Case No. 17-8005

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

IN RE: RAIL FREIGHT FUEL SURCHARGE ANTITRUST LITIGATION

From an Order Denying Class Certification
By the United States District Court for the District of Columbia,
The Honorable Paul L. Friedman, MDL Docket No. 1869, Misc. No. 07-0489

Defendants' Opposition to Plaintiffs' Petition for Permission to Appeal Pursuant to Federal Rule of Civil Procedure 23(f)

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GLOSSARY

BNSF	BNSF Railway Company
CSXT	CSX Transportation, Inc.
NS	Norfolk Southern Railway Company
UP	Union Pacific Railroad Company

INTRODUCTION

Plaintiffs' petition for interlocutory review should be denied because it rests on an alternate reality—one that barely acknowledges this Court's prior decision in this case, ignores findings by the district court that are fatal to certification, and distorts precedent. On the dispositive issues, the decision below merely follows this Court's prior holding that class certification was inappropriate in this case if plaintiffs' damages model found "injuries" where there should be none, or if the evidence indicates the presence of potentially uninjured class members, necessitating individualized examinations. *See In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244 (D.C. Cir. 2013). Following this Court's mandate can hardly be characterized as a novel or manifestly erroneous ruling that undermines class certification law.

The district court had previously certified a nationwide class of more than 16,000 shippers of differing sizes that purchased different types of freight rail service at varying rates and fuel surcharge formulas adopted at different times to ship diverse goods to different locations between July 2003 and December 2008. A central focus of the class certification analysis was plaintiffs' econometric model, which purportedly demonstrated classwide injury. But among other failings, the model was "prone to false positives," meaning that it found injury on shipments that plaintiffs expressly excluded from the class definition because they should not

have been impacted by the alleged conspiracy. *Id*. at 254. There was also substantial evidence of shippers who could not have been impacted by the alleged conspiracy, which tends to show that individual issues predominate.

In vacating the prior class certification ruling, this Court stressed that the diverse and complex class presented here could be certified on remand only if plaintiffs "show that they can prove, through common evidence, that all class members were in fact injured by" defendants' alleged conspiracy to impose rate-based fuel surcharges on freight rail shipments. *Id.* at 252. Plaintiffs' damages model is "essential to plaintiffs' claim they can offer common evidence of classwide injury." *Id*. at 253. Thus, if that model "detects injury where none could exist"—by, for example, finding damages from "legacy" contracts "negotiated before any conspiratorial behavior was alleged to have occurred"—that "would shred the plaintiffs' case for class certification." *Id*. at 252. "Common questions of fact," this Court held, "cannot predominate where there exists no reliable means of proving classwide injury in fact." *Id*. at 252-53. "No damages model, no predominance, no class certification." *Id*. at 253.

On remand, the district court afforded plaintiffs every benefit of the doubt. It delayed the proceedings so they could hire a new expert, and found for plaintiffs on numerous issues that defendants would bring to this Court's attention were the

petition granted. Despite this solicitude, the district court found that plaintiffs could not satisfy Rule 23(b)(3)'s predominance requirement.

Each of the grounds on which the district court denied class certification flows from this Court's remand decision, and each is sufficient—on its own—to sustain the result. First, the district court found that plaintiffs' damages model detected "injury" under "legacy" contracts entered into before the alleged conspiracy where no injury could exist (S-186)—precisely what this Court said would "shred" the case for class certification. Second, it found that the damages model identified hundreds of millions of dollars in damages for intermodal traffic (*i.e.*, shipments that moved by a combination of rail and another transportation mode) even though this traffic was subject to formulas that never changed or were lowered during the alleged conspiracy period—*i.e.*, injury where there should be none under plaintiffs' theory. S-169. Third, it found that over 2,000 class members had no overcharges under the damages model, so plaintiffs' own common evidence does not "establish that all or virtually all class members were injured by the alleged conspiracy." S-204.

Because each of these rulings reflects the district court's adherence to this Court's mandate, none can be "manifest error" warranting interlocutory review. In reality, plaintiffs are asking for review of this Court's legal determinations in the prior appeal. Plaintiffs' efforts to frame "new" issues are unavailing.

Plaintiffs' first contention—that Rule 23's "rigorous analysis" standard requires nothing more than a determination that expert testimony is admissible—is contrary to this Court's prior decision, the decision in *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013), and a decade of precedent that plaintiffs simply ignore. Indeed, in *Comcast*—the foundation for this Court's prior decision—a presumably admissible damages model failed to provide common proof of injury sufficient to support class certification. *Infra* § I.A.

The district court was also well within its discretion in refusing certification because plaintiffs' own damages model suggests that at least 2,000 class members were uninjured, and individualized mini-trials would be needed to determine if they actually were injured (as plaintiffs insisted). *Infra* § I.B. And plaintiffs' grab-bag complaint that the district court ignored various pieces of supposedly important evidence is groundless and, in any event, raises no unsettled or fundamental issue of law. *Infra* § I.C. Finally, plaintiffs fail to show that denial of class certification constitutes a death knell for the litigation that will prevent end-of-case review of any issues. *Infra* § II.

ARGUMENT

PLAINTIFFS HAVE NOT MET THE STANDARD FOR INTERLOCUTORY REVIEW

In this Circuit, interlocutory appeals "'are generally disfavored as disruptive, time-consuming, and expensive' for both the parties and the courts." *Rail Freight*,

725 F.3d at 254. Immediate review of a certification ruling is warranted only if (1) the decision is "questionable" and is likely to sound the "death-knell" of the litigation; (2) the decision "presents an unsettled and fundamental issue of law relating to class actions, important both to the specific litigation and generally, that is likely to evade end-of-the-case review;" (3) the decision is "manifestly erroneous;" or (4) there are "special circumstances" in which "the confluence of multiple rationales may fortify" a decision to grant review where a "single ground for interlocutory appeal might otherwise be shaky." *Id.* at 250. None of these factors is present here.

I. THE DECISION BELOW RAISES NO UNSETTLED FUNDAMENTAL LEGAL QUESTIONS RELATING TO CLASS ACTIONS AND IS NOT MANIFESTLY ERRONEOUS.

A. The District Court Correctly Applied The Standard Dictated By This Court's Prior Decision In Determining That Plaintiffs' Damage Model Cannot Establish Class-Wide Injury.

This Court instructed the district court to determine, on remand, whether the damages model submitted by plaintiffs' expert, Dr. Rausser, resulted in "false positives" for legacy shippers—a finding that, if true, would "shred" the case for class certification. 725 F.3d at 252. The core purpose of a classwide injury model, after all, is to establish injury to all class members "in one stroke." *Cf. Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). If the model cannot do that accurately, it cannot be used to satisfy Rule 23's predominance requirements.

Plaintiffs now seize on the district court's *sua sponte* determination that the model was admissible under *Daubert*, and argue that this *evidentiary ruling* compelled a finding that Rule 23's predominance standard was satisfied. They argue that only a jury can assess the merits of Rausser's attempt to explain away the model's false positives. Pet. 8-11. This contention is a transparent—and groundless—attempt to undo plaintiffs' loss in the prior appeal to this Court.

Preliminarily, plaintiffs' current argument contradicts their positions (a) before this Court in the prior appeal and (b) in the district court on remand that it was for the district court to resolve expert disputes about whether injury-in-fact presents a common issue.[1] More importantly, this newly-minted position is flatly inconsistent with this Court's prior decision. This Court emphasized that it was "indisputably the role of the district court to scrutinize the evidence before granting certification, even when doing so 'requires inquiry into the merits of the claim.'" *Rail Freight*, 725 F.3d at 253. This scrutiny, moreover, necessarily included addressing defendants' "false positives" critique of plaintiffs' damages model because, "[i]f accurate, this critique would shred the plaintiffs' case for

[1] In the prior appeal, plaintiffs *embraced* the district court's responsibility to "decide 'which expert is correct about whether the injury-in-fact question is common to the class.'" SE21. Similarly, on remand, they urged the district court to [redacted] SE13.

certification." *Id.* at 252-53. "If the damages model cannot withstand this scrutiny then, *that is not just a merits issue*. Rausser's models are essential to the plaintiffs' claim they can offer common evidence of classwide injury. No damages model, no predominance, no class certification." *Id.* at 253 (emphasis added and citation omitted).

This Court's decision, moreover, was a straightforward application of *Comcast*, in which the Supreme Court recognized that the question whether an expert's testimony is admissible under *Daubert* is separate and distinct from the question whether the evidence shows "that the case is susceptible to awarding damages on a class-wide basis." 569 U.S. at 32 n.4. The Court explained that, "while the data within an econometric model may well be 'questions of fact' in the relevant sense, what those data prove is no more a question of fact than what our opinions hold." *Id.* at 37 n.5. Whether the requirements of Rule 23 have been satisfied is, of course, a threshold question of law for the court. In its prior ruling, this Court recognized that *Comcast* "sharpen[ed] defendants' critique of [plaintiffs'] damages model as prone to false positives," and made "indisputably clear" that the district court was obligated to address that critique at the class certification stage. *Rail Freight*, 725 F.3d at 253.

Following extensive supplemental briefing, the submission of new expert reports, and a five-day evidentiary hearing, the district court scrupulously adhered

to these instructions. In its decision, it explained that, *after* concluding its *Daubert* inquiry, it would "conduct a rigorous analysis" under Rule 23, "as instructed by the D.C. Circuit, regarding whether Dr. Rausser's model is a reliable means of proving class-wide impact and damages." S-53-54. Rausser's model flunked that test, the court found, because it "generates millions of dollars in overcharges for legacy shippers," and thus does not "reliably distinguish[] overcharges due to the alleged conspiracy from competitively negotiated conduct." S-186.

That assessment is unassailable. In an effort to explain why his model showed damages to legacy shippers, Rausser claimed that, absent the alleged conspiracy, legacy shippers would have renegotiated their contracts to avoid the fuel surcharges. But, as the district court explained, Rausser offered "no quantitative analysis to support [this] proposition," and "[w]ithout either documentary or quantitative evidence, the Court cannot accept as reliable or probative Dr. Rausser's conclusion that all legacy shippers—or even a substantial number of them—were harmed from the alleged conspiracy." S-179.

Rausser also claimed that there were no "true" legacy shipments at all because, among other reasons, nearly half of the legacy shipments moved under contracts that "self-adjusted" during the conspiracy period. The court rejected this explanation because Rausser conceded that he included in this category shipments "that were never in fact adjusted to a higher, allegedly conspiratorial fuel surcharge

and he was unable to identify or quantify shipments that were actually adjusted." S-183.[2]

To manufacture a claim of "manifest error," plaintiffs attempt to recast this Court's prior decision. According to plaintiffs, this Court equated Rule 23's "rigorous analysis" standard with *Daubert*'s test of admissibility. How? Because the Court "discussed whether the model was 'reliable'—while citing to an Eighth Circuit decision involving a *Daubert* analysis." Pet. 10 (noting this Court's citation, *Rail Freight*, 725 F.3d at 253, to *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039 (8th Cir. 2000)). This observation is meaningless. It is of course true that *one way* a class certification motion might fail is if the district court finds the damages model inadmissible under *Daubert* (which is what happened in *Concord Boat*). But the fact that an inadmissible study cannot establish classwide injury plainly does not mean that any damages study admissible under *Daubert* is sufficient to satisfy the requirements of Rule 23. This Court, following *Comcast*, held that that defendants' critiques of Rausser's study would, if correct, "shred the plaintiffs' case for certification." *Rail Freight*, 725 F.3d at 252.

[2] Rausser's inability to explain away the false positives, among other things, should have rendered his model inadmissible under *Daubert* as well—an issue that was never raised or briefed below, and that, if properly resolved, would have foreclosed the entire predicate to plaintiffs' *Daubert* versus Rule 23 contention. But, as defendants have shown, even assuming the model were properly admitted, its flaws plainly precluded a finding of predominance under Rule 23.

Not surprisingly, plaintiffs cite no case holding that admission of an expert damages study compels class certification. Indeed, before and after *Comcast*, numerous courts have ruled that "a district court's conclusion that an expert's opinion is admissible does *not* necessarily dispose of the ultimate question—whether the district court is satisfied, by all the evidence and arguments *including all relevant expert opinion*, that the requirements of Rule 23 have been met." *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 315 n.13 (3d Cir. 2006) (emphases added).[3] The Ninth Circuit has held it is error for a district court to limit "its analysis of whether there was commonality to a determination of whether Plaintiffs' evidence on that point was admissible," thereby failing to conduct the "rigorous analysis" Rule 23 demands. *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 982 (9th Cir. 2011); *see also* 1 *McLaughlin on Class Actions* § 3:14 (14th ed.

[3] As the Third Circuit explained, because "opinion testimony should not be uncritically accepted as establishing a Rule 23 requirement merely because the court holds it should not be excluded, under *Daubert* or for any other reason," it follows that "[w]eighing conflicting expert testimony at the certification stage is not only permissible; it may be integral to the rigorous analysis Rule 23 demands." *Hydrogen Peroxide*, 552 F.3d at 323; *see also Blades v. Monsanto*, 400 F.3d 562, 575 (8th Cir. 2005) ("in ruling on class certification, a court may be required to resolve disputes concerning the factual setting of the case," including "the resolution of expert disputes concerning the import of evidence"); *West v. Prudential Sec., Inc.*, 282 F.3d 935, 938 (7th Cir. 2002) (neglecting to resolve disputes between experts "amounts to a delegation of judicial power to the plaintiffs, who can obtain class certification just by hiring a competent expert"); *see also Cordes & Co. Fin. Servs, Inc. v. A.G. Edwards & Sons, Inc.*, 502 F.3d 91, 106-07 (2d Cir. 2007) (analyzing the opinions of both parties' experts).

2017) ("It is reversible error to certify a class simply on the basis that proffered expert analysis is admissible…. [A] court's obligation to rigorously analyze whether each Rule 23 requirement has been met …. includes weighing conflicting expert testimony and resolving disputes framed by the experts if … necessary ….").

The decision in *Tyson Foods, Inc. v. Bouaphakeo*, does not remotely cast the slightest doubt on that settled law. Plaintiffs seize on the Court's statement that "[o]nce a district court finds evidence to be admissible, its persuasiveness is, in general, a matter for the jury." 136 S. Ct. 1036, 1049 (2016). But that was true only because the criticism at issue went *solely* to the merits. The Supreme Court had just resolved the core *class certification* issue by holding (as a matter of law) that the class members were similarly situated with respect to their legal rights, and that therefore "the experiences of a subset of employees can be probative as to the experiences of all of them." *Id.* at 1048. Against that backdrop, the facts that the defendant neither challenged the admissibility of plaintiffs' statistical study, nor "attempt[ed] to discredit the evidence with testimony from a rebuttal expert," were dispositive. *Id.* at 1044. *Tyson* thus did not even present whether Rule 23's "rigorous analysis" standard requires district courts to resolve disputes between experts over whether studies that meet *Daubert*'s standards can establish injury on a classwide basis. Instead, the *Tyson* Court simply refused to "announce a broad

rule against the use in class actions of … representative evidence," concluded that use of the study at issue there "was permissible in the circumstances of this case," and recognized that the "fairness or utility of statistical methods in contexts other than those presented here will depend on the facts and circumstances particular to those cases." *Id.* at 1040, 1046, 1049.

In short, the district court here did precisely what this Court told it to do and applied the rigorous analysis that Rule 23 requires. The false positives were inescapable. As this Court has already found that this is dispositive, the petition should be denied for this reason alone.

B. The District Court Correctly Held That Predominance Is Not Met Because Plaintiffs' Common Evidence Does Not Prove That All Class Members Were Injured.

The district court also correctly held that plaintiffs could not establish predominance under Rule 23 because their own damages model "indicates that at least 12.7% of class members—or at least 2,037 shippers—are uninjured." S-204.[4] That means that even if the damages model were otherwise accurate and reliable (and it is not), it would not be the common proof that showed that "all class

[4] The district court reached this figure because Rausser himself acknowledged that his model predicts 12.7% of class members had negative overcharges on all of their shipments. S-195. Defendants' expert showed that Rausser's model finds that 28.3% of class members have "net negative overcharges across all of their shipments." S-83.

members suffered *some* injury," which this Court held is necessary to establish predominance. 725 F.3d at 252. This aspect of the district court's decision is not "manifestly erroneous" and raises no "unsettled legal issue" in this Circuit about whether a class can be certified if it contains uninjured class members. Pet. 11-15. Plaintiffs' contrary assertion is based on a misreading of this Court's prior ruling and the district court's decision.

First, this Court's prior decision *did* address the "uninjured-class-member issue." *Cf. id.* at 12 n.4. In fact, defendants appealed the initial class certification decision because it followed one of the very decisions plaintiffs still cite in their current petition, *id*. at 11, which held that the presence of uninjured class members does *not* preclude class certification as long as plaintiffs can show that injury is widespread and there are not "a great many" uninjured class members. 287 F.R.D. 1, 40 (D.D.C. 2012) (quoting *Kohen v. Pac. Inv. Mgmt. Co.*, 571 F.3d 672, 677 (7th Cir. 2009)).

This Court reversed. The opinion specifically rejected *Kohen*'s approach to classwide injury, *see* 725 F.3d at 255, and held that plaintiffs must be able to "prove, through common evidence, that *all* class members were in fact injured by the alleged conspiracy. Otherwise, individual trials are necessary to establish whether a particular shipper suffered harm from the price-fixing scheme," *id.* at 252 (emphasis added and citations omitted). Lest there be any doubt, the opinion

reiterated that this Court "expect[s] the common evidence to show *all* class members suffered *some* injury" because common questions "cannot predominate when there exists no reliable means of proving classwide injury in fact." *Id.* at 252-53 (first emphasis added).[5]

Second, the district court did not "manifestly err[]" by imposing what plaintiffs claim is an "arbitrary cap of 5-6% of uninjured class members at the class certification stage." Pet. 13. If anything, the district court departed from the law of the case and the law of this Circuit by even entertaining the suggestion that it could certify a class where *plaintiffs' own common evidence* indicates that there is a substantial number of uninjured class members.

In all events, plaintiffs' suggestion that this case presents a discrete and unresolved legal issue about whether a 5-6% incidence of uninjured class members prevents class certification fails. The actual number of class members who could not have been injured by any alleged conspiracy is much higher than Rausser's flawed model suggests, and individualized evidence is needed to determine who they are, as defendants would show were this Court to grant the petition.[6]

[5] Again, *Tyson* does not require a different analysis. As even plaintiffs concede, Pet. 12, the Supreme Court declined to decide whether a class may be certified if it includes uninjured members, *see* 136 S. Ct. at 1049.

[6] As defendants explained in the last appeal, (1) fuel surcharges have long been used in the rail industry, and many shippers would have paid fuel surcharges in the same or higher amount regardless of any alleged conspiracy; (2) many are large

Beyond that, the district court did not rely only on a finding that the number of uninjured shippers in Rausser's model exceeded 5-6%. It also relied on the fact that this equates to at least 2,037 shippers (all of whom plaintiffs have consistently maintained were actually injured), yet plaintiffs' explanation ("prediction error" for "shippers with a small number of shipments") cannot "account for all—or even a substantial portion of—the 2,037 shippers." S-200. In addition, plaintiffs' experts do not "try to quantify what number or percentage of shippers are actually uninjured or propose how to identify and separate the truly uninjured from the genuinely injured. They simply assert that all 2,037 shippers are in fact injured." *Id.* As a result, the court found that "there would need to be individualized inquiries to determine which of at least 2,037 (and possibly more) class members were actually injured by the alleged conspiracy—the central issue of each

and sophisticated businesses that could have avoided injury because they negotiated discounts in base rates or smaller base rate increases in exchange for a fuel surcharge; and (3) many are served by only one railroad and thus could not have been harmed by any alleged loss of rail competition. *See* Opening Br. of Petrs., at 37-65, No. 12-7085 (Dec. 3, 2012) (Dkt. 1408054). This Court did not directly address these "attacks on the plaintiffs' ability to satisfy the predominance requirement," because it "focus[ed]" on defendants' argument that "Rausser's damages model is defective." 725 F.3d at 252. On remand, the district court agreed that many intermodal shippers could not have been injured because the intermodal fuel surcharge formulas did not change during or immediately before the class period (S-170-76), but rejected the argument as to carload shippers (S-137-41, S-175-76), and sole-served shippers (S127-30). The district court was right about the intermodal shippers, but mistaken about the others.

plaintiff's claim." *Id.* at S-202. That finding does "not constitute a clear error of judgment, nor [was it] otherwise outside the range of choices the district court was allowed to make." *Garcia v. Johanns*, 444 F.3d 625, 635 (D.C. Cir. 2006) (alterations in original) (affirming denial of class certification).

In an attempt to disguise the fatal nature of the problem, plaintiffs [redacted] Pet. 14. That claim is highly misleading because, "in order to conclude that 99.96% of class revenue was impacted," Rausser took every shipper with at least one positive overcharge, then included all of their revenue, "not just the revenue from the injured shipments." S-203. And in all events, the district court rightly recognized that the question is "whether there is common impact among the class members, not how much revenue was affected by the alleged conspiracy." *Id.*

Finally, interlocutory review is not warranted simply because the district court did not explain why an analysis by another of plaintiffs' experts (Dr. McClave) did not corroborate their claim that shippers with few shipments were injured even though Rausser's model showed no overcharges for them. Pet. 14-15. In that analysis, McClave [redacted] (emphasis added). This aggregate showing proves nothing about whether any

particular shipper was overcharged, and thus is not remotely capable of meeting the plaintiffs' burden of proving that "all class members were in fact injured by the alleged conspiracy," 725 F.3d at 252.

C. The District Court Did Not Fail To Consider Critical Evidence Of Classwide Impact And Damages.

There is likewise no merit to plaintiffs' suggestion that the district court manifestly erred by refusing to consider a variety of other evidence that plaintiffs could allegedly use to meet their burden of proving classwide impact and damages.

First, plaintiffs fault the court for treating the flaws in Rausser's model as "fatal to classwide impact," Pet. 15, even though the court found "strong evidence of conspiracy and class-wide injury" to carload traffic. S-6. [7] This attempt to justify class certification based on defendants' alleged misconduct is factually baseless and legally irrelevant. The central premise of this Court's prior ruling was that

[7] The court had no basis for making any finding on this issue because the parties agreed that, for class certification purposes, the existence of the alleged conspiracy was a common question. S-117. Accordingly, defendants presented none of their evidence to refute plaintiffs' one-sided version of events. Moreover, although the court did not identify the evidence on which it relied, its conclusion appears to be based on evidence it later described as showing "defendants' intent to uniformly apply and enforce new, more aggressive fuel surcharges in the class period." S-132. But that evidence is legally insufficient to support an inference of collusion because the fact that firms in a concentrated market each determined it was in their unilateral interest to attempt broadly to impose fuel surcharges in a period of dramatically rising fuel costs is fully consistent with legitimate, independent conduct. *See, e.g., In re Babyfood Antitrust Litig.*, 166 F.3d 112, 121-22 (3d Cir. 1999).

Rausser's model is "essential" to plaintiffs' case for class certification—"No damages model, no predominance, no class certification." 725 F.3d at 253. The reason, this Court explained, is that "[m]eeting the predominance requirement demands more than common evidence the defendants colluded to raise fuel surcharge rates. The plaintiffs must also show that they can prove, through common evidence, that all class members were in fact injured by the alleged conspiracy." *Id.* at 252. Plaintiffs' petition does not (and cannot) explain how evidence of [redacted] *See, e.g.*, SE25, SE17 [redacted]

Second, plaintiffs have no basis for complaining that the district court disregarded evidence of defendants' discussions about interline shipments. Pet. 16, 18, 20. Defendants objected to the admission of this evidence at the hearing (because 49 U.S.C. § 10706 limits the ability of plaintiffs in an antitrust case to rely on evidence of communications between carriers regarding interline shipments, *see* 725 F.3d at 374 n.1), and the court said it intended to follow the approach it took in the prior certification decision and rule on the certification

question without relying on this evidence. SE38. The court added, however, that, "if people think I can't avoid it this time, then I'll decide the 10706 question before I decide the class certification questions." *Id.* Duly warned, plaintiffs made no objection.

Third, plaintiffs erroneously fault the district court for rejecting Rausser's claim that "legacy shippers" were injured because he did not quantify the extent to which they would have forced defendants to renegotiate contracts and waive fuel surcharges absent the alleged conspiracy. Plaintiffs say Rausser could not do this analysis because of "limitations in the historical data available." Pet. 20. Not so. Plaintiffs ignore the district court's findings that (a) there *is* historical data for NS that Rausser used in his own reports (S-57 n.12), and NS's historical waiver rate of 2.9% is far less than the 75%+ waiver rate that would be needed to support Rausser's theory; and (b) it is illogical to assume that defendants, having bargained for contractual protection against the risk of rising fuel prices, would waive that protection when fuel prices rose. S-180.

Fourth, it was not manifest error for the court to find that Rausser's damages model is not "reliable evidence to explain how intermodal shippers experienced hundreds of millions of dollars in overcharges, when defendants never changed the intermodal surcharge formulas." S-172. Plaintiffs' argument is that the overcharges *could* be explained by an increase in the amount of intermodal traffic covered by a

surcharge. Pet. 18. But the district court found that there is no record evidence to substantiate that claim. S-172-76. Moreover, Rausser admitted that his analysis did not provide "any means to separate the class members who paid a fuel surcharge due to [the] alleged conspiracy from class members who would have paid one anyway." SE41. Thus, his model cannot establish that all intermodal shippers in the class were harmed by supposedly more extensive coverage.

Finally, it was not manifest error for the district court to conclude that, because the damages model cannot reliably distinguish overcharges from the alleged conspiracy from competitively negotiated prices, it is not "a reliable means of assessing class-wide damages." S-208. The court did not apply an improper "certainty" standard. Pet. 21. It concluded that the "problems associated with overcharges for intermodal and legacy shippers – separately or together – show that Dr. Rausser's damages model is unreliable" and is not a "reliable means of assessing class-wide damages." S-208. That finding is entirely consistent with *Comcast*'s holding that, although damages calculations "need not be exact," they cannot be proved on a classwide basis "by a methodology that identifies damages that are not the result of the wrong." 569 U.S. at 35, 37.

II. PLAINTIFFS DO NOT FACE A "DEATH-KNELL" SITUATION.

In addition to the foregoing flaws in plaintiffs' effort to meet the demanding standard for interlocutory review, the denial of class certification does not sound

the "death-knell" of this litigation. This Court has suggested that a death-knell might exist where "high expert costs and other expenses … substantially exceed" the maximum amount of damages allowed by statute, which "arguably might pressure [plaintiffs] to settle independent of the merits" if this Court were to deny interlocutory review of the denial of class certification. *In re Brewer*, 863 F.3d 861, 874 (D.C. Cir. 2017). But this is an antitrust case in which plaintiffs are entitled to treble damages "and the cost of suit, including a reasonable attorney's fee" if they prevail. 15 U.S.C. § 15(a). [redacted] SE2. The named plaintiffs have already incurred the expense of conducting discovery (fact discovery is closed), and hiring experts (expert merits reports have already been exchanged), and their collective damages under Rausser's damages model are $[redacted] *before* trebling. SE7. They thus have the incentive and ability to litigate this case to final judgment and include the class certification issue if there is an appeal.

CONCLUSION

For the foregoing reasons, Plaintiffs' Rule 23(f) petition for interlocutory appeal should be denied.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This document complies with the word limit of Fed. R. App. P. 5(c)(1) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) and Circuit Rule 21(e)(1): this document contains 5,190 words.

This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because: this document was prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14 point font size and Times New Roman style.

/s/ Carter G. Phillips
Carter G. Phillips

ADDENDUM A

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Parties. Except for the Chamber of Commerce, which filed an amicus brief in support of defendants when this case was previously on appeal to this Court, all parties, intervenors, and amici appearing before the district court and in this Court are listed in the Brief for Petitioners.

Ruling under Review. References to the ruling at issue appear in the Brief for Petitioners.

Related Cases. These consolidated antitrust cases are presently before this Court on plaintiffs' petition for interlocutory review of the district court's October 10, 2017 Order denying class certification. *See* Petition Attachment S-1 – S-211. That Order was entered after this Court vacated the initial class certification and remanded the case for the district court to reconsider its decision after performing the "hard look at the soundness of [plaintiffs'] statistical models that purport to show predominance" required by Rule 23, this Court, and *Comcast v. Behrend*, 133 S. Ct. 1426 (2013). *See In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244, 255 (D.C. Cir. 2013).

Other cases in this multidistrict antitrust litigation were previously before this Court on unrelated legal issues. *Fayus Enters. v. BNSF Ry. Co.*, 602 F.3d 444

(D.C. Cir.) (affirming dismissal of the indirect purchasers' state law claims), *cert. denied*, 562 U.S. 1108 (2010).

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

ADDENDUM B

CORPORATE DISCLOSURE STATEMENT

BNSF Railway Company is a wholly-owned subsidiary of its parent, Burlington Northern Santa Fe, LLC ("BNSF LLC"). BNSF LLC is an indirect, wholly-owned subsidiary of Berkshire Hathaway Inc., a publicly held corporation. No publicly owned company has a 10% or greater share of the stock of Berkshire Hathaway, Inc.

CSX Transportation, Inc. is wholly owned by the publicly traded corporation CSX Corporation. No publicly owned company has a 10% or greater share of the stock of CSX Corporation.

Norfolk Southern Railway Company is a wholly-owned subsidiary of Norfolk Southern Corporation, a corporation whose stock is publicly traded. No publicly owned company has a 10% or greater share of the stock of Norfolk Southern Corporation.

Union Pacific Corporation, a publicly traded Utah corporation, owns 100% of Union Pacific Railroad Company, a Delaware corporation. No publicly owned company has a 10% or greater share of the stock of Union Pacific Corporation.

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of November, 2017, I caused the foregoing to be electronically filed with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users.

/s/ Carter G. Phillips
Carter G. Phillips