enacted by unilateral decree," and imposed on a "take it or leave it basis."[6] Defendants' own STB presentations confirmed the universality of their fuel-surcharge regimes. As BNSF's CFO testified, BNSF's "surcharge program is the same for all customers." (HDEx-9.p272; HDEx-1.pp15-17.)[7]

The STB determined that Defendants' fuel surcharges stood "virtually no prospect of reflecting the actual increase in fuel costs for handling the particular traffic to which the surcharge is applied." (RDEx-147.p6.) Defendants' fuel surcharges, the STB ruled, "cannot fairly be described as merely a cost recovery mechanism," and the STB condemned their use as a "misleading and ultimately unreasonable practice." (RDEx-147.p6-7.) The STB's prohibition of rate-based

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[6] (HDEx-95.p3; HDEx-94.p14; HDEx-96.p3; HDEx-97.p3; HDEx-98.p5; HDEx-99.p104, 121, 242.)

[7] Two days before submitting a statement to the STB, NS modified its carload fuel surcharge, elevating the trigger from $23 to $64. (RDEx-136.) This "re-based" fuel surcharge was a ruse In economic terms, it was a wash because the higher trigger price was coupled with a uniform 16.4% base-rate increase designed to to base rates the old $23 WTI fuel surcharge. (RDEx-158; RDEx-138; RDEx-134.)

surcharges concerned only rate-regulated traffic, however, and did not prevent the continuation of rate-based fuel surcharges on the unregulated shipments at issue here. (RDEx-147.p13.)

C. The District Court's Decision Granting Class Certification

1. The District Court's Rigorous Analysis Of Factual Disputes Concerning Class-Wide Impact

The district court addressed the factual disputes bearing on the conspiracy's impact on the Class, including each of the "four principal factual disputes" (Op.39) raised by Defendants and their expert. Over the course of sixty pages, the district court addressed and resolved, by a preponderance of the evidence, all four disputes in Plaintiffs' favor. (Op.41, 79-116.)

First, the district court examined Defendants' contention that whether a Class member would have paid a fuel surcharge "but for" the conspiracy requires individualized inquiry because some shippers paid fuel surcharges before the Class Period. (Op.79-95.) The court rejected this argument, finding "by a preponderance of the evidence that the fuel surcharge programs applied before the Class Period were nothing like the widespread and uniform application of standardized fuel surcharges during the Class Period." (Op.86.) Before the conspiracy, "defendants' differentiated fuel surcharges were subject to competition and negotiation with shippers, were less aggressive, and were applied only sporadically," while the "fuel surcharges that defendants put in place in the spring

of 2003 were of a different breed." (Op.86-87.) These new fuel surcharges were "more aggressive than before," and "were standardized and uniformly applied across all or virtually all shippers—regardless of whether such shippers were legacy or captive shippers." (Op.88.) As the district court found, shippers paid these fuel surcharges for the simple, and Class-wide, reason that they were "non-negotiable." (Op.92.) The district court identified a "sharp increase" in fuel surcharge coverage coincident with "the start of the alleged conspiracy." (Op.95.)

Second, the district court considered Defendants' argument that the impact of the conspiracy was not susceptible to common proof because Defendants purportedly "had different fuel surcharges for intermodal traffic." (Op.89.)[8] The court weighed the expert analyses on intermodal shipments and credited Rausser's conclusion that for each railroad, "92% to 100% of its intermodal revenue can be accounted for by a handful o[f] programs and a few identifiable exceptional programs." (Op.94-95 (quotation marks and citation omitted).) The court also inspected Defendants' declarations and discredited BNSF's intermodal representative's attempt to show discounting in BNSF's application of intermodal fuel surcharges. (Op.106-07 (quotation marks and citation omitted).) The court thus rejected Defendants' argument that "[t]here was no change in the intermodal

[8] Defendants first raised the issue of intermodal traffic at the class certification hearing. (Op.95 n.16.)

standard fuel surcharges of any consequence during the class period." (Op.95 n.16 (quotation marks and citation omitted).)

Third, the district court addressed Defendants' contention that their fuel surcharges might have been offset by base-rate discounts or in exchange for anything else of value. (Op.101-16.) For this proposition, Defendants relied heavily on twenty-one declarations that the court concluded were "unpersuasive and inconsistent with [declarants'] later deposition testimony." (Op.106.) "If defendants' declarations provide examples of anything, it is the paucity of any evidence of discounting." (*Id.*)

Moreover, "[b]ased in large part on the deposition testimony of Defendants' own executives" and Defendants' policies, the district court found that Plaintiffs had established by a preponderance of the evidence that any discounting of base rates was "an anomaly" (Op.41), a finding "consistent with clear mandates from defendants not to modify their standard fuel surcharge program." (Op.110-11.) Citing contemporaneous documents, the court further found that Defendants' policies mandated that they "should *absolutely not* be deferring any rate increases because [they] are applying the FSC." (Op.110 (emphasis in original) (quotation marks and citation omitted).)

The district court also compared the two experts' analyses on the extent of any discounting in exchange for fuel surcharges, and found persuasive and

"consistent with the evidence in the record" (Op.112) Rausser's conclusion that "base rates across the main commodities shipped by defendants remained largely constant in real terms from the years before the Class Period to the years during the Class Period." (Op.113 (quotation marks and citations omitted).) In contrast, Willig relied almost exclusively on Defendants' discredited declarations, which provided "weak evidence" of discounting. (Op.112.)

The district court also concluded that Plaintiffs had "presented persuasive documentary and expert opinion evidence that is common to the class that shows that the standard fuel surcharges were intended to raise overall prices as a percentage multiplier of the base rate." (Op.114.) The court found that "the allegedly conspiratorial fuel surcharges were the starting point for negotiations—a situation commonly observed in price fixing conspiracies where classes have been certified." (Op.115.) "Not only have defendants' own executives admitted that negotiations started with the standard fuel surcharge program," the court explained, "but plaintiffs have shown—in reliance on defendants' own documents and economic analysis of defendants' transaction data—that defendants' standardized fuel surcharge programs overwhelmingly were applied without discounting the base rate." (Op.116; *see also* Op.113 (Defendants' transaction data revealed "no evidence of systematic discounting").)

Fourth, the district court probed, and rejected, Defendants' contention that "sole served" shippers "do not benefit from rail competition in the first place and therefore cannot be injured by an alleged conspiracy among railroads." (Op.98 (quotation marks and citation omitted); *see also* Op.72-74, 97-99.) The court found that

> captive shippers are subject to competitive forces; that defendants' executives expressly have denied that they would have tried to impose more aggressive programs on captive shippers than they were able to impose on non-captive shippers; and that defendants uniformly imposed their standard fuel surcharges during the class period without regard for whether the shipper was captive or had access to alternative modes of transportation.

(Op.98.)

2. The District Court's Rigorous Analysis Of Experts

The district court also undertook a rigorous analysis of the parties' expert opinions and resolved all relevant factual disputes they raised (Op.35-38), ruling that it must decide "which expert is correct about whether the injury-in-fact question is common to the class." (Op.35 (quotation marks and citation omitted).) The court applied the rigorous standard the Third Circuit used in *Hydrogen Peroxide* and considered: (1) whether Plaintiffs' expert's theory of common impact is "plausible" or "viable"; (2) whether Plaintiffs' expert's regression model—a tool commonly used in antitrust cases to isolate the effect of an alleged restraint—is "feasible" or "workable"; and, if so, (3) whether Plaintiffs established by a preponderance of the evidence that their expert's viable theory is susceptible

to proof using evidence common to the Class. (Op.35-38 (citing *Hydrogen Peroxide*).)

First, the district court concluded that Rausser's theory of common impact was "plausible" and "persuasive," and that he had established "the key logical steps behind [his] theory." (Op.116-18 (alteration in original) (quotation marks and citation omitted).) In so ruling, the court studied Rausser's theory, its underlying economic principles, and its reliability. For example, the court found "persuasive" Rausser's analysis of the five structural factors of the rail-freight industry that make it conducive to price-fixing, which in turn provided "strong support" for the conclusion that impact can be proved with common evidence. (Op.118-124.) The court weighed Defendants' criticisms at length before rejecting them. For example, Defendants criticized Rausser's observation that rail-freight pricing is transparent and therefore conducive to price-fixing, but the court agreed with Rausser that rail pricing is transparent given the use of common pricing-authority documents, standardized classifications for shipments, and market intelligence. (Op.123.) The court noted, moreover, that the "mechanism applied by defendants—standardized fuel surcharges—does not require constant communications once the details of the surcharge have been agreed upon." (Op.123.)

Second, the district court concluded that Rausser's regressions were "workable" and "persuasive" and ultimately "give rise to an inference … that putative class members paid more for rail freight transportation services than they would have absent the conspiracy on fuel surcharges." (Op.131; *see also* Op.41, 118, 126-36, 140.) The court explained that "neither defendants nor Willig credibly have identified any … variables" missing from Rausser's model, let alone any variables that would alter his results (Op.132), and it found significant that Rausser had utilized the "entire universe of defendants' transaction data from 2000 to 2008" (Op.131) in constructing regression models demonstrating the conspiracy's impact across the Class.

The court also agreed with Rausser's conclusion that "seven common factors predominate over individual factors in determining rail freight prices, and … these common factors permit a common analysis of defendants' transaction data." (Op.131.) Using these common factors to control for economic forces, Rausser compared prices during the Class Period to prices during a "benchmark" period—the preceding 3.5 years. (Op.128, 135, 138-39.) That comparison revealed "a structural break in the relationship between freight rates and fuel prices around 2003, which is consistent with a conspiracy using Fuel Surcharges to raise freight rate[s]." (Op.133 (quotation marks and citation omitted).) Rausser depicts that structural break:

(RausserRpt.67, RausserRpt.65-68 (showing similar charts for NS, BNSF, and CSX).) In other words, "before the alleged conspiracy, 'if fuel prices went up by a certain amount, it would have a certain effect … on rail freight prices overall; and after the [alleged] conspiracy, if fuel prices went up, it had a much bigger effect on the overall price.'" (Op.84-85 (quoting Oct. 6 Tr. at 139); *see also* RausserRpt-Reply.82-83.)

Third, the district court found, by a preponderance of the evidence, that Rausser's models confirmed that "injury-in-fact is capable of proof at trial through

evidence common to the class" (Op.118), that the models can "calculate damages to the class and to each class member" (Op.140), and that they provide a common methodology for proving impact and damages Class-wide (Op.141-42). In sum, the district court concluded by a preponderance of the evidence that Rausser's theories and analysis were "persuasive," "viable," and "plausible" (Op.74, 94, 96, 112, 122, 124, 141), in contrast to Willig's (Op.72, 85, 88-89, 94, 124, 132); Rausser's regression analyses were "workable" and similarly "persuasive" (Op.41, 118, 126-42); and Defendants' assertions of "fatal flaws" and "methodological failures" in Rausser's work were unfounded (Op.128-36, 139-42). In making these determinations, the district court understood that it was determining ultimately "which expert is correct." (Op. 32 (quotation marks and citations omitted).)

SUMMARY OF ARGUMENT

Defendants would have this Court review and overturn the certification order even though the district court applied the most rigorous standards—standards that Defendants championed below—and carefully considered an enormous record of fact and expert evidence to ensure that those demanding standards had been met. With barely a passing nod to the clear-error standard of review, Defendants rehash factual contentions that the district court properly found inconsistent with the record and resolved in Plaintiffs' favor. Defendants cannot satisfy the strict

standards for interlocutory review under Rule 23(f), much less show that the district court committed clear error or otherwise abused its discretion.

1. Defendants cannot demonstrate that interlocutory review is warranted. There are no "unsettled" issues of law as to the permissible number of "uninjured" class members or the legal standard concerning expert evidence on class certification, let alone any issue relevant here, given that the district court conducted a rigorous analysis to resolve disputes over both fact and expert evidence, applied the very standard that Defendants are advocating, and found (among other things) that evidence common to the Class is available to demonstrate that all or virtually all Class members were injured. Defendants likewise fail to demonstrate that the district court "manifestly erred" in its application of the legal standards or its factual findings, which are all amply supported by the evidence. Moreover, the certification order does not sound the "death knell" of this litigation, given Defendants' financial resources and purported case-dispositive defenses.

2. Unable to identify any legal controversy that might support interlocutory review, Defendants reassert factual arguments—about the extent of pre-conspiracy fuel surcharges, supposed base-rate reductions, intermodal fuel surcharges, and so-called "sole-served" shippers—that the district court carefully considered and rejected based on a potent combination of documents, testimony,

and expert analysis. The district court's findings that all or virtually all Class members were injured by the alleged conspiracy and that Defendants failed to establish *any* categories of uninjured Class members rest on substantial evidence in the voluminous record, and Defendants fall far short of demonstrating that any finding is clearly erroneous.

3. Defendants also have not identified any error with respect to the district court's evaluation of the competing expert analyses. The district court evaluated this evidence under the rigorous standards—articulated in *Hydrogen Peroxide*—that Defendants championed below. Those standards were anything but "relaxed," "lenient," "lax," or "akin to a pleading standard," as Defendants now suggest. After a painstaking review of the expert submissions, the district court resolved every dispute between the experts by a preponderance of the evidence. Noting that its task was to determine "which expert is correct," the district court carefully assessed Defendants' criticisms of Rausser's analyses as inconsistent with the facts and concluded that he had "established the key logical steps behind [his] theory" and that his regression models are "viable," "workable" and "persuasive."

Defendants' belated argument that the district court should have conducted an unspecified *Daubert* review is no more compelling. Defendants opted not to mount, or request the opportunity to present, a *Daubert* challenge below, even after

announcing their intention to do so if they deemed it warranted and even after the Court invited supplemental briefing following the Supreme Court's decision in *Wal-Mart*. What is more, Defendants cannot explain how a *Daubert* motion might have altered the outcome. The district court assessed the experts' qualifications; considered the credibility, fit, and reliability of both experts' testimony; and rejected Defendants' criticisms of Rausser's methodology after a thorough evaluation.

STANDARD OF REVIEW

This Court disfavors interlocutory appeals under Rule 23(f) "as disruptive, timeconsuming, and expensive for both the parties and the courts." *In re Lorazepam & Clorazepate Antitrust Litig.*, 289 F.3d 98, 105 (D.C. Cir. 2002) (quotation marks and citations omitted). Granting a Rule 23(f) petition is ordinarily appropriate in only three narrow circumstances:

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

Id.; *see also In re James*, 444 F.3d 643, 646 (D.C. Cir. 2006).[9] Thus, determinations of fact "generally will not be appropriate for interlocutory review" under Rule 23(f). *See, e.g.*, *Prado-Steiman ex rel. Prado v. Bush*, 221 F.3d 1266, 1275-76 (11th Cir. 2000). Whether a certification decision is "questionable" or "manifestly erroneous" for purposes of Rule 23(f) must be assessed in light of the deferential standard of merits review. *See Lorazepam*, 289 F.3d at 105, 109.

These principles reflect that "the district court is uniquely well situated to rule on class certification matters." *Garcia v. Johanns*, 444 F.3d 625, 631 (D.C. Cir. 2006) (quotation marks and citation omitted). Certification decisions are reviewed "conservatively only to ensure against abuse of discretion or erroneous application of legal criteria." *Id.* (quotation marks and citation omitted). Factual findings underpinning a certification ruling, including those predicated on expert evidence, are reviewed only for clear error. *See Brown v. Kelly*, 609 F.3d 467, 475 (2d Cir. 2010); *In re Xcelera.com Sec. Litig.*, 430 F.3d 503, 507, 516 (1st Cir. 2005); *see also Am. Soc'y for Prevention of Cruelty to Animals v. Feld Entm't, Inc.*, 659 F.3d 13, 21-22 (D.C. Cir. 2011); *De Medina v. Reinhardt*, 686 F.2d 997, 1007 (D.C. Cir. 1982). A finding of clear error is inappropriate "even if [this Court]

[9] In framing the Rule 23(f) standard, Defendants use ellipses to remove the requirement that "unsettled" issues supporting Rule 23(f) intervention be "important … to the specific litigation." Br. 27. But this limitation serves a critical function given the ease with which capable attorneys can "characterize legal issues as novel." *Lorazepam*, 289 F.3d at 105.

would have ruled differently in the first instance." *Garcia*, 444 F.3d at 631. "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 574 (1985).

ARGUMENT

I. THE PETITION SHOULD BE DENIED BECAUSE DEFENDANTS CANNOT SATISFY THE THRESHOLD STANDARD FOR INTERLOCUTORY APPEAL UNDER RULE 23(F)

As a threshold matter, Defendants must first establish that their petition for permission to appeal should be granted, which they cannot do under Rule 23(f).

First, as demonstrated below, no "unsettled" legal issue is before this Court. *See infra* 35-41, 58-62. Defendants' suggestion of an open question about the permissible number of "uninjured" class is not supported by the case law, and in any event, the district court satisfied the very standard that Defendants assert should be applied when it concluded that all or virtually all Class members were injured. The suggestion that the district court applied a "lax" legal standard concerning expert evidence on class certification is equally misplaced given the district court's rigorous analysis, including of the very issues that Defendants now raise on appeal.

Second, as also demonstrated below, the district court did not err, much less manifestly so, in addressing the governing standards and applying those standards

through a rigorous analysis of the massive record of evidence and expert analysis. *See infra* 41-58, 62-70. Far from accepting Plaintiffs' showing uncritically, the court carefully assessed the record and concluded that Defendants' contentions were "unpersuasive" and "contradicted" by the evidence. There is no trace of error in the court's resolution of these factual disputes, much less error that might be "easily ascertainable from the petition itself." *See, e.g.*, *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 959 (9th Cir. 2005); *Lorazepam*, 289 F.3d at 105.

Third, Defendants also point (Br. 28) to the magnitude of injury they allegedly caused, insinuating that large damages alone satisfy the "death knell" prong. To obtain review of a "death knell," however, Defendants must first demonstrate that the certification order is "questionable, taking into account the district court's discretion over class certification." *Lorazepam*, 289 F.3d at 105. This certification decision is not questionable. *See infra* 35-70.

In any event, Defendants' financial assertions are grossly misleading. NS, whose financial resources Defendants highlight, has reported to investors that it "does not believe that the outcome of these proceedings will have a material effect on its financial position, results of operations, or liquidity." *See* NS, Form 10-Q (Oct. 25, 2012) at 14. Other Defendants have made comparable public disclosures. *See* BNSF, Form 10-Q (Nov. 2, 2012) at 19; UP, Form 10-Q (Oct. 18, 2012) at 37. And this is hardly surprising, as Defendants—all Fortune 250 companies or

larger—control 94% of the U.S. rail-freight market. (RausserRpt.21; Op.122.) During the Class Period, Defendants generated $110 billion just from the shipments at issue here. (WilligRpt.¶24) These companies are certainly able to provide restitution to the Class.

Moreover, Defendants' purported case-dispositive defenses—including their contention that 49 U.S.C. § 10706 shields evidence of the conspiracy—belie their argument that certification will trigger the end of the litigation. (Defs'-10706Br.2.) The district court did not rely on any of this disputed evidence, and Defendants have announced that they "undoubtedly will move for summary judgment" on this ground. (Defs'-10706Br.4.)

II. THE DISTRICT COURT'S RULING THAT THE CONSPIRACY'S IMPACT IS CAPABLE OF PROOF THROUGH COMMON EVIDENCE IS CONSISTENT WITH THE MOST DEMANDING LEGAL STANDARD AND IS WELL-SUPPORTED BY RECORD EVIDENCE

A. The District Court Evaluated The Extent Of The Conspiracy's Impact Under The Demanding Legal Standard That Defendants Requested

Defendants assert that the district court required only a showing of "widespread injury," thus departing from the "majority view" requiring common proof that is capable of establishing injury to "all or virtually all" Class members. Br. 23, 29-31 & n.6. But none of the cases on which Defendants rely distinguish

between injury to "all or virtually all" and "widespread injury," much less hold that certification is inappropriate upon a showing of the latter.[10]

But even assuming that these subtly distinct phrases reflect a Circuit split, that split has no bearing on the certification decision here, because the district court found that Defendants' new fuel surcharges "were applied *uniformly*, *to all or virtually all class members*" (Op.41 (emphasis added)); that these new fuel surcharges were "non-negotiable" (Op.92); and that "workable" regression analyses of Defendants' transactional data confirm that injury can be proven at trial with common evidence (Op.118, 133, 140). The district court also found that

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[10] The Fifth Circuit in *Bell Atlantic Corp. v. AT&T Corp.*, 339 F.3d 294 (5th Cir. 2003), did not even assess whether the plaintiffs had established common impact. *Id.* at 303 & n.13. The First and Third Circuit cases on which Defendants rely turned on whether the plaintiffs could establish predominance by speculating about the types of common evidence they might one day develop. *See In re New Motor Vehicles Canadian Export Antitrust Litig.*, 522 F.3d 6, 27, 29 (1st Cir. 2008) (vacating certification where plaintiffs had failed to "establish[]" the "pivotal evidence" behind their "novel and complex" impact theory, and where plaintiffs' expert had only "*proposed* models" in a "purely conclusory manner") (emphasis added); *Hydrogen Peroxide*, 552 F.3d at 315, 321 (reversing class certification where plaintiffs attempted to rely on expert's "*proposed* reliable methods for proving impact and damages[,]" and where district court concluded that "'[s]o long as plaintiffs demonstrate their *intention* to prove a significant portion of their case through factual evidence and legal arguments common to all class members, that will now suffice'") (emphasis added). Finally, the "every member" language in *Blades v. Monsanto Co.*, 400 F.3d 562 (8th Cir. 2005), was *dicta* given the "undisputed evidence" showing that "in a substantial number of cases" the relevant product was not sold at an inflated price. *Id.* at 573; *see also id.* at 571 (noting "widespread examples" in which relevant product was sold at "zero or near-zero premiums").

Defendants failed to establish the existence of uninjured Class members. *See infra* 41-58. These conclusions rested on well-supported factual findings based on mutually enforcing evidence of the sort widely accepted by courts to prove impact on a common basis.

First, the district court found "consistent with the start of the alleged conspiracy," a sharp increase in the application of the new standardized and more aggressive fuel surcharges. (Op.95); *see infra* 45. Squarely rejecting Defendants' contention that these fuel surcharges were offset with base-rate discounts, the court found that any "discounting in the record is an anomaly" (Op.41),[11] and that even these anomalous cases resulted in injury because, as "defendants' own executives admitted," Defendants inflated the "starting point for negotiations." (Op.116);[12] *see* Part II.C.2, *infra*. Defendants' pretextual fuel surcharges therefore enabled near-uniform price increases through across-the-board application to all shippers. *See id.*, *supra* 25-28.[13]

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[11] *See, e.g.*, *McDonough v. Toys R Us, Inc.*, 638 F. Supp. 2d 461, 484 (E.D. Pa. 2009) ("Because the restraints [which prevented discounting] caused higher prices, average prices would clearly have been lower without them.").

[12] Op.114-15 (collecting cases).

[13] *See In re Ethylene Propylene Diene Monomer (EPDM) Antitrust Litig.*, 256 F.R.D. 82, 85 (D. Conn. 2009) (relying on evidence of price hikes that were "not in line with input prices"); *id.* at 88 (noting as example of common evidence of class-wide impact "lock-step increases of national price lists in an oligopolistic market"); *Toys R Us*, 638 F. Supp. 2d at 485-86 (finding impact based on

Second, the district court rejected the notion that any payment of fuel surcharges in the pre-conspiracy period by so-called "legacy" shippers precludes common proof of injury. (Op.85-88.) *See* Part II.C.1, *infra*.

Third, the district court found that the conspiracy impacted intermodal freight rates. (Op.89, 94-95, 95 n.16, 106-07); *see infra* 49-50.

Fourth, the district court found, as Defendants' own executives admitted, that so-called "sole-served" shippers were subject to competitive forces and were assessed the same fuel surcharges as other shippers (Op.72-73, 98), and therefore were affected by any conspiracy (Op.72-74, 88, 97-99); *see* Part II.C.3, *infra*.

Fifth, the district court assessed Rausser's regression analyses of Defendants' complete transactional data set (RausserRpt. 83, 93-94), finding those analyses "persuasive," "plausible," "viable," "workable" and capable of calculating "damages to the class and to each class member." (Op.41, 74, 96, 112, 118, 122-42.)[14] The court also drew "strong support" from Rausser's explanation of

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defendants' maintenance of "uniform list prices nationwide" despite evidence of discounts).

[14] *Allen v. Dairy Farmers of Am., Inc.*, No. 5:09–cv–230, 2012 WL 5844871, at *12-13 (D. Vt. Nov. 19, 2012) (Rausser's "multiple regression model" explains variations in pricing that "cannot be attributed to the alleged conspiracy"); *In re Chocolate Confectionary Antitrust Litig.*, No. 1:08–MDL–1935, 2012 WL 6652501, at *17-18 (M.D. Pa. Dec. 7, 2012) (multiple regression analysis showed that "antitrust injury may be accomplished with evidence common to the class"); *In re Titanium Dioxide Antitrust Litig.*, 284 F.R.D. 328, 347 (D. Md. 2012) (same).

particular structural factors that make the rail-freight industry conducive to price-fixing. (Op.118-24.)[15]

These findings and others constitute a complete rejection of Defendants' contention that the Class contains uninjured members. Defendants' true grievance is with those factual conclusions—not the legal standard the district court applied.[16]

B. The District Court's Approach Is Consistent With *Wal-Mart*

Defendants also suggest (Br. 4, 30-31) that *Wal-Mart*—a case under Rule 23(b)(2)—requires a showing of injury to all or virtually all class members. But again, even if this were so, the district court's findings satisfied that supposed standard. Defendants in any event mischaracterize *Wal-Mart*, which did not purport to address the number of uninjured members permitted in a class.

To the extent *Wal-Mart* addressed the "commonality" requirement of Fed. R. Civ. P. 23(a), the Supreme Court explained this requires a common question, the answer to which is "apt to drive the resolution of the litigation." *See Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011) (quotation marks omitted). In

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[15] *See, e.g.*, *EPDM*, 256 F.R.D. at 91; *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 267 F.R.D. 583, 601, 606 (N.D. Cal. 2010); *In re Chocolate Confectionary Antitrust Litig.*, No. 1:08-MDL-1935, 2012 WL 6652501, at *17-20.

[16] The Chamber of Commerce similarly disregards the district court's exhaustive resolution of factual disputes. Notably, while seeking reversal, "the Chamber takes no position with respect to the underlying factual allegations at issue here." Chamber Br. 1.

reversing certification of an employment-discrimination class, the Court found commonality absent because, in lieu of a "uniform employment practice," plaintiffs theorized that "perhaps subconscious[]" discrimination infected the "discretionary decisionmaking" of thousands of managers concerning millions of employment decisions. *Id.* at 2548, 2552, 2554. The Court's chief concern was that there was no "glue holding" the class's claims together. *See id.* at 2552.

This case bears no resemblance to *Wal-Mart*. Not only did Defendants here implement company-wide policies ensuring uniform application of their fuel surcharges, the Class's fate is bound to the indisputably common question of whether Defendants conspired. *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 300 (3d Cir. 2011) (en banc) (*Wal-Mart* "actually bolsters" class certification where common issue of conspiracy is involved), *cert. denied*, 131 S.Ct. 1876 (2012). Additional common questions abound, including, for example, whether the rail freight industry is conducive to collusion; and whether Defendants instituted directives that proscribed offsetting discounts to base rates. Class treatment is warranted here so that these common issues can "productively be litigated at once." *Wal-Mart*, 131 S. Ct. at 2551.

Wal-Mart is further distinguishable for the paucity of data that plagued the plaintiffs' case there. The plaintiffs' statistical expert there examined only aggregated "regional and national data" and concluded there were "'disparities

between men and women at Wal-Mart.'" *Id.* at 2555. Similarly, the plaintiffs' expert sociologist opined on the basis of anecdotal evidence that Wal-Mart's corporate culture rendered it "'vulnerable'" to "'gender bias,'" but conceded that he could not determine whether stereotyping affected merely 0.5% or as much as 95% of employment decisions. *Id.* at 2549, 2553-54. By contrast, Plaintiffs here supplied considerable factual evidence and econometric analyses, based on actual use of data for *every relevant transaction*, showing that Defendants' conspiracy was designed to, and did in fact, impact all or virtually all Class members. *See supra* 24-28.

C. The District Court Correctly Ruled That Impact Can Be Proven On A Class-Wide Basis With Common Evidence

1. The District Court Properly Rejected Defendants' Speculative Argument That "Legacy" And Intermodal Shippers Would Have Paid The Same Fuel Surcharges Absent The Conspiracy

Defendants argue (Br. 37-42) that many so-called "legacy" and intermodal shippers would have paid the same or higher fuel surcharges absent a conspiracy, preventing Plaintiffs from establishing causation with evidence common to the Class. This argument is at war with the evidence, misconstrues Plaintiffs' methodology for demonstrating impact and damages, and lacks legal support. The district court was right to reject it.

First, Defendants' "legacy" argument begins with the faulty premise that the alleged conspiracy—even if proven at trial—was pointless because many shippers would have faced the same fuel surcharges regardless. But price-fixers risk liability only when they perceive benefits from collusion. *See, e.g.*, *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 656 (7th Cir. 2002) ("[S]ellers would not bother to fix list prices if they thought there would be no effect on transaction prices."). And the contemporaneous evidence here shows Defendants' unmistakable recognition that, absent coordination, they would *not* have been able to impose the same fuel surcharges, or do so across-the-board as a means of raising revenues and profits.

As the district court appreciated, before the conspiracy, Defendants' "fuel surcharges were subject to competition" (Op.86), and Defendants struggled with a long-term decline in rates and "[d]estructive [p]ricing for [r]ail [s]hare." (RDEx-7.CSXFSC000199149.) Defendants recognized that more aggressive fuel surcharges would spur customer pushback and that a unified front was needed to make the new surcharges "stick." *See supra* 11-14. As BNSF noted during the Class Period, while "our reliance on fuel surcharge as a mechanism to control fuel prices … is working well now, *it would only take one competitor to abandon this in an attempt to gain market share to cause this to fail*." (HDEx-31 (emphasis added).)

Material Under Seal Deleted

Defendants' argument also ignores that the "fuel surcharge programs applied before the class period were nothing like the widespread and uniform application of standardized fuel surcharges during the class period." (Op.86.) The new "standard" fuel surcharges: (1) aligned to common indices, assuring that Defendants' fuel-surcharge percentages would move in lockstep; (2) lowered the trigger price; and (3) ballooned faster with rising fuel prices. (Op.87.)

Despite their present contention that "[t]he new lower thresholds … had no effect on the [fuel] surcharges actually paid by shippers during the class period" (Br. 14 n.2), Defendants' documents and testimony acknowledge that the new fuel surcharges were "not the same" as the old ones and, in fact, were a "blatant general rate increase," "more aggressive," and "definitely yielded more revenue." (Glennon-Dep-Tr.42, 67; Neikirk-Dep-Tr.88-92; Young-Dep-Tr.57; HD-Ex-30.NS_010004522.) Defendants also now claim (Br. 38-40) that the pre-Class Period fuel surcharges would have generated more revenue through the Class Period than the standard fuel surcharges adopted in 2003, asserting that there is "no contrary analysis in the record." Br. 16. Yet Rausser's damages model, credited by the district court,

More fundamentally, there is no basis to presume that Defendants would have been able to impose their "theoretically billable" pre-conspiracy fuel surcharges—which generally were not triggered or, if so, only at low levels (Op.86)—at revenue-enhancing levels absent collusion, particularly when the only evidence shows Defendants' recognition that the success of their fuel-surcharge program was dependent on uniform application across the industry, and that increased customer resistance to fuel surcharges would follow from increases in fuel prices. *See supra* 11-14.[17]

Defendants' new fuel surcharges were also different in their *application*, as the district court found. Whereas pre-conspiracy fuel surcharges were "subject to competition and negotiation with shippers … and were applied only sporadically" (Op.86), Defendants' new fuel surcharges were imposed pursuant to "strict policies" that required "across-the-board application of these standardized fuel surcharge programs on all of their shippers" (Op.91) and prohibited offsetting discounts to base rates (Op.110-11). Addressing the common impact of these policies, the district court found that "shippers paid the standard fuel surcharges

[17] Equally counterfactual is Defendants' contention that "substantial amounts of traffic" shipped under fuel-surcharge formulas identical to those used before the Class Period. Br. 38. Defendants place CSX's and BNSF's fuel surcharges, adopted in March and June 2003, into the category of "unchanged" formulas even though CSX and BNSF colluded in adopting them. *See supra* 9-11.

Material Under Seal Deleted

during the alleged conspiracy because the surcharges were non-negotiable." (Op.92.)

Defendants speculate (Br. 37, 40-43) that a "trend" of increasing fuel-surcharge coverage before the Class Period would be expected to continue regardless of whether Defendants conspired. But not only does Defendants' "trend" analysis improperly "lump fuel surcharges before the alleged conspiracy with fuel surcharges applied during the alleged conspiracy" (Op.94), the supposed "trend" encompasses early 2003 *when Plaintiffs allege Defendants were* conspiring (Br. 37, 42-43). Defendants' own transaction data reveals that

Rejecting Defendants' "trend" argument, the district court found that there was a "sharp increase in coverage" coincident with the "start of the alleged conspiracy." (Op.95.) That finding is not erroneous, much less clearly so.

Second, Defendants' arguments misconstrue Plaintiffs' impact and damages methodology, which looks at the alleged conspiracy's effect on *total prices*—not at mere payment of a fuel surcharge. (Pls.-ClassCertReplyBr.28, RausserRpt-

[18] These "theoretically billable" fuel surcharges only accounted for a minuscule percentage of Defendants' revenues.

Reply.96.) Plaintiffs allege that Defendants conspired to raise *prices* through the uniform application of fuel surcharges tied to base rates; neither Plaintiffs nor Rausser, have ever suggested that payment of the standard fuel surcharge alone constitutes antitrust injury. As Rausser explained—"persuasively" according to the district court—his methodology shows that Defendants' collusive fuel surcharges were a "facilitating mechanism … *to increase these all-in rates*." (Op.141 (emphasis added); RausserRpt-Reply.96.)

As the district court noted in finding common impact, Rausser's focus on total prices reveals a "structural break" in the historic relationship between Defendants' fuel prices and freight rates. (Op.140; RausserRpt-Reply.92.) Whether certain Class members faced fuel surcharges on *pre*-conspiracy contracts is immaterial. Those surcharges were assessed *before* the structural break and thus at levels conforming to the historic relationship between fuel costs and prices. (RausserRpt-Reply.92.) When in 2003 Defendants' prices began to rise disproportionately to their costs, legacy shippers who entered new contracts, like all Class members, were impacted and paid higher prices. (*Id.*)

Demonstrating injury to Class members that had legacy fuel surcharges thus does not require, as Defendants insist (Br. 54-58), an amorphous inquiry into these shippers' rationale for paying fuel surcharges. What matters is that these shippers paid higher prices as a result of the conspiracy, as Rausser's model shows. And

determining how much higher those prices were compared to "but for" competitive prices (*i.e.*, damages) requires only the application of Rausser's damages model to the transactional data for those shippers.

Third, Defendants' causation argument lacks any legal support. As Defendants would have it (Br. 43-44), Plaintiffs must affirmatively disprove at class certification every hypothetical alternate cause for the Class's injuries, no matter how fanciful. But it has long been settled that, *even on the merits*, antitrust plaintiffs "need not exhaust all possible alternative sources of injury in fulfilling [their] burden of proving compensable injury." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 114 n.9 (1969); *accord In re Publ'n Paper Antitrust Litig.*, 690 F.3d 51, 66-68 (2d Cir. 2012). Defendants cite no case imposing such an impossible burden (much less at the class certification stage), and the only case they do cite on this issue—*McLaughlin v. American Tobacco Co.*, 522 F.3d 215 (2d Cir. 2008)—is inapposite.[19]

If anything, Defendants' causation argument with respect to legacy shippers underscores the predominance of common questions. At most, Defendants have posed, on the basis of common evidence, an alternate construction of the "but for"

[19] The *McLaughlin* plaintiffs could not establish that the *reliance* element of RICO fraud was susceptible to common proof. *See* 522 F.3d at 223-26. There is no "reliance" element under the Sherman Act, nor can reliance be equated with causation, as the Supreme Court made plain when it abrogated *McLaughlin* in *Bridge v. Phoenix Bond & Indemnity Co.*, 553 U.S. 639, 655-58 (2008).

world. As courts routinely recognize, however, competing conceptions of the "but for" world present a common question that cannot defeat certification and is best reserved for trial. (Op.135 (collecting cases).)

Defendants are incorrect, moreover, that "individualized" analysis of causation will be necessary at trial. They never explain what this individualized analysis might look like and elsewhere have suggested that no amount of individual proof could prove causation as to particular shippers. (WilligRpt.82-86; Willig-Dep-Tr.284-95.) An individual shipper aiming to prove causation and injury at trial would rely on predominantly the same common evidence that Plaintiffs have developed for the Class: evidence of a conspiracy, evidence establishing the "structural break," and a regression analysis isolating and measuring the alleged conspiracy's effect on prices. Defendants' counterfactual arguments—*e.g.*, that the same fuel surcharges would have been imposed absent the conspiracy—would similarly apply to all members of the Class.

For the same reason, Defendants' suggestion (Br. 30-31, 35-36) that the certification order violates the Rules Enabling Act by depriving them of the right to raise individual defenses is incorrect. Defendants have not identified any defenses that would rely on individual, rather than common, evidence at trial. The district

court, moreover, considered each of Defendants' supposedly individual arguments concerning uninjured shippers and found them all unpersuasive.[20]

Fourth, Defendants' suggestion (Br. 3, 13, 38) that intermodal shipments were not impacted because intermodal fuel surcharges did not change is similarly flawed. Defendants concede in a footnote that their intermodal formulas did in fact change (Br. 13 n.1),[21] and ignore that these formulas were closely aligned to their standard carload formulas. (RausserRpt-Reply.22-23, 53-57.) Defendants also ignore the evidence that intermodal shippers were affected by the conspiracy because they were subject to the same policies requiring uniform fuel surcharge application (Pls'-HrgTabs.124-25) and, like all shippers, paid higher prices resulting from the "structural break" in the relationship between Defendants' fuel costs and prices. (RausserRpt-Reply.53-57, 83); *see supra* 26-27. The district court therefore had ample reason to conclude it was "not persuaded" by

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[20] Even if Defendants were to identify any legitimately individual defenses, nothing in the certification order prohibits Defendants from raising those defenses later in the case. *See George v. Nat'l Water Main Cleaning Co.*, No. 10-10289-DJC, 2012 WL 4468768, at *12-13 (D. Mass. Sept. 27, 2012) (citing *Smilow v. Sw. Bell Mobile Systems, Inc.*, 323 F.3d 32, 39-40 (1st Cir. 2003)).

[21] Defendants note several program revisions but omit that CSX modified its intermodal fuel surcharge in 2004 "to make it approximately similar to the BN[SF] surcharge formula." (ClassCert-Tr.209.)

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Defendants' intermodal arguments, which they did not raise until the class-certification hearing. (Op.95 n.16.)

2. The District Court Properly Rejected Defendants' Contention That The Impact Of Their Fuel Surcharges Was Offset In Individualized Negotiations

For their argument that some Class members negotiated base-rate discounts to offset their fuel surcharges (Br. 11-12, 25, 44-48; BNSF Br. 2-4), Defendants rely largely on self-serving declarations from their own executives that the district court determined were not credible. As the court explained, the "most damning portions of almost every single declaration on which defendants rely" was "contradicted by the declarant's subsequent deposition testimony." (Op.89.) For example, declarations purporting to show decreases were exposed at deposition as actually describing *increases* that were less than Defendants initially sought in negotiations. (Op.106-09.) NS vice president Ronald Listwak, for example, stated in his declaration that in negotiations with shipper

NS negotiated a reduction to base rates in exchange for a fuel surcharge. (Listwak-Decl.¶15; Op.108-09.) But later he testified that NS actually negotiated "both the standard fuel surcharge and significant base rate increases" on that contract. (Listak-Dep-Tr.111; Op.108-09.) Similar examples abound. (Op.106-09.)

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Defendants now speculate (Br. 46-47) that, in an environment of rising prices, these so-called "reduced increases"—where shippers supposedly negotiated Defendants down from a large proposed rate increase to something less—could theoretically nullify the effect of Defendants' conspiracy to raise all-in prices through the imposition of fuel surcharges. But, as Defendants acknowledge, Plaintiffs must demonstrate that the conspiracy "raised the entire price of the product above an ascertainable competitive level." Br. 2. Plaintiffs have done just that, based on a regression model applied to Defendants' entire set of transactional data. *See supra* 24-28.

Regardless, Defendants cannot identify *a single instance* where some reduced offset nullified the impact of a fuel surcharge. Defendants in fact identify (Br. 12) only *four shippers*—out of some 30,000 Class members—that supposedly negotiated "reduced increases." And even these scant examples undermine Defendants' contentions. For example,

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[22] Defendants' assertions also clash with their directives "not to discount base rates" to achieve fuel-surcharge application. (Op.110-11); *see supra* 12-14.

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The district court, moreover, found instances of base-rate discounting "rare" and "anomal[ous]," a finding corroborated by the analyses performed by Plaintiffs' expert on Defendants' full set of transaction data. (Op.105-06.) And "even when, in the rare case, base rates were discounted," Defendants' standardized fuel surcharges inflated the "starting point for negotiations." (Op.115.) In fact, Defendants' "executives themselves admitted[] that during the class period defendants uniformly began their negotiations with their standard fuel surcharge program." (Op.90-91.) Numerous courts have recognized that individualized pricing negotiations cannot preclude a finding of common impact where, as here, the alleged conspiracy elevated "the starting point from which negotiations for discounts began." (Op.107, 114-16 (collecting cases) (quotation marks omitted).) The logic is straightforward: "negotiated transaction prices would have been lower if the starting point for negotiations had been list prices set in a competitive market." (Op.115-16 (quotation marks omitted).) Defendants do not identify a single decision criticizing this line of authority or adopting a contrary approach.

Defendants also point (Br. 46) to their expert's claims that certain shippers' base rates decreased during the Class Period. Yet the district court specifically "credit[ed] [Rausser's] determination from his review of the data that there was no evidence of systematic discounting." (Op.113.)

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Far from explaining how the court clearly erred in resolving this expert dispute, Defendants incorrectly assert that the district court "ignored" the issue. Br. 46.

Against this backdrop, Defendants' reliance (Br. 45) on *Robinson v. Texas Automobile Dealers Association*, 387 F.3d 416 (5th Cir. 2004), is misplaced. The *Robinson* plaintiffs sought to demonstrate impact solely on the basis of the class members' payment of a state tax ("VIT") rather than higher all-in prices, and the Fifth Circuit understood the dispositive issue to be "whether the mere payment of a

[23] Likewise, Rausser's supposed "conce[ssion]" that of Class Period shipments saw a "decline in all-in rates" is no concession at all. (Br. 46.) What matters is whether Class members paid higher prices than they would have absent the conspiracy, as Rausser's analyses demonstrate.

VIT—*unaccompanied by any other evidence*—provides enough information such that a party may sustain a price-fixing suit on behalf of the entire class." *Id.* at 423 (emphasis added). In stark contrast, Plaintiffs here allege that Defendants used fuel surcharges to raise *total prices*, and have never equated the mere payment of a fuel surcharge with injury. (Op.114-16.) And unlike the *Robinson* class, Plaintiffs have presented a "persuasive" body of evidence demonstrating that Defendants' fuel surcharges were intended to, and did in fact, raise overall prices. (*Id.*)

3. The District Court Correctly Concluded That Antitrust Injury To "Sole-Served" Shippers Can Be Established With Common Evidence

Defendants also speculate (Br. 48-49) that shippers served directly by only one railroad ("captive" or "sole-served shippers") could not have suffered antitrust injury. But Defendants rely on no actual evidence to support their argument.

Defendants simply ignore the district court's finding that their assertions about sole-served shippers were "contradicted by the statements of defendants' own executives." (Op.72.) For example, NS's CEO testified before Congress that sole-served shippers are subject to "competitive constraints [that] are real" and acknowledged that "even where there is only one railroad serving a facility, there are market factors at play." (CorrectedHDEx-36.p16.) UP's CEO likewise testified that sole-served shippers are subject to "competitive constraints." (Young-Dep-Tr.201.) CSX, moreover, acknowledged internally that "[s]tudies

have shown that, in aggregate, captive shippers don't pay higher prices than non-captive shippers" and that "CSX[] sets prices based on all competitive factors." (HDEx-37.CSXFSC000153187.) The district court properly credited these statements of Defendants' CEOs and their internal documents over counsel's contrary assertions.

While Defendants speculate (Br. 50-51) that any competitive restraints on sole-served shippers were limited to non-rail modes of transportation, the record contains no evidence of any such limitation. Defendants merely raised generalities about sole-served shippers before the district court (ClassCert-Tr.220-21) and thus can only speculate at this stage that competitive restraints on sole-served shippers were limited to truck and barge.

U.S. Magnesium ("USM"), a named plaintiff and sole-served shipper, provides a useful example of the conspiracy's effect: In 2002, before the conspiracy, USM convinced a top UP salesperson to drop a proposed fuel surcharge. (Op.73.) But in 2003, after the conspiracy began, the same UP salesperson reported to USM that "[a]s a company policy, all contracts without fuel language will have fuel language upon renewal. This is a mandate by UP management." (RDEx-72.USM005663.) Defendants now assert that there "was zero evidence that [USM] avoided a surcharge in 2002 because of competition from BNSF" (Br. 51 n.12), but Defendants ignore that UP would not have needed

to make such a change for sole-served shippers if it always had been able to impose prices at the monopoly level. The district court properly credited USM's experience as illustrative of the competitive constraints that sole-served shippers faced before the conspiracy. (Op.73.) Clear error is absent.

The district court was further justified in crediting the testimony of Defendants' executives who denied that they ever considered imposing more aggressive fuel surcharges on sole-served shippers than they were able to impose on other shippers. (Op.72-74.) BNSF's CEO testified that BNSF would never consider a more onerous fuel surcharge for sole-served shippers, testifying that such an approach would "violate [BNSF] principle." (Rose-Dep-Tr.232; Op.74.) UP's CFO similarly admitted that he was unaware of any discussions of separate fuel-surcharge programs for captive shippers. (Knight–Dep-Tr.64; Op.74.)[24]

Finally, the district court rightly credited Rausser's analysis confirming that Defendants imposed the same conspiratorial fuel surcharges on both sole-served and other shippers. (Op.74 (citing RausserRpt-Reply.23).) Again, *all* shippers experienced the same structural break. If sole-served shippers had already been

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paying a monopoly price, as Defendants now contend, the structural break could not have occurred as to those shippers.

Nor do Defendants cite any competing expert findings, much less any analysis identifying any sole-served shippers that purportedly could not have been injured by the alleged conspiracy. Quite the opposite

Without any record evidence to support their theory, Defendants turn (Br. 52) to a specialized regulatory inquiry called the "market dominance test" as a basis for arguing that the determination whether sole-served shippers have competitive options is subject to individual inquiry. This argument was not raised below, and thus is not properly before the Court. *See, e.g.*, *In re Veneman*, 309 F.3d 789, 791, 796 (D.C. Cir. 2002). It is also irrelevant. The "market dominance" assessment considers whether a shipper faces "an absence of effective competition" as determined, in part, by established formulas that do not bear on any apparent antitrust inquiry, *see* 49 U.S.C. §§ 10707(a), (d)(1)(A), and thus a regulator tasked with making such assessments has expressly disclaimed responsibility for making antitrust determinations, *see*, *e.g.*, *Intramodal Rail Competition*, Ex Parte No. 445 (Sub-No. 1), 1 I.C.C. 2d 822, 1985 WL 1127462, at *16 (I.C.C. Oct. 29, 1985). The assessment, moreover, does not even consider the

types of rail competition that captive shippers would enjoy absent a conspiracy. *See Assoc. of Am. R.R. v. Surface Transp. Bd.*, 306 F.3d 1108, 1112 (D.C. Cir. 2002).[25]

III. THE DISTRICT COURT'S FINDINGS AS TO EXPERT ANALYSIS ADHERE TO THE MOST DEMANDING LEGAL STANDARD AND ARE WELL-SUPPORTED BY RECORD EVIDENCE

A. The District Court Evaluated The Competing Expert Analyses Under The Demanding Legal Standard That Defendants Requested

Straining to create controversy, Defendants contend (Br. 1, 19, 26-27, 31-33, 53-54) that the district court erred in applying the Third Circuit standard—which Defendants now cast as something "akin to a pleading standard"—to evaluate expert evidence and that the court should have conducted a *Daubert* analysis to assess admissibility. Both contentions are incorrect.

First, Defendants neglect to mention that, in their opposition to class certification and in supplemental briefing following *Wal-Mart*, Defendants

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[25] Defendants (Br. 50-51) string-cite inapposite cases for the unremarkable proposition that antitrust injury requires a reduction of competition. Several involved *pro*-competitive conduct. *See Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 340 (1990); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 593-94 (1986); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 487 (1977). In others, the court found that competition was absent because of a regulatory scheme (*City of Pittsburgh v. W. Penn Power Co.*, 147 F.3d 256, 269 (3d Cir. 1998)); a patent (*In re Tamoxifen Citrate Antitrust Litig.*, 466 F.3d 187, 219 (2d Cir. 2006)); or a lack of any evidence of competition (*Cont'l Cablevision of Ohio, Inc. v. Am. Elec. Power Co.*, 715 F.2d 1115, 1119-20 (6th Cir. 1983) ("The parties stipulated that no competition exists among them.")).

themselves championed the Third Circuit's approach—articulated in *Hydrogen Peroxide*—for evaluating expert evidence. (Defs'-ClassCertOpp.24-25; Defs'-ClassCertSupp.Br.6.) Defendants argued that *Hydrogen Peroxide*, and not earlier decisions within this Circuit, embodied the "rigorous analysis" Rule 23 requires. (Defs'-ClassCertSuppBr.2, 6; Defs'-ClassCertOpp.24-25 n.37; Defs'-Wal-MartReplyBr.6 n.5.) Defendants improperly attempt to reverse course now. *See, e.g.*, *McKesson HBOC, Inc. v. Islamic Republic of Iran*, 271 F.3d 1101, 1110 (D.C. Cir. 2001) ("It is a cardinal rule of appellate procedure that a party may not challenge as error a ruling or other trial proceeding invited by that party") (quotation marks and citation omitted), *vacated in part on other grounds*.

In any event, Defendants' assertion that the *Hydrogen Peroxide* test applied by the district court is tantamount to a "pleading standard" (Br. 32) is simply wrong. Far from accepting Rausser's analyses uncritically, the district court "agree[d] with Defendants" (Op.33, 40) that, under *Hydrogen Peroxide* and *Wal-Mart*, it was obligated to resolve all "factual disputes, including among the experts, that bear on the decision whether to certify a class" (Op.33). The district court understood that it could not accept a mere "threshold" showing (Op.33 (quotation marks omitted)) and was instead required to determine "which expert is correct" (Op.32 (quotation marks omitted)).

Applying this demanding standard, the district court plumbed the parties' submissions, "weigh[ing] the expert reports," the expert deposition transcripts, the experts' qualifications, the towering evidentiary record, and the various criticisms of Rausser's work advanced by Defendants (Op.2 n.1, 8 n.3, 30, 39-41, 61 n.11, 64 n.12, 118, 126-36, 138-42), before determining that Rausser's conclusions were "viable," "plausible," and "persuasive" (Op.74, 96, 111, 122, 124, 141), and that Willig's competing views were not (Op.72, 85, 88-89, 94, 124, 132). The court, for example, found "persuasive" Rausser's conclusion that the "rail freight industry is conducive to price fixing," rejecting each of Willig's countervailing contentions. (Op.118-123.) It likewise rejected Willig's criticisms of Rausser's regression models, concluding that Rausser had "presented a workable regression analysis that is susceptible to proof at trial through available evidence common to the class." (Op.136.) The court also addressed and rejected each of Willig's challenges to Rausser's damages analysis, finding that "Rausser has developed a workable regression model … to calculate damages to the class and to each class member." (Op.140.) Defendants never explain what more the court should have done.

Second, Defendants allude (Br. 32) to a Circuit split over whether district courts *may* conduct a full *Daubert* screening of expert evidence *if a Daubert challenge is asserted at class certification*. But Defendants here never raised a

Daubert challenge despite numerous opportunities to do so, including after *Wal-Mart* was decided (*see, e.g.,* StayOp.6), and they cannot now claim the district court erred in failing to address *Daubert* arguments they waived long ago. *See, e.g.*, *District of Columbia v. Air Fla., Inc.*, 750 F.2d 1077, 1084 (D.C. Cir. 1984).

Defendants, moreover, cannot explain how a *Daubert* challenge would have altered the outcome. Even without a *Daubert* motion, the district court addressed Rausser's professional credentials (Op.8 n.3, 61 n.11); found that the type of regression analyses he used are "commonly … used as a basis for certifying a class" (Op.35, 124-26); concluded that he had "established the key logical steps behind [his] theory" (Op.136); and evaluated and rejected Defendants' criticisms, which questioned the "reliab[ility]" of his expert report and raised purported "methodological" flaws (Op.78, 116-37; Defs'-ClassCertOpp.62; *see also* StayOp.6). That process is consistent with *Daubert* and Fed. R. Evid. 702.

Failing that argument, Defendants erroneously contend that the Supreme Court "is reviewing the Third Circuit's approach" to expert proof as articulated in *Hydrogen Peroxide* and suggest that the district court's "lax scrutiny" of expert evidence cannot stand. Br. 32. The Supreme Court, however, granted certiorari in *Behrend v. Comcast Corporation*, 655 F.3d 182 (3d Cir. 2011), *cert. granted*, 133 S.Ct. 24 (2012), to consider a much narrower question: "Whether a district court may certify a class action without resolving whether the plaintiff class has

introduced admissible evidence, including expert testimony, to show that the case is susceptible to awarding damages on a class-wide basis." *Behrend* is worlds apart from the district court's extensive findings here that Rausser had developed and actually implemented econometric models, which he actually applied to every transaction within the Class, and that actually "can calculate damages to the class and each class member." *See supra* 28; *compare Behrend*, 655 F.3d at 204 n.13 (interpreting *Wal-Mart* to require only that a district court "evaluate whether an expert is presenting a model *which could evolve to become* admissible evidence") (emphasis added).

B. The District Court Correctly Credited Rausser's Analyses Of Impact And Damages

Underlying Defendants' challenges to Rausser's work are three fundamental misunderstandings about regression analyses that have no basis in law or the record evaluated by the district court. To begin with, Defendants suggest (Br. 2) that it is impossible to model pricing in the rail-freight industry using well-established multiple regression analyses. As the district court recognized, however, multiple regression analyses are "commonly used as a basis for certifying a class." (Op.35 (collecting cases).) Indeed, numerous courts have relied on these types of economic tools in antitrust class actions involving diverse industries. *See, e.g.*, *supra* n.14.

Next, Defendants attempt (Br. 55) to undermine Rausser's regression analyses by characterizing as merely his "chosen variables" the price determinants that explain at least 75-84% of the variation in rail freight rates over a representative sample of millions of shipments. (Op.131-32.) But Defendants fail to provide any economic support for the notion that other price determinants warrant inclusion. Defendants even conceded below that "[o]f course" the variables that Rausser identified "play an important role in overall rail rates." (Defs'-ClassCertOpp.64.) Defendants cannot legitimately challenge the district court's finding that Rausser's models "plausibly include the logical determinants of freight rates, and neither defendants nor Dr. Willig credibly have identified any missing variables." (Op.132.) Defendants' suggestion that fuel costs are not accounted for in Rausser's analyses (Br. 19) seems designed to sow confusion, as those costs are expressly included in his damages regression model. (RausserRpt.115; RausserRpt-Reply.92-93.)

Finally, despite Defendants' insistence otherwise (Br. 53-54, 62-65), damages need not be uniform across the Class or calculated with absolute precision, as the district court recognized. (Op.141-42); *see Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 810, 815 (7th Cir. 2012) ("It is well established that the presence of individualized questions regarding damages does not prevent certification under Rule 23(b)(3)."); *In re Scrap Metal Antitrust Litig.*, 527 F.3d

517, 535 (6th Cir. 2008) ("precise mathematical calculation of damages" is not necessary to certify class); *Rossi v. Standard Roofing, Inc.*, 156 F.3d 452, 483-84 (3d Cir. 1998) (once antitrust injury is demonstrated, "the jury is permitted to calculate the actual damages suffered using a reasonable estimate") (quotation marks omitted).

As explained below, Defendants' specific attacks on Rausser's models also lack merit.

1. The District Court Properly Rejected Defendants' Causation Critique

Defendants assert that Rausser's analysis is unreliable because it purportedly does not demonstrate "*why* particular shippers paid fuel surcharges." Br. 54. This argument fails because, as discussed above, Rausser does not equate payment of a fuel surcharge with injury. Rather, Rausser examined *the total prices* that Class members paid, and his impact and damages analyses revealed, coincident with the onset of the conspiracy, a structural break in the historical relationship between fuel prices and overall freight rates that resulted in higher total prices across the Class. (Op.140; RausserRpt-Reply.92.)

The district court understood the import of Rausser's focus on total prices, and correctly rejected as "misplaced" the very criticism Defendants attempt to resuscitate here. (Op.131.) According to the court, "Rausser's common factor and damage models together set forth persuasive, workable multivariate regressions

that give rise to an inference of causation (the most any regression analysis can be expected to do)—that is, that putative class members paid more for rail freight transportation services than they would have absent the conspiracy on fuel surcharges." (*Id.*) That inference is bolstered, as the court found, by evidence demonstrating that the answer to causation is "simple and applies class-wide: shippers paid the standard fuel surcharges during the alleged conspiracy because the surcharges were non-negotiable." (Op.92); *see supra* 11-14. Defendants offer no reason to dispute the court's factual findings on this issue, much less to conclude that the court committed clear error.

Pushing their defective causation argument into new quarters, Defendants assert (Br. 56) for the first time (and without any supporting economic analysis) that rising fuel costs, rather than the alleged conspiracy, provide an "equally reasonable" explanation for the structural break. But a district court's selection between purportedly "reasonable" causal theories cannot be reversible error. *See Anderson*, 470 U.S. at 573-74. And an alternate explanation for the structural break is but another common question militating in favor of class certification.

In any event, Defendants betray a profound misunderstanding of Rausser's work and the district court's findings.

This analysis demonstrates not that "customers paid more in fuel surcharge payments" during the Class Period, as Defendants suggest (Br. 56), but that shippers paid higher prices.[26] The district court's recognition of these unremarkable economic precepts is well supported and does not constitute clear error.

2. Rausser's Damages Model Appropriately Calculates Overcharges For Shipments Made Under Pre-Class Period Contracts

Defendants next contend (Br. 58-62) that Rausser's damages model is unreliable because it produces damages for shipments that moved under contracts executed before the Class Period. This argument is but another version of Defendants' flawed causation critique, as shipments under these pre-Class Period contracts are not even part of the Class, and the relevant issue is whether Class members paid higher all-in rates following Defendants' aggressive imposition of new fuel surcharges. Drawing on substantial record evidence, the district court

[26] Defendants also assert (Br. 55) for the first time that Rausser's analysis is flawed because it compares all shipments between January 2000 and June 2003 (the benchmark period) with only those shipments during the Class Period that contained a fuel surcharge. Defendants did not make this point below, and do not now suggest, much less present economic evidence showing, that the structural break would vanish if Rausser's benchmark model had been limited to shipments covered by a fuel surcharge.

found that they did. *See supra* 20-28, 43-47. Rausser's model, which accounts for the imposition of any pre-conspiracy fuel surcharges by examining total prices (inclusive of any fuel surcharges), conclusively shows damages to these shippers.

Regardless, Defendants' argument once again confuses the start of the Class Period with the beginning of the alleged conspiracy. *See supra* 45. As noted, the start date of the Class Period is conservative given that Defendants' documents and deposition testimony show the conspiracy beginning in early 2003. *See supra* 9-11; (Op.11, 86-87). Components of the conspiracy, such as the elimination of discounting and the imposition of new, more aggressive standard fuel surcharges, did not suddenly spring into existence at the start of the Class Period on July 1, 2003; Defendants began to implement their scheme months earlier, however incrementally. *See supra* 9-11. As Rausser explained, it is not surprising, much less suggestive of a "severe defect" in his analysis (Br. 58),

Defendants' argument also lacks legal support. There is no debate that a damages model generally may not aggregate injuries resulting from lawful and unlawful conduct. But it does not follow, and none of the cases Defendants cite suggests (Br. 58-60), that a damages model must be discarded because it calculates

overcharges for a narrow subset of transactions *outside* a class definition.[27] This is even more true where, as here, the start of the Class Period post-dates the conspiracy's formation.

3. The District Court Correctly Found That Rausser's Model Defines A Persuasive But-For World And Overcharge

Finally, Defendants distort (Br. 62-65) Rausser's damages model to suggest that his but-for world generates damages approximately equal to the entire fuel surcharges paid. The district court properly rejected this argument. (Op.141-42.) The court credited Rausser's "persuasive[]" explanation that, based on an analysis of 100% of Defendants' transactional data, the overcharge was "well below the *average* percentage Fuel Surcharge imposed during the Class Period" (RausserRpt-Reply96 (emphasis in original); Op.141.)

Defendants' argument is predicated on the mistaken assertion that Rausser assumes "a but-for world with zero recovery of higher fuel costs." Br. 65. That is

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[27] Defendants rely on cases involving fundamentally flawed damages analyses that bear no resemblance to Rausser's work. *See, e.g.*, *In re Plastics Additives Antitrust Litig.*, No. 03–CV–2038, 2010 WL 3431837, at *16 (E.D. Pa. Aug. 31, 2010) (expert conceded that "regression results are in no way indicative of individual impact"); *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1056-57 (8th Cir. 2000) (analysis arbitrarily calculated damages whenever defendants' market share exceeded 50%, without any consideration of "actual price[s]"); *MCI Communications Corp. v. Am. Tel. and Tel. Co.*, 708 F.2d 1081, 1163 (7th Cir. 1983) (damages study presumed damages for 22 alleged exclusionary acts even though liability was established for only seven); *Coleman Motor Co. v. Chrysler Corp.*, 525 F.2d 1338, 1353 (3d Cir. 1975) (experts "conceded that the damage figures they tendered were attributable at least in part to the lawful competition").

false. Defendants disregard the district court's explanation (and crediting of Rausser's analysis) of the various ways Defendants recovered fuel costs even without fuel surcharges, which could lead to overcharges approximating the fuel-surcharge levels. (Op.141-42.) As Rausser noted, base rates that were increasing during the Class Period were a source of fuel-cost recovery for Defendants. (Op.141-42; RausserRpt-Reply.96.) By applying a fuel surcharge on top of the base rate, the overcharge could—at times—approach or exceed the fuel-surcharge level given the dual sources of fuel-cost recovery. (Op.141-42; RausserRpt-Reply.96.) Likewise, fuel-cost escalators (such as RCAF) were another form of fuel-cost recovery. (Op.141-42; RausserRpt-Reply.96.) When Defendants engaged in "double-dipping" by applying a fuel surcharge to a rate that already included a fuel cost escalator, the overcharge again would be expected to reach or surpass the total fuel surcharge paid. (Op.141-42; RausserRpt-Reply.96.) Finally, NS's rebasing program coupled significant base-rate increases, which alone captured more than Defendants' incremental fuel costs, with a fuel surcharge. This, too, could yield an overcharge that approached the fuel-surcharge level. (Op.141-42; RausserRpt-Reply.96.) Defendants have no answer for this evidence, and the district court did not err by crediting it.

Defendants' reliance on *New Motor Vehicles*, 522 F.3d at 27-28, is also unavailing. There, the court was concerned that "aspects of plaintiffs' theory

remained to be developed. . . . At the time of class certification, more work remained to be done in the building of plaintiffs' damages model and the filling out of all steps of plaintiffs' theory of impact." *Id.* at 29. Here, in contrast, Plaintiffs presented a fully developed model that had already incorporated 100% of Defendants' data.

IV. BNSF PROVIDES NO BASIS FOR INDIVIDUAL INQUIRY

While claiming that it has written separately "to highlight its unique factual circumstances" (BNSF Br. 1), BNSF merely rehashes the same types of assertions that Defendants jointly argue. If anything, BNSF's conduct only highlights the conspiracy's impact.

For example, in contending that its "record of individualized negotiation is unique and unrefuted" (*id.*), BNSF relies almost exclusively on declarations that the district court found unreliable (Op. 90-91, 106-08, 116), and ignores reams of undisputed evidence, including that it implemented strict policies mandating across-the-board application of its fuel surcharges and prohibiting any discounting of base rates. *See supra* 11-14, 50-54. For instance, on nearly every page, BNSF cites the declaration of David Garin to establish its record of individualized negotiation. But, at deposition, Garin testified that

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BNSF's contention (BNSF Br. 1-2) that impact cannot be shown with common evidence because of intermodal and other pre-Class Period fuel surcharges is no more convincing than Defendants' similar joint arguments. *See* Part II.C.1, *supra*. BNSF resorts to factual distortions when it asserts that it "showed that '25 to 30 percent' of its customers *paid* surcharges by January 2003." BNSF Br. 2. The underlying document states, however, that 25 to 30 percent of BNSF's revenue was

much less than the record revenues BNSF attributed to surcharges during the Class Period.

Finally, BNSF contends (BNSF Br. 4-5) that its application of mileage-based fuel surcharges to some shipments demands individual inquiry. BNSF never raised this argument below. *See Air Fla., Inc.*, 750 F.2d at 1084.[28] And because mileage-based surcharges are not within the Class definition, at most this argument might constitute a defense to the allegation that a conspiracy occurred. But that liability argument would be common to the Class, as all parties, including BNSF,

[28] The only evidence on which BNSF relies is an exhibit submitted by *Plaintiffs*.

agreed below. (Op.22.) In any event, the circumstances of BNSF's limited adoption of mileage-based surcharges only supports an inference of collusion.[29]

CONCLUSION

Defendants' Rule 23(f) petition should be denied or, alternatively, if granted, the class-certification order should be affirmed.

Dated: January 10, 2013

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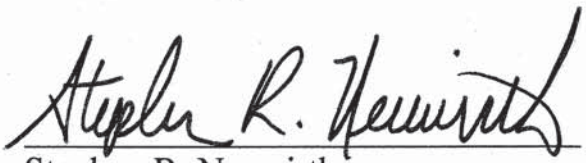
[29] BNSF omits evidence establishing that it sought Defendants' agreement for a mileage-based surcharge. Failing that, BNSF instead aligned itself with the rate-based programs of the other Defendants. (Pls'-ClassCertBr.21.)

CERTIFICATE OF COMPLIANCE

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

This brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure, and this Court's Order granting BNSF permission to file a separate brief, because this brief contains 15,196 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii) of the Federal Rules of Appellate Procedure and Circuit Rule 32(a)(1).

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



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CERTIFICATE OF SERVICE

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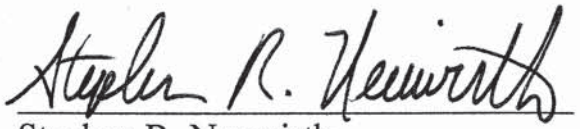

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