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Case No. 17-8005

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

IN RE: RAIL FREIGHT FUEL SURCHARGE ANTITRUST LITIGATION

MDL DOCKET NO. 1869
MISC. NO. 07-489 (PLF)

On Petition for Interlocutory Appeal from an Order of the United States District Court for the District of Columbia
Hon. Paul L. Friedman, District Judge

PLAINTIFFS' PETITION FOR PERMISSION TO APPEAL PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 23(f)

Michael D. Hausfeld
Sathya S. Gosselin
Swathi Bojedla
HAUSFELD LLP
1700 K Street, NW, Suite 650
Washington, DC 20006
Telephone: (202) 540-7200

Michael P. Lehmann
Seth R. Gassman
HAUSFELD LLP
600 Montgomery Street, Suite 3200
San Francisco, CA 94111
Telephone: (415) 633-1908

Kathleen M. Sullivan
David M. Cooper
Stephen R. Neuwirth
Sami H. Rashid
Alicia Cobb
QUINN EMANUEL URQUHART & SULLIVAN, LLP
51 Madison Avenue, 22nd Floor
New York, New York 10010
Telephone: (212) 849-7000

Counsel for Petitioners

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QUESTIONS PRESENTED

Whether this Court should grant permission to appeal under Federal Rule of Civil Procedure 23(f) to resolve one or more of the following issues:

1. Whether the district court manifestly erred in holding that Rule 23 mandates a substantially more rigorous standard for the "reliability" of an expert's opinion than required by *Daubert*.

2. Whether the district court manifestly erred in holding that a class cannot be certified if any more than 6% of the class may be uninjured, where the supposed lack of injury is premised solely on a damages model.

3. Whether the district court manifestly erred by ignoring key record evidence that corroborated the damage model's results and by holding antitrust damages must be "certain" at class certification.

PRELIMINARY STATEMENT

This case concerns a conspiracy among Defendants, the four largest U.S. freight railroads, to impose higher (and previously unsuccessful) fuel surcharges and thereby increase all-in prices for all shippers, in violation of the antitrust laws. The district court found "strong evidence of conspiracy and class-wide injury" (S-6) for carload shippers and upheld Plaintiffs' models of classwide impact and damages under *Daubert*. It nonetheless denied class certification because it found Plaintiffs' expert's damage model ultimately unpersuasive on the merits and because the model supposedly indicated the presence of uninjured class members.

Both of the district court's bases for its decision implicate fundamental and unsettled issues of class action law. Here, the district court took legally erroneous

positions on these unsettled issues and manifestly erred in ignoring, without explanation, crucial evidence of classwide injury. For these reasons, and because the district court's erroneous denial of certification sounds the "death knell" of claims by thousands of class members, this Court's intervention is necessary.

First, the district court erred on the standard to apply to expert evidence on class certification. While the issue is unsettled, the Supreme Court has recently indicated that once expert evidence is deemed admissible, it cannot be rejected at class certification based on the judge's opinion of its merits. *See Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1049 (2016). Yet that is exactly what the district court did, holding that reliability under *Daubert* was not enough—and that instead the court must take sides in a battle of the experts. In doing so, the district court usurped the jury's role rather than simply deciding whether the elements were capable of classwide proof, as Rule 23 requires. (S-111-12.)

Second, the district court erred in denying certification because of potentially uninjured, yet identifiable, class members. There is significant disagreement among courts on the effect of potentially uninjured class members on class certification. *Tyson* suggested that uninjured class members do not impede certification if they can be identified and later excluded from participation in any recovery. Ignoring *Tyson*, the district court imposed a stringent 5-6% ceiling for uninjured class members (a ceiling never announced by a circuit court or the Supreme Court), and

then found more than 6% of the class uninjured based solely on damages modeling and despite numerous other types of classwide evidence that demonstrated that all class members were injured.

Third, the district court manifestly erred by assessing the damages model in isolation as though it were the only evidence of classwide impact, ignoring abundant supporting documentary and deposition evidence. The district court thereby treated any supposed imperfection in the model as fatal, substantially raising the bar for class certification. The district court also manifestly erred in concluding that it must be "certain" of the accuracy of classwide damages estimates before the action could proceed as a class action.

STATEMENT OF FACTS

In 2007, Plaintiffs—businesses that ship products by rail—filed suit, alleging that the four largest U.S. freight railroads—Defendants BNSF Railway Co., CSX Transportation, Inc., Norfolk Southern Railway Co., and Union Pacific Railway Corp.—colluded to aggressively impose fuel surcharges as a "means to implement what effectively operate as across-the-board rate increases" in violation of Section 1 of the Sherman Act. (S-320.) That same year, the Surface Transportation Board ("STB") concluded, in a regulatory proceeding, that Defendants' fuel surcharges were "an unreasonable practice" that "cannot fairly be described as merely a cost recovery mechanism" because they were not tethered to fuel costs. *In re Rail Freight*

Fuel Surcharge Antitrust Litig., 287 F.R.D. 1, 16 (D.D.C. 2012).

Following the district court's grant of class certification in 2012, this Court granted Defendants' Rule 23(f) petition and vacated the district court's certification order, remanding with the instructions to consider the issues raised by this Court. On remand, the district court found all Rule 23 requirements satisfied except predominance on the issues of classwide impact and damages.

As to classwide impact, the district court found that "[t]he documentary record in this case has not changed" since it initially certified the class: "plaintiffs again present substantial documentary evidence that indicates that defendants (1) created new, aggressive fuel surcharge formulas for carload traffic; (2) intended to apply their fuel surcharge programs as widely as possible to all or virtually all of their customers through new policies; and (3) viewed their fuel surcharge programs as profit centers." (S-135.) Specifically, the district court found there was substantial documentary and deposition evidence that, before the class period, Defendants' fuel surcharges were only "theoretically billable," in that Defendants had "difficulty applying and enforcing fuel surcharges in contracts" and that "defendants recognized the risk in applying fuel surcharges on their customers when their competitors did not." (S-135.) In contrast, during the class period, Defendants imposed fuel surcharges "in lockstep," and applied them "to as many customers as possible" as a "mandate" across business segments. (S-136-37.)

Moreover, in the face of scores of challenges by Defendants' experts, the district court found that nearly all of the opinions and statistical models proffered by Plaintiffs' principal expert, Dr. Gordon Rausser, were "reliable" and "relevant" under *Daubert*, and therefore admissible. (S-36-62, 163.) This includes Dr. Rausser's classwide damages regression model, which employs "100% of the available transaction data" from Defendants from 2000 to 2008 (before and after the class period) as well as data from the STB to estimate the historical relationship between rail rates and market factors unrelated to collusion. (S-50, 53.)

Nonetheless, the court denied class certification based on its finding, by a preponderance of the evidence, that Dr. Rausser's model was incorrect because it shows overcharges for intermodal traffic and legacy shippers. (S-169-86.) The court recognized that at least *some* of the intermodal traffic and legacy shippers would be subject to overcharges during the class period. (S-56, 172, 182.) But it held that the evidence did not corroborate, to the requisite degree, the precise amount of these overcharges reflected in the modeling. (S-173-76, 180-85.) The court also denied certification because Dr. Rausser's classwide damages model, when applied at the individual class member level, shows negative damages for more than 5-6% of class members. (S-186-97.) Finally, the district court found that classwide damages were not "certain" enough, and suggested that individualized damages inquires might predominate. (S-207-08.)

ARGUMENT

A Rule 23(f) petition may be granted where the class certification decision (1) presents "an unsettled and fundamental issue of law relating to class actions . . . that is likely to evade end-of the-case review," (2) is "manifestly erroneous," or (3) creates a "death-knell" situation. *In re Lorazepam & Clorazepate Antitrust Litig.*, 289 F.3d 98, 99-100, 105 (D.C. Cir. 2002).

I. THE DISTRICT COURT MANIFESTLY ERRED ON THE UNSETTLED QUESTION OF THE STANDARD TO BE APPLIED TO MODELS OF CLASSWIDE INJURY AND DAMAGES

There is an unsettled and fundamental question regarding the standard for reviewing expert evidence such as economic models used to demonstrate classwide injury and damages.[1] These models are "mainstream tool[s]" commonly used in antitrust and other class actions, (S-51), making the standard for reviewing expert evidence a critical issue in class action law.

The Supreme Court has held there must be a "rigorous analysis" of the Rule 23 requirements. One of those requirements is the predominance of common issues, defined as issues "capable of classwide resolution." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). But there is substantial ambiguity as to when expert

[1] This recurring and unsettled issue of law, and the one discussed *infra* Part II, are highly likely to evade review if the Rule 23(f) petition is denied because both concern only the issue of class certification, and an appeal after final judgment of the denial of class certification is very uncertain.

evidence renders an issue capable of classwide resolution. Courts often perform a *Daubert* inquiry prior to class certification, and some circuits require it. *See, e.g.*, *Am. Honda Motor Co. v. Allen*, 600 F.3d 813, 815-16 (7th Cir. 2010).

Here, Defendants raised no *Daubert* challenge to Dr. Rausser, and the district court *sua sponte* determined the admissibility of his testimony. It ruled that "reliability" of expert evidence means one thing in the context of *Daubert* and another in the context of Rule 23. (S-23-24.) The district court acknowledged that "the D.C. Circuit has not spoken to the issue," and that other circuit courts had only "discussed generally how district courts must evaluate expert opinion at class certification." (S-24.) The court determined that "only one court has discussed the scope of *Daubert*'s reliability inquiry when courts must also determine reliability under Rule 23(b) or the difference between the two reliability standards": *In re Processed Egg Prods. Antitrust Litig.*, 81 F. Supp. 3d 412, 415-17 (E.D. Pa. 2015) ("*Eggs*").[2] (S-24.)

Here, the district court took the position that even if an expert model is reliable under *Daubert*, it can constitute classwide proof *only* if the judge also finds its

[2] *Eggs* also happened to assess the "reliability" of Dr. Rausser, denying the *Daubert* challenge, later certifying the class, and rejecting arguments—similar to those raised by Defendants here—"premised on the notion that variation of damages between and among class members defeats predominance." *Eggs*, 312 F.R.D. 171, 202-03 (E.D. Pa. 2015).

ultimate conclusions correct by a preponderance of the evidence. It first determined that nearly every opinion Dr. Rausser offered satisfied the requirements of reliability and fit under *Daubert*. (S-21-23, 25-62.) The district court then determined that two additional Plaintiffs' experts whose work corroborated Dr. Rausser's—Drs. McClave and Leitzinger—also satisfied *Daubert*. (S-84-94, 102-06.)

The district court nonetheless held that even if an expert's model satisfies *Daubert*, the judge must decide for himself which expert is the most persuasive in a battle of the experts. *See, e.g.*, (S-111) ("In its rigorous analysis of the evidence presented by these experts, this Court not only must determine which evidence is most persuasive, it must resolve any factual disputes between the experts."). And the district court ultimately found that Dr. Rausser's opinions—although they reflected a reliable methodology that fit the facts—were not sufficient classwide proof because he was not persuaded enough by those opinions. *See, e.g.*, (S-176) ("[P]laintiffs have not shown by a preponderance of the evidence that there is common evidence that could be used to explain the overcharges to intermodal shippers from defendants' fuel surcharge enforcement during the alleged conspiracy."); (S-186) ("[I]t is plaintiffs' burden to show that legacy shippers were affected by the alleged conspiracy. The Court concludes that plaintiffs have failed to meet that burden by a preponderance of the evidence.").

This test is manifestly erroneous as a matter of law. The Supreme Court recently held that a challenge to a class action based on supposed "statistical[] inadequa[cy]" of admissible expert analysis was misplaced: "Once a district court finds evidence to be admissible, its persuasiveness is, in general, a matter for the jury . . . . The District Court could have denied class certification on this ground only if it concluded that no reasonable juror could have believed" the evidence. *Tyson*, 136 S. Ct. at 1048-49; *see also Kleen Prods. LLC v. Int'l Paper Co.*, 831 F.3d 919, 922 (7th Cir. 2016). Indeed, it would violate the Rules Enabling Act to subject otherwise admissible evidence to a higher bar simply because it is classwide evidence (instead of individual evidence). *Tyson*, 136 S. Ct. at 1046. Yet that is exactly what the district court did here.

The district court also improperly usurped the jury's role by making the judge the arbiter of whether the classwide proof will succeed at trial. Predominance tests whether an issue is *capable* of classwide proof, not whether the proof will persuade the jury (let alone persuade the judge). No prior decision of this Court or the Supreme Court has held that the "rigorous analysis" at class certification supplants the ultimate factfinding that is the province of the jury. *See id.* at 1049 ("Resolving that question [about the probativeness of representative evidence], however, is the near-exclusive province of the jury.").

Because the district court held that Dr. Rausser's model was sufficiently reliable to go to a jury and because the model (if credited by the jury) would be adequate evidence of classwide injury from which a jury could award classwide damages, there plainly could be a trial based entirely on classwide evidence. Nothing more is required to demonstrate predominance because "the office of a Rule 23(b)(3) certification ruling is not to adjudicate the case; rather, it is to select the method best suited to adjudication of the controversy fairly and efficiently." *Amgen Inc. v. Connecticut Ret. Plans & Trust Funds*, 568 U.S. 455, 460 (2013). Indeed, *all* of the district court's concerns about the persuasiveness of Dr. Rausser's models are themselves issues that can be resolved on a classwide basis, and thus they present no barrier to predominance. *See Tyson*, 136 S. Ct. at 1047 (an attack that expert's analysis is "unrepresentative or inaccurate" is a "defense" that "is itself common to the claims made by all class members").

The district court misinterpreted this Court's prior opinion in *Rail Freight*. This Court discussed whether the model was "reliable"—while citing to an Eighth Circuit decision involving a *Daubert* analysis. *Rail Freight*, 725 F.3d 244, 253 (D.C. Cir. 2013) (citing *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1056-57 (8th Cir. 2000)). The district court then elevated that standard by holding that "at a minimum, reliability under Rule 23 is a higher standard than reliability under *Daubert*." (S-112.) As discussed above, there is no legal basis for this higher

standard,[3] and certainly nothing that allows a judge to deny certification simply because he decides that the plaintiffs' reliable expert testimony is ultimately less persuasive than the defendants' expert testimony.

II. THE DISTRICT COURT MANIFESTLY ERRED ON THE UNSETTLED QUESTION OF THE EFFECT OF POTENTIALLY UNINJURED CLASS MEMBERS ON CLASS CERTIFICATION

The district court also addressed another unsettled legal issue fundamental to almost any Rule 23(b)(3) class—whether any or a large number of uninjured class members precludes class certification. Circuit courts have offered widely varying views on this issue. *See, e.g.*, *Kohen v. Pac. Inv. Mgmt. Co.*, 571 F.3d 672, 677 (7th Cir. 2009) (precluding class certification if class "contains a great many" uninjured persons); *In re Nexium Antitrust Litig.*, 777 F.3d 9, 25, 30-31 (1st Cir. 2015) (allowing certification if class includes "a de minimis number of potentially uninjured parties" but declining to decide whether certification is possible when there is "more than a de minimis number"); *Avritt v. Reliastar Life Ins. Co.*, 615 F.3d

[3] This issue tracks Justice Scalia's question during oral argument in *Comcast*, where he asked "what difference would it make in the world" if a judge determined reliability under a *Daubert* or a Rule 23 analysis. Transcript of Oral Argument at 52, *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013) (No. 11-864), available at https://www.supremecourt.gov/oral_arguments/argument_transcripts/2012/11-864.pdf.

1023, 1034 (8th Cir. 2010) ("[A] class cannot be certified if it contains members who lack standing.").[4]

The Supreme Court granted certiorari in *Tyson* to decide this issue, where a 3,300-member class included hundreds of uninjured persons. 136 S. Ct. at 1043-44, 1049. The petitioner ultimately abandoned its argument that the presence of uninjured class members precludes class certification. *Id.* Still, the Court provided guidance on the issue: "Whether [plaintiffs' proposed methodology] or some other methodology will be successful in identifying uninjured class members is a question that, on this record, is premature. Petitioner may raise a challenge to the proposed method of allocation when the case returns to the District Court for disbursal of the award." *Id.* at 1050. No circuit court has yet considered the impact of *Tyson* on the uninjured-class-member issue, although one district court discussed *Tyson* and held that "the presence of uninjured class members should not serve as a basis for decertifying the class," and uninjured class members could be addressed "as the case proceeds towards trial." *Ridgeway v. Wal-Mart Stores, Inc.*, No. 08-CV-05221-SI, 2016 WL 4529430, at *13 (N.D. Cal. Aug. 30, 2016); *see also Cope v. Let's Eat*

[4] This Court previously referenced that "all class members" must suffer injury, *Rail Freight*, 725 F.3d at 252, but did not directly address the uninjured-class-member issue.

Out, Inc., 319 F.R.D. 544, 552 (W.D. Mo. 2017). Given the circuit conflict and the potential impact of *Tyson*, this Court's guidance is needed.

Moreover, the district court's decision on this issue is manifestly erroneous. Relying on "a few reported decisions," the district court held that "5% to 6% constitutes the outer limits of a *de minimis* number of uninjured class members" for satisfying predominance. (S-196.) However, the proper reading of *Tyson*—and class action law generally—is that if uninjured class members can be identified at the end of a case, then their presence does not pose an issue for class certification. What concerned the Supreme Court was not *the presence* or *number* of uninjured class members but whether uninjured class members *would eventually recover damages* post-trial. *Tyson*, 136 S. Ct. at 1049-50. Moreover, even before *Tyson*, many courts recognized that uninjured class members do not impede certification if they will not ultimately be awarded damages. *See, e.g.*, *Nexium*, 777 F.3d at 32 & n.28, 35-36 & n.32 (upholding certification over dissent's complaint that certified class could include 24,000 uninjured members). Here, even assuming *arguendo* that the district court was correct that shippers calculated by the Rausser model to have had negative damages were uninjured, those identified shippers could readily be excluded later from participating in any recovery.

Ignoring all of this, the district court imposed an arbitrary cap of 5-6% uninjured class members at the class certification stage. Assessing Rule 23(b)(3)

predominance is "not bean counting," however. *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 801 (7th Cir. 2013). In *Nexium*, for example, the court affirmed class certification where 5.8% of the class was uninjured not because it slipped under a 6% threshold, but because "*de minimis*" should be looked at "in functional terms" by assessing whether the inclusion of uninjured members would "cause non-common issues to predominate." 777 F.3d at 30-31.

Here, Dr. Rausser showed [redacted] (S-244.) When Plaintiffs' expert Dr. McClave applied the model to shippers [redacted] (S-250-54, 315.)

More fundamentally, the court mistakenly concluded that class members exhibiting negative damages were not, in fact, injured when even Defendants' expert admitted that the presence of negative damages for individual class members does not mean "these people were not hurt." (S-232.) Notably, almost all class members with negative damages were shippers with very few shipments during the class period. (S-239-44, 257.) Plaintiffs' experts did not, as the district court suggested, "simply assert that all 2,037 shippers are in fact injured" without analysis. (S-200.) For example, [redacted]

[redacted] (S-256-58.) [redacted] (S-257.)

III. THE DISTRICT COURT MANIFESTLY ERRED IN ITS ANALYSIS OF CLASSWIDE IMPACT AND DAMAGES

A. The District Court Manifestly Erred By Refusing To Consider Critical Evidence Of Classwide Impact

The district court previously recognized that a regression model is "not the only way for plaintiffs to succeed in a motion for class certification," and that other forms of evidence could suffice to show that "methods of common proof exist to show class-wide impact." *Rail Freight*, 287 F.R.D. at 44. This time around, and although the district court again recognized "strong" non-model evidence of "classwide injury," (S-6), it examined the damages model in isolation, treating any supposed flaw in the model as fatal to classwide impact. But there is no basis for refusing to consider whether documentary evidence and a model (even if imperfect) *together* constitute sufficient classwide evidence to show that an element is capable of classwide determination. *See, e.g.*, *Kleen Prods.*, 831 F.3d at 927 (affirming finding of predominance where plaintiffs "built up their case with several types of evidence," including documentary evidence); *In re High-Tech Emp. Antitrust Litig.*,

985 F. Supp. 2d 1167, 1217 (N.D. Cal. 2013) ("[T]he importance of . . . statistical models is diminished in light of the extensive documentary evidence that supports Plaintiffs' theory of impact.").

Here, the district court unequivocally disregarded swaths of evidence that Plaintiffs proffered in support of class certification that Defendants asserted were inadmissible under 49 U.S.C. § 10706(a)(3)(B)(ii) ("§ 10706"), which affords limited statutory protection to discussions regarding a particular interline shipment movement in which two railroads participate. (S-39 n.5.) The district court determined it "need not reach this issue [of admissibility] now" because it could decline certification "without relying on any of these documents." *Id.* But this makes sense only if the documents could never be used to show classwide impact, and the model had to stand alone.

The evidence Defendants challenged under § 10706 shows, among other things, that Defendants' executives discussed (but collusively decided never to implement) "programmatic changes" that would have *reduced* their pre-class period fuel surcharge programs across-the-board and directly "brought relief to shippers under legacy contracts." (S-216-19, 260, 266-72, 281-86.) The district court ignored this evidence and further ignored Dr. Rausser's opinion concerning how these "programmatic changes" would have resulted in lower prices on legacy shipments absent Defendants' coordination. The district court's "complete

disregard" of this and other classwide evidence of impact highlighted below is manifest error. *See In re District of Columbia*, 792 F.3d 96, 97-98 (D.C. Cir. 2015).

1) The District Court Ignored Evidence Explaining The Model's Showing As To Intermodal Shippers

The district court found Dr. Rausser's model unpersuasive in part because the model reveals overcharges on intermodal shipments (as distinct from carload shipments). The district court focused on the fact that Defendants did not change the formulas they used to calculate the intermodal fuel surcharge rates during the class period, and also on the unavailability of data analysis to confirm that intermodal shippers "received massive discounts or waivers from the published intermodal formulas" during the pre-class period that they also would have received during the class period absent the conspiracy. (S-173-74.)

In focusing on unavailability of waiver data, the district court ignored the strong documentary evidence and data analysis that *is* in the record that shows Defendants conspired to apply surcharges *more broadly* to intermodal contracts and shipments during the class period. [redacted] (S-263) (emphases added). [redacted]

[redacted] (S-274.)

[redacted] (S-312.)

Confirming what the documentary record reveals, [redacted] (S-306-07 & Fig.47.) The district court manifestly erred in failing to consider this evidence of dramatically increased coverage, which amply explains why the model reveals overcharges for intermodal shippers.

2) The District Court Ignored Evidence Explaining The Model's Showing As To Legacy Shippers

The district court similarly found Dr. Rausser's model was not "persuasive" because it supposedly cannot account for the amount of overcharges as to "legacy" shippers. This Court vacated and remanded the original class certification decision here because the district court did not explain how legacy shippers, defined as those "bound by rates negotiated before any conspiratorial behavior was alleged to have occurred," had overcharges in Dr. Rausser's model. 725 F.3d at 252-53.

On remand, Plaintiffs provided the explanation: the contracts that Defendants had [redacted] (S-222-29.) Plaintiffs also established that many other contracts that Defendants had identified as "legacy" contracts were in fact entered into or amended *after* the conspiracy began. (S-221, 224-29.)

Dr. Rausser also explained that he would expect "legacy" shipments to be impacted by the alleged conspiracy regardless because in the absence of a conspiracy, "Defendants would have yielded to resistance from shippers (including legacy shippers) and reduced or offset the dramatically increasing [fuel surcharge] rates that Defendants applied during the Class Period, either by adjusting those [fuel surcharge] rates, re-pricing base rates or offering other concessions." (S-215.) [redacted] (S-299, 301-02.)

The district court did not dispute these explanations, but held them inadequate

because Dr. Rausser did not precisely quantify these occurrences. (S-179.) [redacted] (S-310.)

Setting aside [redacted], Plaintiffs *did* submit powerful documentary evidence corroborating the impact of the conspiracy on legacy shipments, which the district court again ignored. For instance, in the months just before the class period, as a result of competitive pressures, BNSF made a temporary, across-the-board reduction to its surcharges from 5% to only 2%, thereby decreasing prices on legacy shipments. (S-292.) BNSF never implemented an across-the-board discount again during the class period. (S-218-19.) Similarly, as highlighted above, evidence challenged by Defendants under § 10706 reveals that their executives discussed (but collusively decided never to implement) "programmatic changes" that would have *reduced* their pre-class period fuel surcharge programs and rates on legacy shipments during the class period. Moreover, the district court ignored that the STB's finding of an "unreasonable practice" applied equally to legacy shippers, and ignored its earlier finding that defendants' policies were "standardized and uniformly applied across all or virtually all shippers—regardless of whether such shippers were legacy . . . shippers." *Rail*

Freight, 287 F.R.D. at 16.

Only by ignoring all this evidence, and Dr. Rausser's corresponding opinion, could the district court fault Plaintiffs for not identifying which shippers "would have been able to renegotiate their preexisting contracts" absent conspiracy. (S-181.) The evidence the district court ignored shows that Defendants could have impacted legacy shippers in one fell swoop by changing their applicable fuel surcharge formulas across-the-board.

B. The District Court Manifestly Erred In Its Analysis Of Classwide Damages

The district court also committed manifest error in assessing whether Plaintiffs had advanced sufficient evidence of their ability to estimate classwide damages with common proof. The district court determined that the purported issues it identified with intermodal and legacy shippers meant that it could not be "certain" that the damages calculated for carload shippers were accurate. (S-208.) That was legal error for the same reasons discussed above. It was also erroneous because "certainty" is not the burden of proof for establishing damages. *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563 (1931) ("[I]t will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference . . . ."). And in antitrust cases, proof of the amount of damages is even more lenient. *Id.*; *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 265 (1946). Finally, to the extent the district court held that individualized damages

inquiries alone preclude class certification, that is also manifestly erroneous. *See, e.g.*, *Tyson*, 136 S. Ct. at 1045; *Kleen Prods.*, 831 F.3d at 929; *Roach v. TL Cannon Corp.*, 778 F.3d 401, 405 (2d Cir. 2015).

IV. THIS CASE WOULD BE THE "DEATH KNELL" FOR THE VAST MAJORITY OF THE CLASS

The petition should also be granted because the denial of class certification is the death knell for most class members. Interlocutory appeal should be granted "when there is a death-knell situation for either the plaintiff or defendant that is independent of the merits of the underlying claims, coupled with a class certification decision by the district court that is questionable." *Lorazepam*, 289 F.3d at 100, 105. Here, most potential plaintiffs have claims that are likely to be too small to justify the expense of litigation. *Id.* at 102. For example, [redacted], attesting that their damages are far too small to justify an individual suit. *See* (S-249-50.) [5] Moreover, scores of individual lawsuits by those with economically viable claims will substantially burden the district court—and may be

[5] The named Plaintiffs could appeal the denial of class certification after final judgment, but that prospect is highly uncertain given the possibility of settlement or the named Plaintiff prevailing on the merits and having no interest in then challenging class certification.

rendered unnecessary by a reversal of the denial of class certification—which further supports this Court's deciding the class certification issue now.

CONCLUSION

For these reasons, this Court should grant the petition for permission to appeal and reverse the decision below denying certification of the class.

Respectfully submitted,

/s/ Michael D. Hausfeld
Michael D. Hausfeld
Sathya S. Gosselin
Swathi Bojedla
HAUSFELD LLP
1700 K Street, NW, Suite 650
Washington, DC 20006
Telephone: (202) 540-7200

Michael P. Lehmann
Seth R. Gassman
HAUSFELD LLP
600 Montgomery Street, Suite 3200
San Francisco, CA 94111
Telephone: (415) 633-1908

/s/ Kathleen M. Sullivan
Kathleen M. Sullivan
David M. Cooper
Stephen R. Neuwirth
Sami H. Rashid
Alicia Cobb
QUINN EMANUEL URQUHART
& SULLIVAN, LLP
51 Madison Avenue, 22nd Floor
New York, NY 10010
Telephone: (212) 849-7000

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/s/ Kathleen M. Sullivan
Kathleen M. Sullivan
QUINN EMANUEL URQUHART
& SULLIVAN, LLP
51 Madison Avenue, 22nd Floor
New York, NY 10010
Telephone: (212) 849-7000

ADDENDUM A

Certificate of Parties

Pursuant to Circuit Rules 5(a) and 28(a)(1)(A), Petitioners Carter Distributing Company, Dakota Granite Company, Donnelly Commodities Incorporated, Dust Pro, Inc., Nyrstar Taylor Chemicals, Inc., Olin Corporation, Strates Shows, Inc., and US Magnesium LLC submit the following Certificate of Parties:

Parties and Amici. The following is a list of all parties, intervenors, and amici who, to counsels' knowledge, have appeared in the district court in relation to this consolidated direct purchaser case:

1. Plaintiffs
    a. Carter Distributing Company
    b. Dakota Granite Company
    c. Donnelly Commodities Incorporated
    d. Dust Pro, Inc.
    e. Nyrstar Taylor Chemicals, Inc.
    f. Olin Corporation
    g. Strates Shows, Inc.
    h. US Magnesium LLC
2. Defendants
    a. BNSF Railway Company

b. CSX Transportation, Inc.

c. Norfolk Southern Railway Company

d. Union Pacific Railroad Company

ADDENDUM B

Corporate Disclosure Statements

Pursuant to Circuit Rules 5(a) and 26.1, Petitioners Carter Distributing Company, Dakota Granite Company, Donnelly Commodities Incorporated, Dust Pro, Inc., Nyrstar Taylor Chemicals, Inc., Olin Corporation, Strates Shows, Inc., and US Magnesium LLC submit the following disclosures:

1. 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.

2. 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.

3. 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.

4. 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.

5. 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.

6. Olin Corporation, a Virginia corporation, has no parent corporation. As of October 2017, 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.

7. 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 provides entertainment, amusement rides, games, and various food and merchandise concessions to festivals and fairs in the eastern United States.

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

CERTIFICATE OF SERVICE

I hereby certify that on December 1, 2017, I caused a true and correct copy of the foregoing Petition for Permission to Appeal Pursuant to Fed. R. Civ. P. 23(f) to be 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/ Kathleen M. Sullivan
Kathleen M. Sullivan
QUINN EMANUEL URQUHART
& SULLIVAN, LLP
51 Madison Avenue, 22nd Floor
New York, NY 10010
Telephone: (212) 849-7000