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

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PRELIMINARY STATEMENT

Defendants' opposition ("Opp.") to Plaintiffs' Rule 23(f) petition ("Pet.") largely abandons the district court's reasoning, effectively confirming the need for this Court's review. Defendants treat the standard for expert evidence on class certification and the effect of uninjured class members as resolved by this Court's prior decision even though the district court recognized these central issues as critical and unsettled. In fact, this Court's decision merely required the district court to consider the reliability of the expert evidence, saying nothing about whether the reliability standard exceeded *Daubert*, whether the expert evidence satisfied the predominance requirement, or whether uninjured class members affect certification. Moreover, Defendants fail to confront language in *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036 (2016), that casts great doubt on the district court's resolution of these issues. Defendants also fail to defend the district court's refusal to consider critical evidence of classwide injury and damages, instead resting upon a supposed waiver that the district court never found and is expressly refuted by the record.

ARGUMENT

I. DEFENDANTS FAIL TO SHOW THAT THE DISTRICT COURT'S STANDARD FOR CLASSWIDE INJURY AND DAMAGES IS SETTLED OR CORRECT

Defendants make no effort to defend the district court's decision that, even where an expert's model for classwide injury and damages uses a reliable

methodology and is tied to the facts, the plaintiffs must further prove to the judge that the *results* of that model are *correct* by a preponderance of the evidence. Instead, Defendants mischaracterize (Opp. 6) Plaintiffs as contending that admissibility of expert evidence is conclusive of Rule 23 predominance and that "only a jury can assess the merits of" the expert evidence. But Plaintiffs never suggested as much. Rather, Plaintiffs argue that the district court may determine (1) whether the model is "reliable" under *Daubert*; and (2) if it is reliable, whether the model—and all of the other supporting evidence—demonstrate that classwide injury and damages can be proven with "common evidence." *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244, 253 (D.C. Cir. 2013). But this Rule 23 assessment of the expert's economic model cannot require the judge to decide the ultimate *correctness* of the model, thereby usurping the jury's role.[1]

Furthermore, Defendants erroneously argue (Opp. 6-7, 10-12) that the law is settled on this issue. But the district court candidly admitted that this issue had never been addressed by this circuit and had been mentioned in dicta by only one out-of-

[1] Defendants' argument (Opp. 6 & n.1) that Plaintiffs "embraced" the standard the district court adopted—which invades the province of the jury and violates the Rules Enabling Act—is meritless. The statements Defendants cite (SE-13, SE-21) merely show that Plaintiffs supported a rigorous analysis of Rule 23's requirements. Plaintiffs expressly stated (SE-15; *see also* Dkt. 800 at 8-10) that "reliability" was the proper standard and that Defendants' argument for a "higher standard" was unsupported.

circuit district court. (S-24); *see also* 3 *Newberg on Class Actions* § 7:24 (5th ed. 2017). Defendants suggest (Opp. 6-7) that this Court's prior opinion resolved the issue, but Defendants mistakenly conflate (1) this Court's instruction that the district court assess whether the model is a "reliable means of proving classwide injury," citing an Eighth Circuit case applying *Daubert*, *Rail Freight*, 725 F.3d at 253, with (2) the district court deciding whether the model is ultimately correct. Defendants note (Opp. 9) that the absence of reliability under *Daubert* is not the only reason to deny class certification, but nothing in this Court's opinion suggests a higher standard than *Daubert* in assessing the reliability of expert opinions at class certification.

As for the other cases Defendants cite (Opp. 10 & n.3), three do not suggest that a higher standard than *Daubert* applies at class certification, and all three question the expert's *methodology* rather than the expert's *conclusion*. *See Blades v. Monsanto*, 400 F.3d 562, 570, 575 (8th Cir. 2005); *West v. Prudential Secs., Inc.*, 282 F.3d 935, 938 (7th Cir. 2002); *Cordes & Co. Fin. Servs. v. A.G. Edwards & Sons*, 502 F.3d 91, 107 (2d Cir. 2007). The other two cited cases also do not hold that the certification-stage standard exceeds *Daubert*, but rather hold only that admissible expert testimony does not necessarily show an issue is capable of classwide proof where the district court *entirely* fails to address a criticism of the plaintiffs' expert opinions. *See Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 984

(9th Cir. 2011); *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 322 (3d Cir. 2009). Here, in sharp contrast, the district court not only found Dr. Rausser's methodologies reliable generally, but specifically found reliable his analysis of the supposed false positives. S-54-62.

In any event, all of these cases pre-date *Tyson*, which (while not focused on *Daubert* specifically) held that, "[o]nce a district court finds evidence to be admissible, its persuasiveness is, in general, a matter for the jury." 136 S. Ct. at 1049. Defendants argue (Opp. 11) that *Tyson* is inapposite "because the criticism at issue went *solely* to the merits." That is incorrect: *Tyson* expressly held, in that same paragraph, that "[t]he District Court could have denied *class certification on this ground* only if it concluded that no reasonable juror could have believed that the employees spent roughly equal time donning and doffing." 136 S. Ct. at 1049 (emphasis added).[2] Moreover, Defendants (like the district court) ignore crucial language elsewhere in *Tyson*, establishing that class certification cannot be denied if the criticism of plaintiffs' classwide proof can itself be resolved on a classwide basis.

[2] Defendants also invoke (Opp. 7) *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013), but *Comcast* held only that a damages model did not suffice for class certification where it used "a methodology that identifies damages that are not the result of the wrong." *Id.* at 37. It did not suggest that the *reliability* of the model must be determined with a higher standard than *Daubert*, and its focus on *methodology* shows that where, as here, a district court finds the methodology reliable, it cannot reject a model simply because it finds the ultimate conclusion unpersuasive.

Id. at 1047. And that is undisputedly true here of *all* of Defendants' criticisms of Dr. Rausser's model, thus making the claims capable of classwide resolution by a jury.

Finally, the district court's rejection of Dr. Rausser's admittedly "reliable" model cannot be reconciled with the classwide documentary evidence of how the conspiracy operated to affect all class members. The Surface Transportation Board ("STB") determined, on an industry-wide basis, 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); *Rail Fuel Surcharges*, 2007 WL 201205, at *4 (S.T.B. Jan. 26, 2007). The "railroads largely 'concede[d]" this basic fact during the STB proceedings. *Rail Freight*, 287 F.R.D. at 53. And the STB admonished Defendants for "mislabeling" this "broader revenue enhancement measure" in an unsuccessful attempt to blunt shipper outcry. *Rail Fuel Surcharges*, 2007 WL 201205, at *4. Studies by other government agencies have also confirmed that Defendant' fuel surcharges significantly over-recovered increases in the costs of fuel during the same period. S-322-25. Dr. Rausser's analyses build on these independent and trustworthy determinations of rampant overcharges. *Id.*

The district court's own ruling refutes Defendants' argument (Opp. 18) that

the documentary evidence does not show classwide application of fuel surcharges. As the court found: "Dr. Kalt's testimony that there was 'substantial deviation' from defendants' standard carload formulas … is not supported by the documentary record. … Defendants' own statements indicate that there were only a few exceptions to … across-the-board fuel surcharge coverage with respect to carload traffic." S-141 (internal citation omitted); *see also* S-262, 273-74, 350, 352-53, 355, 359-61, 363. Thus, in light of what the record establishes, a model in this case likely would be *unreliable* if it found no classwide effect from the conspiracy. The district court's rejection of Dr. Rausser's model despite the reliability of its methodology, its fit with Plaintiffs' case, and the documentary and other supporting classwide evidence (*see infra* Part III)—based on mere disagreement with the precise amount of a few of the model's outputs—goes far beyond the dictates of Rule 23 and clashes with courts nationwide, making this case appropriate for Rule 23(f) review.[3]

[3] Courts have consistently focused in the class certification analysis on reliability of methodology, not the expert's ultimate conclusions. *See, e.g.*, *In re Blood Reagents Antitrust Litig.*, MDL No. 09-2081, 2015 WL 6123211, at *22, *33 (E.D. Pa. Oct. 19, 2015); *In re Elec. Books Antitrust Litig.*, No. 11 MD 2293(DLC), 2014 WL 1282293, at *30 (S.D.N.Y. Mar. 28, 2014).

II. DEFENDANTS FAIL TO REFUTE THE DISTRICT COURT'S MANIFEST ERROR ON THE UNSETTLED QUESTION OF THE EFFECT OF POTENTIALLY UNINJURED CLASS MEMBERS ON CLASS CERTIFICATION

As to uninjured class members, Defendants again abandon the district court's reasoning, instead insisting (Opp. 13-14) that this Court's prior opinion held that *all* class members must be injured for class certification. This Court, however, never analyzed the uninjured class member issue, and its offhand reference to "all class members," 725 F.3d at 252, cannot be treated as a definitive holding. As the district court explained, "defendants never argued and the Court never considered whether plaintiffs needed to show injury to every last class member at the class certification stage." S-187. Even if Defendants were correct that this Court somehow *sub silentio* sided with the one court in the minority of a circuit split (*see* Pet. 11-12), that would only underscore the need for Rule 23(f) review because the district court would then have interpreted this Court's case law incorrectly on a critical issue of class action law.

Defendants fail to identify any legal support for the district court's "5% to 6%" test for uninjured class members (S-196) and fail to reconcile it with *Tyson*. Defendants argue (Opp. 14 n.5) that *Tyson* left the issue open, but while *Tyson* did not definitively decide the issue, its reasoning was instructive and cannot be ignored: "Whether [plaintiffs' proposed methodology] or some other methodology will be successful in identifying uninjured class members … is premature" if the defendant

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can later challenge uninjured class members in allocating damages. 136 S. Ct. at 1050.

In any event, Defendants fail to confront the fact that negative damages in the model do not mean a particular shipper was not impacted by the conspiracy—[redacted] (S-232). *See* Pet. 14-15. Defendants quibble (Opp. 16) over the exact amount of class-period revenue attributable to the supposedly uninjured class members. But they do not dispute that the supposedly uninjured class members were almost all very small shippers, who were *more* likely to be harmed by the conspiracy. Pet. 14-15.

III. DEFENDANTS FAIL TO REHABILITATE THE DISTRICT COURT'S MANIFEST ERROR IN ITS ANALYSIS OF CLASSWIDE IMPACT AND DAMAGES

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

Defendants do not dispute that the district court considered Dr. Rausser's model in isolation rather than examining whether the documentary evidence and model together show that classwide impact is susceptible to classwide proof. Nor do Defendants dispute that the district court's approach conflicts with other cases (Pet. 15-16), and with the basic requirement that, at class certification, the elements of the claim need only be capable of proof on a classwide basis. Instead, Defendants point (Opp. 18) to this Court's previous statement: "No damages model, no predominance, no class certification." *Rail Freight*, 725 F.3d at 253. Yet this

statement did not remotely suggest that the model must be considered in isolation, ignoring all other evidence, in deciding predominance.

Defendants also provide no legal justification for the district court's disregard of large amounts of evidence that Defendants asserted were inadmissible under 49 U.S.C. § 10706(a)(3)(B)(ii) ("§ 10706"). Defendants argue (Opp. 18-19) only that Plaintiffs waived their objection on this issue. Not so. The district court never said that it would ignore the § 10706 evidence, but rather only that "I'll see if I can decide this case without relying on them." S-368; *see id.* at S-374. Moreover, Plaintiffs clearly stated at the hearing and in their post-hearing brief that the court should consider the § 10706 evidence in determining whether Rule 23 was satisfied. S-369-71, 377-78; Dkt. 835 at 4-5.

As to the specific criticisms of the model, Defendants mistakenly argue (Opp. 19-20) that the "model cannot establish that all intermodal shippers in the class were harmed by supposedly more extensive coverage" or separate out unharmed intermodal shippers. But the district court found (S-142) that "Dr. Rausser persuasively argues that there was no need to create a separate model for coverage." Defendants assert (Opp. 19-20) that the district court found no evidence that Defendants conspired to apply surcharges more broadly to intermodal shipments during the class period, but in fact the district court addressed only "discounts or waivers" (S-172-175), *not* the breadth of application of the intermodal surcharges in

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the first place.

Finally, Defendants err in defending the district court's finding that, while some "legacy" shippers would face overcharges due to the conspiracy (S-181-82), Dr. Rausser supposedly did not quantify them adequately (S-179-181, 185-86). Contrary to Defendants' assertion (Opp. 19) [redacted] S-335-36 & Tbl.80. [redacted] *See id.*; S-306-07 & Fig.47; S-332 & Fig.37. Indeed, Defendants (like the district court) simply ignore the classwide evidence showing how the conspiracy impacted shipments under legacy contracts by enabling Defendants not to reduce surcharges on those shipments, as Defendants did before the class period but not thereafter. Pet. 16, 20-21; S-339-48.[4]

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

Defendants argue (Opp. 20) that the district court did not apply an improper

[4] Contrary to the district court's suggestion (S-6), an agreement among competitors not to change their prices violates antitrust law. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 221 (1940).

"certainty" standard for damages, but ignore the quotations from the district court using that exact word (S-208). Regardless, Defendants do not dispute that, to the extent the district court held that individualized damages inquiries alone preclude class certification, it manifestly erred. Pet. 21-22.

IV. DEFENDANTS FAIL TO REFUTE THAT THIS CASE WOULD BE THE "DEATH KNELL" FOR THE VAST MAJORITY OF THE CLASS

As Defendants do not dispute, the vast majority of class members have damages too small to proceed absent class certification. And while Defendants suggest (Opp. 21) that named Plaintiffs may raise class certification "if there is an appeal" after final judgment, they do not dispute that this prospect is highly uncertain. *See* Pet. 22 n.5.[5] Rule 23(f) review is thus warranted.

CONCLUSION

This Court should grant the petition for permission to appeal and reverse the decision below denying certification of the class.

[5] Even if this did not suffice for the "death knell" factor, review is warranted under the "confluence of multiple rationales" test expressed in *Rail Freight*. 725 F.3d at 250.

Respectfully submitted,

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I hereby certify that on December 1, 2017, I caused a true and correct copy of the foregoing Reply in Support of 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.

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