NOT YET SCHEDULED FOR ORAL ARGUMENT

United States Court of Appeals for the District of Columbia Circuit

No. 18-7010

IN RE: RAIL FREIGHT FUEL SURCHARGE ANTITRUST LITIGATION - MDL NO. 1869,

IN RE

(For Continuation of Caption See Inside Cover)

On Appeal from the United States District Court for the District of Columbia in Case No. 1:07-mc-00489-PLF, Honorable Paul L. Friedman, U.S. Senior District Judge.

PROOF BRIEF FOR PLAINTIFFS-APPELLANTS PUBLIC COPY – SEALED MATERIAL DELETED

MICHAEL D. HAUSFELD
SATHYA S. GOSSELIN
SWATHI BOJEDLA
HAUSFELD LLP
1700 K Street, NW, Suite 650
Washington, DC 20006
(202) 540-7200

MICHAEL P. LEHMANN
SETH R. GASSMAN
HAUSFELD LLP
600 Montgomery Street, Suite 3200
San Francisco, California 94111
(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
(212) 849-7000

March 26, 2018 *Counsel for Plaintiffs-Appellants*

DAKOTA GRANITE COMPANY, on behalf of itself and all others similarly situated; STRATES SHOWS, INC.; NYRSTAR TAYLOR CHEMICALS, INC., formerly known as Zinifex Taylor Chemicals, Inc.; DUST PRO, INC.; DONNELLY COMMODITIES INCORPORATED; US MAGNESIUM, LLC; CARTER DISTRIBUTING COMPANY; OLIN CORPORATION,

Plaintiffs-Appellants,

v.

BNSF RAILWAY COMPANY; CSX TRANSPORTATION, INC.; NORFOLK SOUTHERN RAILWAY COMPANY; UNION PACIFIC RAILROAD COMPANY,

Defendants-Appellees,

DOW CHEMICAL COMPANY; RAYONIER INC.,

Intervenors-Appellees.

CERTIFICATE OF PARTIES, RULINGS, AND RELATED CASES

I. Parties

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

II. Ruling Under Review

The ruling at issue in this case is the order of the district court denying Plaintiffs' motion for class certification. [Dkt.844("Opinion")]; *In re Rail Freight Fuel Surcharge Antitrust Litig.*, No. MC 07-0489 (PLF), --- F. Supp. 3d ---, 2017 WL 5311533 (D.D.C. Nov. 13, 2017) (Friedman, J.).

III. Related Cases

There was a prior appeal of an order granting class certification in this case, which this Court vacated and remanded. *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244 (D.C. Cir. 2013) (Brown, J., joined by Garland, C.J., and Sentelle, J.).

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the D.C. Circuit Rules and Rule 26.1 of the Federal Rules of Appellate Procedure, Plaintiffs state as follows:

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., was a Delaware corporation. Nyrstar Taylor Chemicals, Inc.'s parent corporation was 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 March 2018, 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.

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PRELIMINARY STATEMENT

This class action, which returns to this Court for a second time, alleges that the four largest U.S. freight railroads conspired to apply and enforce fuel surcharges that effectuated across-the-board rate increases on companies that ship products by rail. The Court's prior decision (per Brown, J., joined by Garland, C.J., and Sentelle, J.) vacated and remanded a 2012 district court order (Friedman, J.) certifying the class. The Court directed the district court to reconsider its Rule 23(b)(3) predominance finding in light of the Supreme Court's then-new decision in *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013), and in particular, to consider one attack on Plaintiffs' expert damages model as supposedly showing "false positive" damages for shipments governed by pre-conspiracy "legacy" contracts that fell outside the class definition.

On remand, the district court found "strong evidence of conspiracy and class-wide injury" as to the majority of affected rail shipments. The court also found that Plaintiffs' experts' opinions regarding classwide antitrust impact and damages were reliable and admissible under *Daubert*—including on the "legacy" contract issue. The court nonetheless denied class certification because it was not ultimately convinced, on the merits, by Plaintiffs' expert damages model. Interpreting this Court's post-*Comcast* mandate as imposing a new, higher, and distinct "reliability" requirement under Rule 23(b)(3), on top of the reliability requirement that governs

admissibility of expert evidence under *Daubert*, the district court found Plaintiffs' expert's damages model not "persuasive."

That ruling is legal error and misinterprets this Court's mandate. Nothing in the Court's prior decision raised a new bar requiring that reliable and admissible expert evidence surviving *Daubert* scrutiny also be found separately reliable under some higher standard, such that it actually "persuades" the judge at the certification stage before it can count toward the Rule 23(b) predominance inquiry. Rule 23(b)(3) requires only "a showing that *questions* common to the class predominate, not that those questions will be answered, on the merits, in favor of the class." *Amgen Inc. v. Connecticut Ret. Plans & Tr. Funds*, 568 U.S. 455, 459 (2013). Thus, Rule 23(b)(3) requires the predominance of issues that are ***capable*** of or ***susceptible*** to common proof at trial, not judicial assessment that the common proof is persuasive. Requiring more—at this stage—puts the cart before the horse and supplants the jury. The Supreme Court recently confirmed as much in *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1049 (2016). The district court's attempt here to predict the success of Plaintiffs' common proof at trial, rather than asking whether this litigation raises predominantly common questions of law or fact, is legally erroneous.

The district court independently erred in denying class certification because the class includes potentially uninjured (though identifiable) class members. The district court held, without supporting authority, that class certification is prohibited

if any more than 5-6% of class members might have escaped injury—regardless of the volume of commerce or number of transactions tied to those class members. In the district court's analysis, Plaintiffs exceeded that strict ceiling because 12% of shippers (virtually all small class members by volume, many with just a single shipment, and collectively accounting for *less than one-tenth of one percent of the shipments and the revenue at issue in this case*) exhibited negative damages under the expert model. That approach again has no foundation in Rule 23(b)(3), which concerns whether a claim is capable of or susceptible to classwide proof, not whether plaintiffs successfully proved their claims at the class-certification stage. And there was substantial classwide proof that all of the shippers, including those with negative damages in the model, were in fact harmed. The district court's approach is also at odds with *Tyson*, which clarified that potentially uninjured class members do not preclude class certification so long as they can be excluded from recovery if they ultimately fail to prove injury. That can be done here because the 12% of class members with negative damages in the model, and the amount of their purchases, are all known.

The district court's finding of reliable and admissible classwide evidence as to all elements of Plaintiffs' antitrust claims satisfies the predominance requirement—and compels class certification. For these reasons, this Court should reverse and order that the class be certified.

JURISDICTIONAL STATEMENT

The district court has jurisdiction under 28 U.S.C. §§ 1331 and 1337. Plaintiffs appeal the district court's October 10, 2017 decision denying class certification. On October 24, 2017, Plaintiffs timely filed a petition for permission to appeal under Rule 23(f). On December 20, 2017, this Court granted the petition. This Court has jurisdiction under 28 U.S.C. §1292(e) and Rule 23(f).

This Court's order granting review under Rule 23(f) stated that its decision was without prejudice to reconsideration by the merits panel. For the reasons stated in Plaintiffs' Rule 23(f) petition, there is a strong basis for Rule 23(f) review, as the certification decision below presents unsettled and fundamental issues of law relating to class actions; the district court manifestly erred in its analysis of classwide impact and damages; and denial of class certification would sound the death knell for most class members. *See In re Lorazepam & Clorazepate Antitrust Litig.*, 289 F.3d 98, 99-100, 105 (D.C. Cir. 2002). Reconsideration of this Court's permission to appeal after full merits briefing would provide no benefit and deny the parties, district courts, and future litigants this Court's guidance on legal issues of wide-ranging applicability.

QUESTIONS PRESENTED

1. Whether a district court may deny class certification under Rule 23(b)(3) based on its evaluation, on the merits, of expert evidence of classwide impact

and injury even though all elements of a claim are capable of classwide proof and the expert evidence is reliable and admissible under *Daubert*.

2. Whether a district court may deny class certification under Rule 23(b)(3) based on the supposed lack of injury to some class members under a damages model, notwithstanding other classwide evidence that all class members were injured and notwithstanding the ability to identify and exclude any uninjured class members if they fail to prove injury and damages.

STATEMENT OF THE CASE

In 2007, the plaintiff class (companies that ship products by rail) filed this action, alleging that the four largest U.S. freight railroads—Defendants BNSF Railway Co. ("BNSF"), CSX Transportation, Inc. ("CSX"), Norfolk Southern Railway Co. ("NS"), and Union Pacific Railway Corp. ("UP")—colluded to impose rate-based 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. [Dkt.324(2nd.Am.Compl.)¶54].

The named Plaintiffs include eight companies—ranging from Olin Corporation (with revenues exceeding $1 billion per year) to U.S. Magnesium and Nyrstar (both mid-sized businesses) to Donnelly Commodities (a small business)—that directly purchased from one or more Defendant rail freight services to which a rate-based fuel surcharge was applied during the class period, July 1, 2003 to

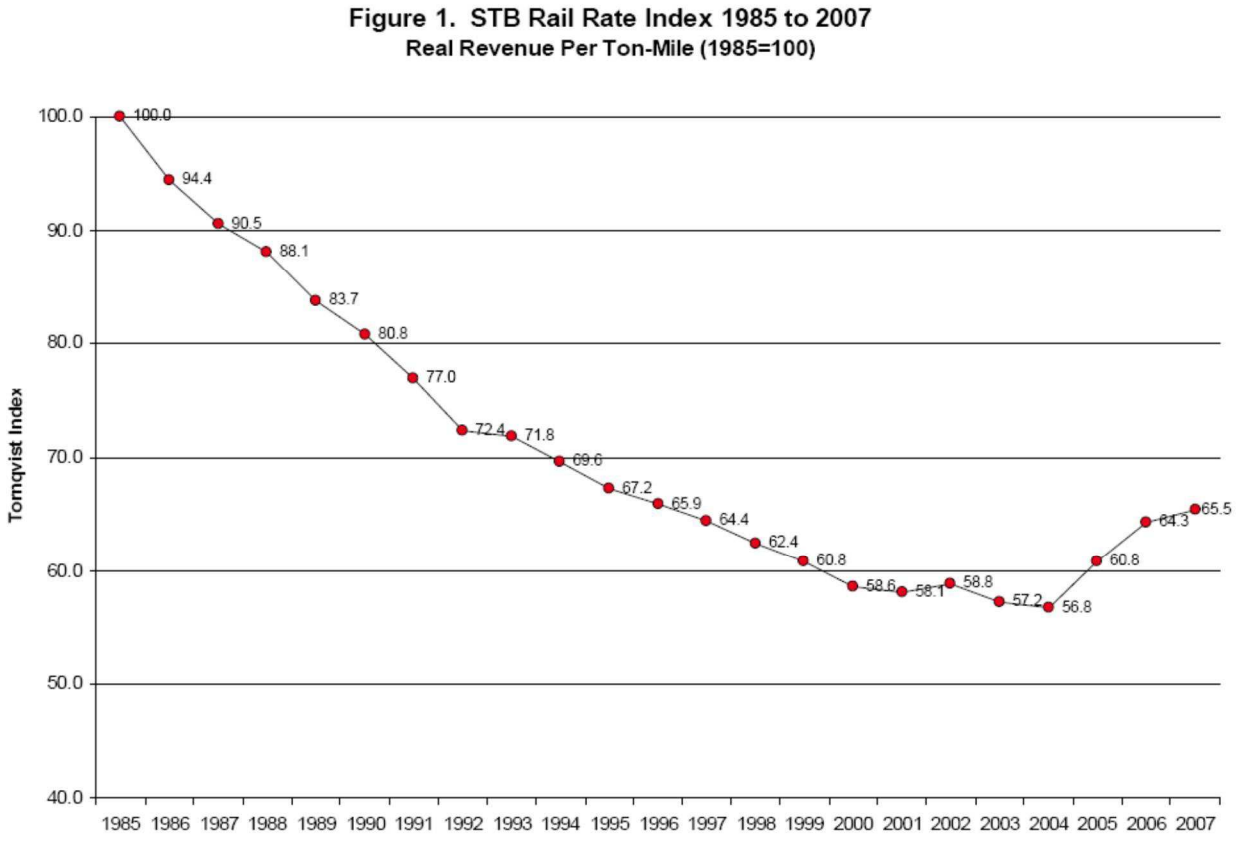
December 31, 2008 ("Class Period"). Plaintiffs seek to recover damages as a result of Defendants' alleged anticompetitive conduct.

A. The Alleged Conspiracy

Plaintiffs allege that, during the Class Period, Defendants conspired to apply and enforce "rate-based" fuel surcharges—*i.e.*, surcharges that use a percentage applied to the base rate for a shipment—as a means to impose an across-the-board rate increase on rail freight shipments, a result that would have been prohibitively difficult to achieve on a contract-by-contract basis. Because the base rate for a shipment contains fixed costs and a profit margin, and not just incremental costs, a fuel surcharge levied as a percentage applied to the base rate charges a shipper an amount [redacted] [Dkt.368.Corrected.Expert.Report.of.Gordon.Rausser.Ph.D.("Rausser.Class.Cert.Rpt.").at.68]. Thus, one of Defendant's executives internally referred to the fuel surcharge program as a "blatant general rate increase." [Dkt.407-4.Decl.of.Joseph.D.Hammond.("HD").Ex.30.at.NS_01000452].

Supporting the inference of conspiracy, Defendants' conduct changed markedly after the conspiracy began. In the decades before the Class Period, Defendants confronted a persistent, long-term decline in rail-freight rates. A study from the Surface Transportation Board ("STB") concluded that between 1985 and 2004, inflation-adjusted rail rates decreased in every year except one. [Dkt.337-

17.Decl.of.Sami.H.Rashid.("RD").Ex.177.at.1-2].



[Dkt.337-17.Decl.of.Sami.H.Rashid.("RD").Ex.177.at.2 fig.1]. Defendants noted [redacted] as a factor. [Dkt.337-16.RD.Ex.170.at.86-87]; *see also* [Dkt.337-10.RD.Ex.7.at.CSXFSC000199149]; [Dkt.406-26-27.HD.Ex.24.at.BNSF0574531].

Between 2000 and 2003, Defendants unilaterally attempted to increase revenues, including by imposing fuel surcharges tied to freight rates—and failed. [Dkt.337-16.RD.Ex.173.at.109]; [RD.Ex.170.at.31]; [Dkt.438-6.Decl.of.Steig.D.Olson.("OD").Ex.5.at.194-98]. During that time, Defendants did not coordinate attempts to impose fuel surcharges on their customers.

[RD.Ex.173.at.109]; [RD.Ex.170.at.31]; [OD.Ex.5.at.194-98]. Indeed, they blamed competition from their peers for their inability to impose and enforce fuel surcharges. [Dkt.337-10.RD.Ex.5.at.BNSF-0574617].

Without a conspiracy among Defendants during the pre-Class Period, fuel surcharges were subject to negotiation with shippers, were a source of fierce competition among the railroads, and often were not included in rail contracts as a result of customer resistance. [Dkt.407.HD.Ex.26.at.NS_010076082]; [Dkt.711-11.Decl.of.Kyle.R.Taylor.("TD").Ex.102.at.NS_010042204]; [Dkt.407-1.HD.Ex.27.at.NS_010072620]; [Dkt.337-17.RD.Ex.180]. Even when fuel surcharges were included in contracts, Defendants did not always enforce or collect them because of customer pushback. [Dkt.704-86.TD.Ex.81.at.CSXFSC000159790]; [Dkt.704-84.TD.Ex.79]. In this environment, Defendants' fuel surcharge coverage was [redacted] and even [redacted] [Dkt.409-3.HD.Ex.69.at.226 (CSX executive)]; *see also* [Dkt.409-2.HD.Ex.68.at.27, 29]; [Dkt.409-4.HD.Ex.70.at.24]; [Dkt.711-18.TD.Ex.109.at.34 fig.5]; [Dkt.704-96.TD.Ex.91.Expert.Reply.Report.of.Gordon.Rausser.Ph.D.("Rausser.Merits.Reply.Rpt.").at.177 & Figs.66-67]; [Dkt.704-98.TD.Ex.93.Expert.Report.of.Gordon.Rausser.Ph.D.("Rausser.Merits.Rpt.").at.150-51]; [Dkt.409.HD.Ex.66.at.28]. Notably, Defendants faced these challenges even

though the fuel surcharges at that time were only "theoretically billable" in that they often were not triggered, were triggered only at minimal levels, or could not be collected. [Dkt.408-19.HD.Ex.65.at.26]; [HD.Ex.66.at.28].

But all of that changed in early 2003. Just before the start of the Class Period, Defendants' senior executives convened a series of extraordinary meetings to discuss implementing agreed-upon, coordinated fuel surcharge programs and practices across their entire customer bases. At these meetings, Defendants' senior executives openly discussed [redacted] ([Dkt.337-18.RD.Ex.210]) and their desire to [redacted] ([Dkt.337-18.RD.Ex.208.at.BNSF-FSC000643]) and develop an [redacted] on fuel surcharges ([Dkt.337-12.RD.Ex.59.at.NS001000424]). Defendants documented, moreover, their [redacted] that [redacted] ([Dkt.337-18.RD.Ex.204.at.NS001000361]) and that [redacted] ([Dkt.511-8.OD.Ex.6.at.UPFSC_0616652]).

In March 2003, [redacted] ([Dkt.406-19.HD.Ex.17.at.UPFSC.0075386; Dkt.411-33.HD.Ex.154]), [redacted] ([RD.Ex.210]), [redacted] ([Dkt.337-

11.RD.Ex.26.at.CSXFSC000084489]). Similarly, [redacted] ([RD.Ex.208.at.BNSF-FSC000643]), [redacted] ([HD.Ex.68.at.59-63]), [redacted] ([Dkt.406-21.HD.Ex.19]).

Following these meetings, Defendants all made changes to implement significantly more aggressive carload[1] fuel surcharge programs and enforce all of their fuel surcharge programs in a more uniform manner, without the discounts, waivers, and offsets that were the hallmarks of earlier competition. [RD.Ex.26]; [Dkt.337-11.RD.Ex.38.at.UPFSC0000840]; [Dkt.337-16.RD.Ex.171.at.97]; [Dkt.337-10.RD.Ex.2.at.BNSF-0511834]; [Dkt.337-12.RD.Ex.57.at.BNSF-FSC000486]; [Dkt.337-11.RD.Ex.47.at.UPFSC.0183975-76, 82]; [Dkt.337-11.RD.Ex.50.at.NS001000354]; [Dkt.337-18.RD.Ex.213.at.NS00100012-13]; [Dkt.337-12.RD.Ex.77.at.NS_013001655].

Thereafter, Defendants' standard carload fuel surcharge percentages moved in virtual lockstep throughout the Class Period:

[1] "Carload" rail freight traffic travels only by rail, whereas "intermodal" rail freight traffic "travels by rail and one other mode of transportation such as truck or ship." [Opinion.at.7].

[Rausser.Class.Cert.Rpt.at.60 fig.16]. Defendants also similarly aligned their intermodal fuel surcharge programs. [Rausser.Merits.Reply.Rpt.at.170-72].

The new fuel surcharge programs, once enforced, generated significantly more revenue. Indeed, NS executives internally acknowledged that the new carload fuel surcharge program [Dkt.406-16.HD.Ex.14.at.NS_010026785]. Meanwhile, BNSF referred to the new programs as a "profit-center." [Dkt.711-31.TD.Ex.122.at.BNSF-0691138].

Defendants also acknowledged that their new fuel surcharge programs faced

[redacted] ([HD.Ex.14.at.NS_010026785]), and that [redacted] ([Dkt.407-5.HD.Ex.31.at.BNSF-0574216]). Accordingly, in addition to implementing new *formulas*, Defendants implemented policies that their carload and intermodal fuel surcharges would be synchronized, rigidly enforced, and applied to as many freight shippers as possible. *Supra* at 9-10.

As a result of these coordinated efforts, Defendants enjoyed record revenues during the Class Period—reversing the historic downward trend in rail freight rates identified by the STB. [Rausser.Class.Cert.Rpt.at.77 fig.23]; [RD.Ex.177.at.2 fig.1]; *see also* [Dkt.337-15.RD.Ex.150.at.NS010002883]; [Dkt.337-13.RD.Ex.99.at.BNSF-0458203]; [Dkt.337-15.RD.Ex.146.at.BNSF-0033701]; [Dkt.337-16.RD.Ex.165.at.16]; [Dkt.337-16.RD.Ex.166.at.20]; [Dkt.337-16.RD.Ex.167.at.19]; [Dkt.337-15.RD.Ex.148.at.CSXFSC000182751]. And for each Defendant, the delta between gross rail rates and reported fuel costs expanded dramatically during the Class Period. [Rausser.Class.Cert.Rpt.at.65-68 figs.19-22].

B. STB Proceeding

In 2006, as Defendants' fuel surcharges soared, the STB launched regulatory proceedings to evaluate the reasonableness of Defendants' use of rate-based fuel surcharges. Numerous rail freight shippers submitted comments to the STB, describing the new fuel surcharge programs as "mandated on a 'take it or leave it

basis'" ([Dkt.410-8.HD.Ex.94.at.14]; *see also* [HD.Ex.94]; [Dkt.410-11.HD.Ex.97]), and that they had become "'non-negotiable,' enacted by unilateral decree" ([Dkt.410-9.HD.Ex.95.at.3]; *see also* [HD.Ex.95]).

The STB determined that Defendants' rate-based fuel surcharges stood "virtually no prospect of reflecting the actual increase in fuel costs for handling the particular traffic to which the surcharge is applied," and that the programs constituted "a misleading and ultimately unreasonable practice." [Dkt.337-15.RD.Ex.147.at.6-7].[2] Indeed, the STB found that "there is no real correlation between the rate increase and the increase in fuel costs for that particular movement to which the surcharge is applied." [RD.Ex.147.at.7]. The STB therefore prohibited the use of rate-based fuel surcharges—but only as to the small amount of ***rate-regulated*** traffic within the STB's jurisdiction; the decision did not prevent the continuation of such fuel surcharges on the more than 80 percent of rail freight shipments that are ***not*** rate-regulated. These rate-***un***regulated shipments are at issue here.

C. The Original Class-Certification Decision

In its 2012 decision certifying the class, the district court found ample

[2] Other governmental studies confirm that the Defendants' fuel surcharges substantially over-recovered their actual incremental fuel costs during the Class Period. *See, e.g.*, [Dkt.408-6.HD.Ex.52.at.ix, 272]; [Dkt.408-7.HD.Ex.53.at.2-3, 8-9, 11-14, 19-24].

common proof of antitrust impact. The court found that, while the "pre-class period fuel surcharges often were not triggered or applied, and when they were they were small," the fuel surcharges Defendants put in place in the spring of 2003 "were of a different breed," as they were "more aggressive and yielded more revenue than earlier programs." *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 287 F.R.D. 1, 48 (D.D.C. 2012). Moreover, the district court found that, during the Class Period, Defendants' fuel surcharges were "standardized and uniformly applied across all or virtually all shippers—regardless of whether such shippers were legacy … shippers." *Id.* at 49. Furthermore, the district court found "no evidence of widespread discounting of base rates in exchange for application of fuel surcharges" once the Class Period began, and that "any such discounting in the record is an anomaly that does not preclude a finding of predominance." *Id.* at 28. The district court noted too that, "even when, in the rare case, base rates were discounted, … the allegedly conspiratorial surcharges were the starting point for negotiations." *Id.* at 60-61 (internal citations omitted).

The district court also found, based on the damages model of Plaintiffs' expert, Dr. Gordon Rausser, that "impact and damages are capable of proof at trial with common evidence." *Id.* at 28. In reaching this conclusion, the district court found that Dr. Rausser's models "set forth persuasive, workable multivariate regressions that give rise to an inference of causation (the most any regression

analysis can be expected to do) ….” *Id.* at 68. The court also found that “plaintiffs have satisfied their burden of showing by a preponderance of the evidence that ‘they will be able to measure damages on a class-wide basis using common proof.’” *Id.* at 72.

This Court granted review under Rule 23(f). *See In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244 (2013). This Court vacated and remanded, holding that the district court had erred in failing to consider whether Dr. Rausser’s finding of damages for so-called “legacy” shippers constituted “false positives” that impugned the reliability of the model. *Id.* at 254-55. In its decision, this Court understood legacy shippers as those that “were bound by rates negotiated before any conspiratorial behavior was alleged to have occurred,” and therefore could not have been injured by the conspiracy. *Id.* at 252-53. The Court vacated and remanded for the district court to consider the Supreme Court’s then-new decision in *Comcast*, and to consider in particular the legacy-shipper issue. *Id.* at 255.

D. The District Court’s Decision Denying Class Certification On Remand

On remand, the district court denied class certification. [Opinion.at.1-207.] The district court again found “strong,” non-expert “evidence of conspiracy and class-wide injury.” [Opinion.at.2]. According to the district court, “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." [Opinion.at.131]. The district court further found that, during the Class Period, Defendants had imposed fuel surcharges "in lockstep," and applied them "to as many customers as possible" as a "mandate" across business segments. [Opinion.at.132-33].

Moreover, the district court determined that nearly every opinion Dr. Rausser offered satisfied the requirements of reliability and fit under *Daubert*—including those concerning the models of classwide impact and damages. [Opinion.at.32-58]. The district court also determined that the opinions of two additional Plaintiffs' experts—Drs. James McClave and Jeffrey Leitzinger, whose work corroborated Dr. Rausser's—satisfied *Daubert*. [Opinion.at.80-90, 98-102].

Despite these findings of strong non-expert evidence of classwide injury and reliability of the expert damages model under *Daubert*, the district court denied class certification because it deemed Dr. Rausser's opinions insufficiently "reliable" on the merits to satisfy Rule 23(b)(3). The district court ruled that, beyond assessing reliability under *Daubert*, it was also required by this Court's mandate to undertake a separate inquiry into the "reliability" of the classwide evidence under a "rigorous" Rule 23(b)(3) analysis. [Opinion.at.106-08]. In the district court's view, this analysis required it to determine whether Plaintiffs' expert evidence was ultimately

convincing on the merits and in so doing to resolve the battle of the experts. *See, e.g.*, [Opinion.at.54, 107]. In conducting this analysis, the court concluded that Dr. Rausser's regression model was insufficiently "persuasive" because "(1) a large portion of the class traffic reflected in his damages model was intermodal traffic—not carload traffic—that was subject to competitively negotiated fuel surcharge formulas established during the pre-class period and which never changed; [and] (2) his damages model finds unexplainable overcharges with respect to legacy shippers …." [Opinion.at.2]; *see also* [Opinion.at.165-82]. The district court also 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. [Opinion.at.200-05].

In addition, the district court found that "there are too many uninjured shippers in the class who cannot be identified or sufficiently explained to satisfy the 'all or virtually all' standard for predominance under Rule 23(b)(3)." [Opinion.at.2]; *see also* [Opinion.at.182-200]. The district court ruled that the 12% of the class members with negative damages in Dr. Rausser's model exceeded the 5-6% threshold it deemed, without authority, to be the maximum permissible number for uninjured class members. [Opinion.at.189-93].

SUMMARY OF ARGUMENT

This Court should vacate and remand, with direction to the district court to

certify the class. Plaintiffs put forward admissible and reliable common evidence sufficient to prove all elements of their antitrust claim. Both grounds for the district court's denial of class certification are legally erroneous.

I. The district court first erred in denying class certification on the ground that Plaintiffs' expert damages model is supposedly not "reliable" or "persuasive" on the merits. The court recognized that there was admissible, common evidence that—if credited by the jury—could prove injury and damages for the entire class. But it ruled that expert evidence offered on behalf of a class, however reliable under *Daubert*, must be disregarded in the Rule 23(b)(3) predominance inquiry if it does not convince the district court that it is correct on the merits. The district court's addition of a persuasiveness requirement for classwide expert evidence at the certification stage is legally baseless and improperly takes the evaluation of classwide injury and damages away from the jury.

Rule 23(b)(3) does not create a requirement of persuasiveness on the merits for class certification, instead referring only to the predominance of common issues. Moreover, *Tyson* held that a challenge to classwide evidence, including statistical expert evidence, must follow the same rules as a challenge to evidence in a non-class case. This holding follows directly from the Rules Enabling Act, which prohibits the creation of a higher bar for a class (rather than a single plaintiff) to prove an antitrust violation.

Applying the correct test for predominance—which requires only the predominance of issues ***capable*** of or ***susceptible*** to classwide proof and examines the totality of classwide evidence—the class here should be easily certified. Plaintiffs put forward voluminous, classwide, non-expert (*i.e.*, documentary and lay testimonial) evidence that Defendants conspired to set rate-based fuel surcharges and applied those fuel surcharges in a manner that was designed to (and did) have classwide effects. Plaintiffs also submitted the expert opinion of Dr. Rausser, corroborated by two other experts, including a regression model of damages that the district court found reliable and admissible under *Daubert*. Addressing the question that had been the focus of this Court's earlier remand, the district court found reliable Dr. Rausser's opinions explaining that the model accurately showed damages for "legacy" shippers because the conspiracy had altered the competitive environment for ***all*** shippers, including shippers under legacy contracts. Moreover, most supposed "legacy" shipments were not legacy shipments at all, or had provisions that caused them to be affected by the conspiracy. Thus, the results of Dr. Rausser's damages model are fully aligned with Plaintiffs' theory of liability, in compliance with *Comcast*.

The classwide non-expert evidence, when coupled with admissible expert evidence, amply demonstrates the predominance of common issues of fact and law. The district court found as much in its 2012 certification order, and changed course

on remand based only on the mistaken view that it was now required to determine not just reliability under *Daubert* but also whether Dr. Rausser's opinions were convincing on the merits before re-certifying the class. Indeed, the district court's numerous errors and omissions of key evidence in evaluating the persuasiveness of Dr. Rausser's model under its new, elevated "reliability" test highlights exactly why such a test is improper. Under the correct test, there is no basis to deny certification, and this Court should reverse and order the class certified.

II. The district court independently erred in holding that, if any more than 5-6% of class members might not have been injured (based on the results of a classwide damages model), class certification is prohibited. There is no legal basis for that arbitrary dividing line, and in any event, the district court erred in holding that the 12% of shippers exhibiting negative damages in Dr. Rausser's model escaped injury.

First, the supposedly uninjured class members represented less than one-tenth of one percent of the shipments and revenue at issue in this case. Any dispute over this tiny fraction of shipments cannot predominate over the common issue of injury for virtually all of the shipments and revenue.

Second, there was no legal basis for the district court to find that approximately 12% of the class was not injured merely because those class members exhibited negative damages under Dr. Rausser's model. The district court recognized (and Defendants' expert even conceded) that negative damages in the

model did not disprove injury. The district court's finding that most of these entities nevertheless escaped injury cannot be reconciled with Rule 23, which asks only whether the claims are ***capable*** of or ***susceptible*** to classwide proof. Here, they are because there is substantial classwide evidence (quantitative and qualitative) that the supposedly uninjured class members were actually injured and that the negative damages in the model were the result of statistical noise and limited data points, given that the 12% were almost all very small shippers.

Finally, under *Tyson*, if uninjured class members can be identified and excluded from recovery after trial, they are no impediment to class certification. Here, the supposedly uninjured class members can easily be excluded from recovery if they do not prove injury because they (and the amounts of their shipments) are already identified. There is no legal basis for preventing certification of a class simply because some small, known subset of class members might ultimately not succeed at trial.

ARGUMENT

This Court reviews a district court's denial of class certification for abuse of discretion. "Nonetheless, it remains [this Court's] responsibility to review those rulings carefully and to rectify any erroneous application of legal criteria and any abuse of discretion." *Wagner v. Taylor*, 836 F.2d 578, 586 (D.C. Cir. 1987); *see also Hartman v. Duffey*, 19 F.3d 1459, 1471 (D.C. Cir. 1994). "A district court by

definition abuses its discretion when it makes an error of law." *Koon v. United States*, 518 U.S. 81, 100 (1996). The district court found all prerequisites to class certification satisfied here except for predominance under Rule 23(b)(3). [Opinion.at.1-2, 102-200]. As set forth below, the predominance determination is erroneous as a matter of law and therefore necessarily an abuse of discretion.

I. THE DISTRICT COURT ERRED IN RULING THAT THE PREDOMINANCE REQUIREMENT OF RULE 23(b)(3) WAS NOT SATISFIED DESPITE THE EXISTENCE OF EVIDENCE "CAPABLE OF" OR "SUSCEPTIBLE TO" PROVING CLASSWIDE INJURY AND DAMAGES AT TRIAL

Predominance requires that "questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). The district court ruled that Rule 23(b)(3) imposes two separate "reliability" requirements on expert evidence: not only must the evidence be admissible under *Daubert*, but it must clear the *additional* hurdle of being "persuasive" to the court on the merits. In particular, the court ruled that, "at a minimum, reliability under Rule 23 is a higher standard than reliability under *Daubert*." [Opinion.at.108]. And the court ultimately found that Dr. Rausser's expert damages opinions—although they reflected a reliable methodology that fit the facts and were rooted in common, classwide evidence—did not permit a finding of the existence of classwide proof because the district court was not persuaded enough by those opinions. *See, e.g.*, [Opinion.at.170-71] (finding Plaintiffs'

evidence and theory of why the model shows damages for intermodal shippers "[un]persuasive"); [Opinion.at.175] ("Dr. Rausser's opinion that the change in the economic environment affected all legacy shippers during the class period is unpersuasive."); [Opinion.at.177] ("[T]he Court also is not persuaded by Dr. Rausser's legacy decomposition analysis."); [Opinion.at.182] ("[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.").

The district court's newly created "reliability" test, interpreting Rule 23(b)(3) to require that classwide evidence, however common, reliable, and admissible, also be "persuasive" on the merits, has no basis in the text of Rule 23(b)(3), this Court's prior mandate in this case, or any other precedent. The ruling adopting and applying this unsupported test requires this Court's reversal.

A. Rule 23(b)(3) Requires Only That The Elements Be *Capable* Of Or *Susceptible* To Proof With Admissible, Common Evidence

The Supreme Court has defined "common" issues under Rule 23(b)(3) as those "capable of classwide resolution." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). In other words, "a common question is one where the same evidence will suffice for each member to make a prima facie showing [or] the issue is susceptible to generalized, class-wide proof." *Tyson*, 136 S. Ct. at 1045 (internal quotation marks omitted). In contrast, "[a]n individual question is one where

members of a proposed class will need to present evidence that varies from member to member." *Id.* (internal quotation marks omitted). Thus, "[t]he predominance inquiry asks whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues." *Id.* (internal quotation marks omitted).

The district court's decision requiring that common evidence, however reliable and admissible, must also be persuasive at class certification to show predominance is erroneous for several reasons.

First, Rule 23(b)(3) says ***nothing*** about an independent test of persuasiveness for evidence to count toward predominance, and the Supreme Court has expressly rejected any such merits-related addition to Rule 23. Rule 23(b)(3) requires only that common ***questions*** of law or fact predominate; it does not suggest that the judge should attempt to ***answer*** those common questions on the merits in advance of trial. *See Amgen*, 568 U.S. at 460. And the Supreme Court has held that predominance does not turn on whether an issue will actually be proven classwide, but rather on whether an issue is "capable" of or "susceptible" to classwide proof. *Tyson*, 136 S. Ct. at 1045; *Wal-Mart*, 564 U.S. at 350.

Furthermore, *Tyson* expressly rejected the idea of a higher or different standard for the reliability of expert evidence at class certification. As the Court explained: "A representative or statistical sample, like all evidence, is a means to

establish or defend against liability. Its permissibility turns not on the form a proceeding takes—be it a class or individual action—but on the degree to which the evidence is reliable in proving or disproving the elements of the relevant cause of action." *Tyson*, 136 S. Ct. at 1046 (citing Fed. R. Evid. 401, 403, and 702). Applying this principle, the Court rejected a challenge to a class action based on supposed "statistical[] inadequa[cy]" of admissible expert analysis, reasoning that an attack on an expert's analysis as "unrepresentative or inaccurate" is a "defense" that "is itself common to the claims made by all class members." *Id.* at 1047. Likewise, here, ***all*** of the district court's concerns about the persuasiveness of Dr. Rausser's model are themselves issues that can be resolved on a classwide basis by a jury, and thus present no barrier to predominance.

The district court failed to address *Tyson*'s reasoning on this issue. Instead, the court relied on the idea that "[t]his 'rigorous analysis' of whether plaintiffs have established predominance is certainly a more in-depth inquiry than required under *Daubert*." [Opinion.at.108]. But that rigorous analysis is confined to "the prerequisites of Rule 23[]." *Wal-Mart*, 564 U.S. at 350-51. "Merits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied." *Amgen*, 568 U.S. at 459. Thus, Rule 23(b)(3) does not permit (let alone require) a

rigorous analysis of whether the evidence of predominance ***persuades*** the judge, only whether the Rule 23(b)(3) elements of common ***questions*** are satisfied.

Second, it would violate the Rules Enabling Act to subject otherwise reliable and admissible evidence to an additional persuasiveness requirement simply because it is classwide evidence (instead of individual evidence). "Rule 23's requirements must be interpreted in keeping … with the Rules Enabling Act, which instructs that rules of procedure 'shall not abridge, enlarge or modify any substantive right.'" *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 613 (1997) (quoting 28 U.S.C. § 2072(b)). And *Tyson* held that this principle prevents courts from treating classwide evidence any differently than individual evidence: "In a case where representative evidence is relevant in proving a plaintiff's individual claim, that evidence cannot be deemed improper merely because the claim is brought on behalf of a class. To so hold would ignore the Rules Enabling Act[] …." 136 S. Ct. at 1046.

Yet that is exactly what the district court did here. The *only* reason Plaintiffs' expert damages evidence was deemed inadequate is that it did not survive a higher reliability bar than that imposed by *Daubert*. And that hurdle would not exist in an individual action, making it substantially more difficult to prove an antitrust claim for a class than for an individual plaintiff, in violation of the Rules Enabling Act.

Third, the district court improperly usurped the jury's role by making the judge the exclusive arbiter of whether the classwide proof will succeed at trial. As

Tyson explained, "[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. For instance, whether a statistical analysis using an average for the class "is probative" as to each class member "is the near-exclusive province of the jury." *Id.* And the Supreme Court further held that "[t]he District Court could have denied class certification on this ground only if it concluded that no reasonable juror could have believed" in the persuasiveness of the evidence. *Id.* (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-52 (1986), a Rule 50 case that did not involve a class action). In short, the same summary-judgment standard for every case (*i.e.*, the no-reasonable-juror test) applies to class actions; the class-certification analysis provides no excuse for a judge to supplant the jury's function by determining the persuasiveness of the evidence on the merits.

Finally, this Court's instruction to look at the "reliab[ility]" of Dr. Rausser's model was not an invitation to the district court to decide for itself the persuasiveness of the model—or any other evidence. The only time this Court used the word "reliable" in describing the necessary analysis, 725 F.3d at 252-53, it cited a case that was not a class action and that considered reliability solely in the *Daubert* context. *See Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1056-57 (8th Cir. 2000). The Court thus did not adopt any separate, second "reliability" requirement in addition to the reliability required under *Daubert*.

Moreover, this Court's judgment of vacatur and remand was focused on the district court's failure to consider at all why Plaintiffs' expert damages model found damages for legacy shipments. 725 F.3d at 255 ("[T]he district court never grappled with the argument concerning legacy shippers."). To be sure, this Court also noted that there should be a "hard look at the soundness of statistical models that purport to show predominance." *Id.* But the Court never suggested that this "hard look" required a judicial determination of persuasiveness on the merits before treating the evidence as relevant to the predominance inquiry. In any event, the district court's interpretation of this Court's opinion is inconsistent with *Tyson*, which unequivocally held that the test of evidentiary reliability does not differ between class and individual actions. Rule 23(b)(3)'s only additional test for classwide evidence is that of ***predominance***, not ***persuasiveness***.

Other courts also have rejected the district court's approach of going beyond *Daubert* analysis to separately decide, at class certification, the persuasiveness of class plaintiffs' expert evidence. For instance, the Seventh Circuit has interpreted *Tyson* to mean that, "where there is no *Daubert* challenge, the district court may rely on expert evidence for class certification." *Kleen Prods. LLC v. Int'l Paper Co.*, 831 F.3d 919, 922 (7th Cir. 2016); *see also Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 812-14 (7th Cir. 2012). The Second Circuit (in a pre-*Tyson* decision) is in accord. *See In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 135-

36 (2d Cir. 2001) (Sotomayor, J.). Moreover, the Eighth Circuit has suggested that even a truncated analysis under *Daubert* suffices on class certification. *See In re Zurn Pex Plumbing Prods. Liability Litig.*, 644 F.3d 604, 614 (8th Cir. 2011); *see also, e.g.*, *Beltran v. InterExchange, Inc.*, 2018 WL 526907, at *7 (D. Colo. Jan. 24, 2018).[3]

The district court addressed ([Opinion.at.20]) only one case that, in its view, might govern: *In re Processed Egg Prods. Antitrust Litig.*, 81 F. Supp. 3d 412 (E.D. Pa. 2015) ("*Eggs*"), which also happened to assess the "reliability" of Dr. Rausser. *Eggs* proposed that "reliability" of expert evidence means one thing for *Daubert* and another for Rule 23, even while recognizing that "the line between *Daubert* and the ultimate issues might prove somewhat illusory." *Id.* at 416. Ultimately, *Eggs* denied the *Daubert* challenge as to Dr. Rausser and later certified the class, rejecting

[3] There is some language from other circuits suggesting that the inquiry into the reliability of expert evidence at the class-certification stage should be more stringent than *Daubert* scrutiny. *See Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 982 (9th Cir. 2011); *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 322-23 (3d Cir. 2009). However, those opinions pre-date *Tyson* and do not address the above arguments regarding why a higher bar than *Daubert* is impermissible. Accordingly, this Court should reject the approach of these courts. In any event, even these circuits did not hold, as the district court did here, that a court should dismiss expert evidence of common proof in deciding predominance because the court deems the evidence unpersuasive. Instead, they held that admissible expert testimony does not necessarily show that an issue is capable of classwide proof where the district court fails ***entirely*** to address a criticism of the plaintiffs' expert opinions. *See Ellis*, 657 F.3d at 984; *Hydrogen Peroxide*, 552 F.3d at 322.

arguments—similar to those raised by Defendants here—"premised on the notion that variation of damages between and among class members defeats predominance …." *In re Processed Egg Prods. Antitrust Litig.*, 312 F.R.D. 171, 202-03 (E.D. Pa. 2015).

B. Under The Correct Analysis, The Class Should Be Certified Because Antitrust Impact And Damages Are Capable Of Or Susceptible To Proof On A Classwide Basis

Applying the correct standard of Rule 23(b)(3) predominance, without the erroneous addition of an additional "persuasiveness" hurdle for expert evidence, Plaintiffs readily satisfied Rule 23(b)(3)'s predominance requirement.

1. Extensive Documentary And Testimonial Evidence Shows Classwide Impact

Plaintiffs presented an enormous amount of classwide evidence of a conspiracy among Defendants to impose and enforce previously unsuccessful rate-based fuel surcharges across their customer bases, without regard to customer type. *See supra* at 6-13. The district court accordingly found (and recognized that Defendants did not dispute) that conspiracy was capable of proof on a classwide basis. [Opinion.at.117-18].

Even putting to one side Plaintiffs' expert evidence, the remaining evidence provides a rich source of common proof of classwide impact, showing that the fuel surcharges applied to—and therefore impacted—the entire class. From the start, common impact—the imposition of rate-based fuel surcharges [redacted]

[redacted]—was embedded in the architecture of the conspiracy. *See supra* at 9-10. Anything less than uniform application would have exposed the pretext of fuel-cost recovery as false.

The evidence shows that, in the wake of their 2003 meetings, *supra* at 9-13, Defendants started aggressively enforcing their existing fuel surcharges, and each Defendant issued policies mandating that their rate-based fuel surcharges now would be applied to all new shipping contracts. Defendants' own contemporaneous statements confirm this fact:

- BNSF: "Every Contract should include a fuel surcharge clause. All new and all renewing contract negotiations should have a fuel surcharge as the goal." [Dkt.337-18.RD.Ex.223]; *see also* [Dkt.337-18.RD.Ex.224].
- UP: "As a company policy, all contracts without fuel language will have fuel language upon renewal. This is a mandate by UP management, I have no choice." [Dkt.337-12.RD.Ex.72].
- CSX: [redacted] [Dkt.337-13.RD.Ex.86.at.CSXFSC000000574].
- NS: [redacted]

[redacted] [Dkt.406-13.HD.Ex.11.at.1]; *see also* [Dkt.409-17.HD.Ex.83.at.19].

Defendants also implemented strict policies against granting exceptions to the standard fuel surcharges, which applied irrespective of shipper type or the date of any contract. As a CSX executive stated: [redacted] [Dkt.406-24.HD.Ex.22]; *see also* [HD.Ex.69.at.191]; [Dkt.337-15.RD.Ex.141.at.CSXFSC000086200]; [Dkt.337-13.RD.Ex.82.at.NS_010034040].

The documents and lay witness testimony also show Defendants' intent to apply fuel surcharges uniformly and their dramatic success in doing so, even as fuel surcharges soared to nearly 40% of base rates. *See supra* at 9-13, 31. During the Class Period, Defendants monitored their progress toward 100% fuel surcharge coverage. [Dkt.337-14.RD.Ex.121.at.BNSF-0031238-39]; [Dkt.337-14.RD.Ex.113]; [Dkt.337-14.RD.Ex.111]; [RD.Ex.86.at.CSXFSC000000574]. By June 2006, [redacted]. [Dkt.409-13.HD.Ex.79.at.66-68]. As BNSF itself stated: "FSC [Fuel Surcharge] Adherence … In summary business units have done an excellent job in

adherence. Virtually no exceptions." [Dkt.406-22.HD.Ex.20.at.BNSF-0048723]. NS similarly stated in April 2005 that there were "relatively few publications with no FSC, nonstandard FSC or blends of FSCs." [Dkt.406-23.HD.Ex.21.at.NS_007000489].

The evidence also shows that Defendants needed to minimize any exceptions because the success of their conspiracy turned on their collective adherence to the agreed-upon fuel surcharges and related policies. Indeed, strict application of the agreed-upon prices is an essential part of any price-fixing conspiracy. *See* Phillip E. Areeda (late) & Herbert Hovenkamp, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶2022 (4th ed. 2017); *see also United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 213 (1940) ("The aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition.") (citation and quotation marks omitted).

Furthermore, any limited negotiations over fuel surcharges that did take place started from the fuel surcharges set by Defendants' conspiracy. Defendants admitted as much. *See, e.g.*, [Dkt.409-19.HD.Ex.85.at.25-26] (Deposition of BNSF executive Marc Allen: "Q. ... [Y]ou started the negotiation with a given [BNSF] customer with the $1.25 HDF standard fuel surcharge program as the starting point? A. That's correct."); *see also* [HD.Ex.85.at.27]; [Dkt.410-2.HD.Ex.88.at.55]. And evidence that Defendants conspired to maintain an inflated base price from which all

negotiations began is an acceptable method by which to establish classwide injury-in-fact. *See, e.g.*, *Kleen Prods.*, 831 F.3d at 929; *In re Urethane Antitrust Litigation*, 768 F.3d 1245, 1254 (10th Cir. 2014).

2. Extensive Expert Evidence Shows Classwide Impact And Damages

In addition to the non-expert evidence of common impact, Plaintiffs produced extensive expert evidence establishing classwide injury and damages. Dr. Rausser found that the structure of the industry made it conducive to price-fixing, and that Defendants' conduct was consistent with conspiracy, as opposed to actions in their own economic self-interest. [Class.Cert.Hr'g.Pls.Ex.1.at.2]; [Rausser.Merits.Rpt.at.5-8]. He further constructed a common-factors regression analysis to determine "whether the Defendants' rail freight prices are based on factors that are common to all shipments," which revealed that seven factors explain 75% of the variation in rail freight prices and "confirms that it is possible for a regression model to control for factors that determine freight rates in assessing what portion of the higher prices observed in the Class Period are attributable to the alleged conspiracy." [Rausser.Merits.Rpt.at.113]; [Rausser.Merits.Rpt.at.159-60]; [Class.Cert.Hr'g.Tr.(Sept.27,2016).at.366]. He also found that Defendants' transaction data reflect that Defendants applied the "Fuel Surcharge strategy across the board and that the prices paid by Class Members increased as a result." [Rausser.Merits.Rpt.at.113].

Next, Dr. Rausser constructed a damages model incorporating 100% of Defendants' transaction data, accounting for the seven common factors plus several others to account for demand and supply forces, and isolating the effect of the conspiracy. *See* [Class.Cert.Hr'g.Tr.(Sept.27,2016).at.369, 372-73]; [Rausser.Merits.Rpt.at.164, 168-69, 187]; [Dkt.711-1.Supplemental.Reply.Expert.Report.of.Gordon.Rausser.Ph.D.("Rausser.Supp.Reply.Rpt.").at.22]; [Class.Cert.Hr'g.Pls.Ex.1.at.10-13]. This analysis incorporates over 50 million transactions during the 3½-year benchmark (*i.e.*, pre-class) period, and over 40 million transactions during the Class Period—and it achieves an R-squared of 86%, meaning that the regression is able to explain and account for 86% of the variation in freight rates (which economists and econometricians recognize reflects an extremely high explanatory power for a regression model). [Rausser.Merits.Reply.Rpt.at.249]; [Rausser.Supp.Reply.Rpt.at.22]; [Class.Cert.Hr'g.Tr.(Sept.27,2016).at.368, 370-71]; [Class.Cert.Hr'g.Pls.Ex.1.at.11]. After running his damages model, Dr. Rausser discovered "a structural break in the relationship between fuel prices and freight rates, coincidental with the start of the conspiracy," which is yet further evidence of classwide impact. [Rausser.Merits.Rpt.at.170]. In all, Dr. Rausser's damages model revealed an average weekly overcharge of 9.8% during the Class Period. [Rausser.Supp.Reply.Rpt.at.47]; [Rausser.Merits.Rpt.at.249 & Tbl.103].

In the face of Defendants' challenges, Dr. Rausser conducted 50 tests that each confirmed the reliability and robustness of the model by showing that changing variables and shipper populations in various ways did not meaningfully change the results (*i.e.*, deviation from prices consistent with the common-factors analysis). *See* [Class.Cert.Hr'g.Pls.Ex.1.at.12]; [Class.Cert.Hr'g.Tr.(Sept.27,2016).at.375-76]. In addition, Dr. Leitzinger, an expert in economics and econometrics, confirmed that Dr. Rausser's analysis was reasonable, reliable, free of bias, and employed widely accepted regression techniques. [Dkt.760.Expert.Report.of.Jeffrey.J.Leitzinger.Ph.D. ¶¶39-58, 111-13]. Dr. McClave, an expert in statistics and econometrics, further supported Dr. Rausser's analysis and performed his own analysis showing that all or virtually all shippers were injured during the Class Period (including those that exhibited negative damages). [Dkt.704-69.TD.Ex.64.Expert.Report.of.James.T.McClave.Ph.D.at.6, 13-17].

3. Plaintiffs' Evidence Of Classwide Impact And Damages Satisfies The Correct Predominance Test

Plaintiffs' extensive non-expert and expert evidence of antitrust impact and damages more than suffices to show that all elements of the antitrust claim are "capable of" or "susceptible to" classwide proof. All of the evidence discussed above is common to the class, and Plaintiffs rely upon no individualized evidence. Moreover, there is no question that this common evidence—or even a subset—could

be used to prove antitrust conspiracy, impact, and damages to the class at trial. The district court's own reasoning confirms as much.

First, the district court acknowledged that the "documentary evidence" of "class-wide injury" was "strong." [Opinion.at.2]. In particular, the district court expressly rejected the idea that there were any meaningful exceptions to Defendants' classwide imposition of rate-based fuel surcharges, much as it did in its initial class-certification decision. [Opinion.at.137]; *see In re Rail Freight Fuel Surcharge Antitrust Litig.*, 287 F.R.D. 1, 28, 49, 57-60 (D.D.C. 2012) (standardized fuel surcharges "were applied uniformly, to all or virtually all class members" and "any examples of discounting are, at best, anomalies that do not preclude a finding of predominance").[4] The district court also found, in its original class-certification decision, that "during the class period defendants uniformly began their negotiations with their standard fuel surcharge program." *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 287 F.R.D. at 50; *see also id.* at 61. The district court made no contrary finding in its remand decision on class certification.

While the district court recognized the strength of the documentary and testimonial evidence, standing alone, as proof of classwide impact, it mistakenly disregarded that evidence in its predominance analysis of whether impact was

[4] This Court did not question those findings in its decision in the prior appeal, and the district court reaffirmed them on remand. [Opinion.at.166].

susceptible to classwide proof. Instead, it examined the damages model in isolation, treating any supposed flaw in the model as fatal to predominance. This approach was seemingly a response to this Court's statement in the prior appeal: "No damages model, no predominance, no class certification." 725 F.3d at 253. But this statement—inviting the district court to examine, for the first time, Defendants' legacy-shipper contention—did not mandate that the district court consider the model in isolation and ignore all other evidence in determining predominance.

There is no legal or logical basis for refusing to consider whether documentary evidence and a model ***together*** constitute sufficient classwide evidence to show that a claim is capable of or susceptible to classwide determination. Rule 23(b)(3) asks only whether common questions of law or fact predominate. In complex antitrust cases, common proof at trial is typically a mix of documentary evidence, lay-witness testimony, and expert testimony, and the predominance inquiry, properly understood, is a holistic evaluation of *all* of the evidence plaintiffs propose to use. *See, e.g.*, *Kleen Prods.*, 831 F.3d at 927; *In re High-Tech Emp. Antitrust Litig.*, 985 F. Supp. 2d 1167, 1217 (N.D. Cal. 2013). Indeed, the non-expert evidence is especially significant here given that it is probative of conspiracy ***and*** classwide impact. *See supra* at 6-13, 31.

Second, the district court's *Daubert* ruling confirmed the reliability and admissibility of the expert opinions that Plaintiffs would use (in conjunction with

other non-expert evidence) to prove classwide injury and estimate damages at trial. In the face of dozens of challenges by Defendants' experts, the district court held that nearly every opinion Dr. Rausser offered satisfied the requirements of reliability and fit under *Daubert*. [Opinion.at.17-19, 21-58].[5] In particular, the district court held that Dr. Rausser's opinion that the rail freight industry was susceptible to collusion was well supported and reliable. [Opinion.at.35-38]. The district court also admitted "the subsections of Dr. Rausser's analysis that illustrate[d] whether the transactional data demonstrate, for example, widespread application of fuel surcharges or a lack of discounting to shippers." [Opinion.at.39]. The district court further found that "Dr. Rausser's common factors model is reliable under *Daubert* and Rule 702." [Opinion.at.43-44].

The court likewise found reliable under *Daubert*, and therefore admissible, Dr. Rausser's damages model because his regression analysis and use of a class period variable is a "widely accepted method to compute damages in price-fixing cases." [Opinion.at.47-48]; *see also* [Opinion.at.49]. The district court rejected all of Defendants' challenges to Dr. Rausser's methodology, and found ***no*** basis to dispute the data Dr. Rausser used or his methods of analyzing the data.

[5] The only exceptions are statements from Dr. Rausser that "come[] too close" to saying that a conspiracy in fact occurred ([Opinion.at.34-35]), and statements regarding "defendants' intent or whether the fuel surcharge programs were pretextual" ([Opinion.at.39]).

[Opinion.at.47-49]. The court also determined that the two additional Plaintiffs' experts whose work corroborated Dr. Rausser's—Drs. McClave and Leitzinger—satisfied *Daubert*. [Opinion.at.80-90, 98-102].

The district court further found that Dr. Rausser's opinions explaining why his model accurately calculates damages for legacy shipments—addressing the argument about "false positives" flagged by this Court—were reliable and admissible under *Daubert*. [Opinion.at.51-58]. In particular, Dr. Rausser opined that the conspiracy, once underway, altered the competitive environment for ***all*** shippers, even those with pre-existing contracts, because Defendants had now agreed not to compete on fuel surcharges and thus shippers could no longer push back and achieve discounts, waivers, or non-enforcement. As the district court explained, this opinion was supported by evidence that "fuel surcharges were only 'theoretically billable' in the pre-class period because shippers often resisted fuel surcharge application through negotiation and waivers," and "'[i]t is reasonable to expect that, in an environment of competition, Defendants would have yielded to resistance from shippers (including legacy shippers) and reduced or offset the dramatically increasing FSC rates.'" [Opinion.at.52]. In addition, Dr. Rausser conducted a "legacy decomposition" analysis, showing that, of the so-called legacy shipments identified by Defendants as shippers who "were bound by rates negotiated before any conspiratorial behavior was alleged to have occurred," *In re Rail Freight Fuel*

Surcharge Antitrust Litig., 725 F.3d at 252, "80.4% … were not legacy shipments at all." [Opinion.at.55]. Among this huge group of misidentified shipments were: (1) contracts under which shippers had to pay the fuel surcharge in place ***at the time of shipment*** (*i.e.*, fuel surcharges in fact resulting from the conspiracy); (2) contracts that employed fuel surcharges created during the alleged conspiracy or conspiracy-formation period; and (3) contracts that actually fell within the class definition. [Opinion.at.54-55]; *see also* [Dkt.704-1.Supplemental.Expert.Report.of.Gordon.Rausser.Ph.D.("Rausser.Supp.Rpt.").at.37-38, 71 & Tbl.28]. Furthermore, the district court noted that Defendants' expert "Dr. Kalt does not specifically challenge Dr. Rausser's legacy decomposition analysis; nor did he replicate Dr. Rausser's analysis." [Opinion.at.56]. Ultimately, the district court held that "Dr. Rausser's methods for his legacy decomposition analysis are reliable under Rule 702. Dr. Rausser's methodology is sound …." [Opinion.at.57].

Because the district court held that Dr. Rausser's model was sufficiently reliable and admissible to go to a jury, there could be a trial based entirely on classwide documentary and expert evidence. The district court's denial of class certification, nonetheless, turned on its mistaken view that it was required to evaluate Dr. Rausser's model in isolation, divorced from all other record evidence, and discern, on the merits, whether it was convinced of the persuasiveness of the model's

results by a preponderance of the evidence. In the absence of these two legal errors, predominance is plainly satisfied, as the district court found when it originally certified the class.

C. The District Court Erred In Finding The Common Evidence "Unpersuasive"

The impropriety of the district court's new "reliability" test is vividly illustrated by the flaws in the court's analysis. Invading the province of the jury, the court committed multiple errors and critical omissions in identifying three supposed flaws in Plaintiffs' expert's damages model.

1. The District Court Erred In Finding The Model Unpersuasive As To Intermodal Shippers

The district court's first "issue[] precluding a finding of predominance" is its finding that Dr. Rausser's model is unpersuasive because the model reveals overcharges on intermodal shipments (as distinct from carload shipments), and some Defendants did not change the formulas they used to calculate the intermodal fuel surcharge rates during the Class Period. [Opinion.at.165]. The court agreed that the conspiracy impacted some intermodal shipments and questioned only whether the model accurately reported the magnitude of that impact. This analysis fails to render the model unreliable under any plausible meaning of that standard.

First, the district court's analysis of intermodal shippers fails to consider key documentary evidence. In particular, the district court doubted the magnitude of

damages arising from increased ***enforcement*** of fuel surcharges and a decrease in ***waivers*** of fuel surcharges during the Class Period. [Opinion.at.169-71]. The district court, however, mistakenly disregarded the argument and documentary evidence that Defendants aligned their intermodal fuel surcharges and also conspired to apply fuel surcharges more broadly during the Class Period than they had during the pre-Class Period. That is, during the Class Period, Defendants sought to ***add*** fuel surcharges to intermodal contracts and to intermodal shipments to which Defendants had not previously applied a fuel surcharge. *See supra* at 10-11; *see also* [HD.Ex.68.at.26-29]; [RD.Ex.223]; [HD.Ex.20.at.BNSF-0048723].

Moreover, the district court did not even mention the extensive documentary evidence of Defendants' extraordinary meetings in 2003, at which their senior executives met and discussed fuel-surcharge [redacted] on fuel surcharges. *See supra* at 9-10. The district court refused to consider this evidence, for any purpose, given Defendants' motion to exclude it 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. [Opinion.at.35 n.5]. The district court determined that it "need not reach this issue [of admissibility] now" because it could decline certification "without relying on any of these documents." *Id.* But a deferred admissibility challenge is no reason to subtract that common evidence from the Rule

23(b)(3) analysis; whether Plaintiffs can utilize this common proof at trial is an open question, and thus it must be considered as part of the predominance inquiry.[6]

Second, Dr. Rausser explained that Defendants aligned (and enforced) their standard intermodal fuel surcharges during the Class Period, consistent with the larger alleged conspiracy. [Rausser.Merits.Reply.Rpt.at.170-72]. Even Defendants' expert admitted that all four Defendants' intermodal fuel surcharge [redacted] during the Class Period. [Rausser.Merits.Reply.Rpt.at.171 (quoting Corrected Expert Report of Joseph P. Kalt ¶200 (Mar. 1, 2013))]. And to the extent that alignment reflected an agreement among competitors not to change their prices, that too violates antitrust law and presents a common source of antitrust injury. *See, e.g.*, *Socony-Vacuum*, 310 U.S. at 221.

Third, the district court erred in focusing on the absence of data confirming the precise degree to which intermodal shippers received fuel-surcharge discounts during the pre-Class Period that they also would have received during the Class

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[6] The evidence the district court refused to consider also showed that Defendants discussed (but collusively decided never to implement) "programmatic changes" that would have *reduced* fuel surcharge programs across the board and provided relief to legacy and intermodal shippers ([Rausser.Supp.Rpt.at.11-14]; [HD.Ex.17]; [HD.Ex.154]); [redacted] ([Dkt.711-12.TD.Ex.103]); and that Defendants' conspiratorial communications about fuel-surcharge programs, application, and enforcement were never limited in any way that might exclude legacy and intermodal shippers as targets ([Rausser.Supp.Rpt.at.11-14]).

Period absent the conspiracy (although to a greater degree). [Opinion.at.176-77]. That data was not available, and its unavailability to provide independent confirmation of the model's conclusions does not render the model unreliable because that model is based on methodology the court accepted and other experts confirmed. That is especially true given the documentary evidence discussed above.

Confirming what the documentary record reveals, Dr. Rausser presented data analysis showing an astounding increase in surcharge coverage on Defendants' intermodal revenue during the Class Period. For example, [redacted]. [Rausser.Merits.Rpt.at.150-51 & fig.47]. Dr. Rausser presented similar analyses as to the other Defendants' intermodal fuel surcharge coverage. *Id.* In short, even if it were true that Defendants did not conspire on their intermodal formulas (and it is not), Defendants also colluded, successfully, to ***apply*** those formulas to more intermodal shippers and shipments than they had during the pre-Class Period. The district court's failure to consider this evidence of dramatically increased coverage, which likewise explains why the model reveals overcharges for intermodal shippers, starkly illustrates the misguided nature of the district court's effort to usurp the jury's role and to determine the persuasiveness of classwide evidence at class certification.

2. The District Court Erred In Finding The Model Unpersuasive As To Legacy Shippers

The district court also found Dr. Rausser's model "unpersuasive" because it was not accompanied by a separate "quantitative" analysis detailing which specific legacy shippers would have received waivers absent a conspiracy, and in what amounts. [Opinion.at.175-77]. That objection likewise misapprehends the transactional information available to Dr. Rausser and goes well beyond the inquiry this Court outlined in the previous appeal. This Court's 2013 vacatur and remand found error in the district court's failure to address, at all, Defendants' argument that Dr. Rausser's damages model might be flawed because it exhibited positive damages for legacy shipments, defined as shipments under contracts "bound by rates negotiated before any conspiratorial behavior was alleged to have occurred." 725 F.3d at 252-53.

On remand, Plaintiffs provided the explanation: the conspiracy reshaped the competitive environment for all shippers, regardless of contract vintage, and furthermore, most of the contracts that Defendants had previously identified as "legacy" contracts actually did not fit that definition. *See supra* at 19, 40-41. And the district court upheld Dr. Rausser's expert analysis of these points as reliable and admissible on *Daubert* grounds. *See supra* at 16, 19, 40-41.

The court nonetheless found the explanations unpersuasive on the merits, based on its disregard of or failure to consider arguments and evidence that might

well persuade a jury. The court accepted Dr. Rausser's competitive-environment explanation as consistent with economic theory, particularly because fuel surcharges rose dramatically during the Class Period. [Opinion.at.177]. Even Defendants' expert admitted that [redacted] [Dkt.704-95.TD.Ex.90.at.264, 266-67]. The court nonetheless rejected this explanation because Dr. Rausser did not precisely quantify these occurrences. [Opinion.at.175, 177]. But the district court did not appreciate the limitations in the historical data—[redacted] [Dkt.707-5.Decl.of.Timothy.O'Mara.Ex.4.at.192].

Dr. Rausser's analysis to one side, the district court disregarded Plaintiffs' powerful documentary evidence attesting to the impact of the conspiracy on legacy shipments. This evidence showed that Defendants engaged in across-the-board programmatic *reductions* to fuel surcharges on legacy shipments before the Class Period, which they halted abruptly during the Class Period despite mounting customer resistance. For instance, in January 2003, just before the alleged

conspiracy, BNSF fretted that [redacted] [Dkt.406-28.HD.Ex.25.at.BNSF-0328866]. Shortly thereafter, 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. [Dkt.704-77.TD.Ex.72.at.BNSF-0572406]. At the time, BNSF explained its decision to reduce its fuel surcharges as needed [redacted] *Id.* BNSF's competitors, meanwhile, worried about the precedent set by these deep discounts. [Dkt.704-73.TD.Ex.68]; [Dkt.704-4.TD.Ex.2.at.UPFSC0129813]. Within weeks, [redacted], and BNSF never again implemented an across-the-board discount during the Class Period. [Rausser.Supp.Rpt.at.13-14]. Similarly, [redacted]. [Rausser.Supp.Rpt.at.12-13]. Any of these programmatic changes would have reduced prices for thousands of legacy shippers, in one fell swoop.

The district court ignored this evidence altogether, as well as Dr. Rausser's reliance on it for his opinion that the damages model accurately exhibits damages for legacy shipments. [Rausser.Supp.Rpt.at.6-15]; [Rausser.Supp.Reply.Rpt.at.41]; [Class.Cert.Hr'g.Tr.(Sept.27,2016).at.378-80]. The district court similarly ignored

that the STB's finding of an "unreasonable practice" applied equally to legacy shippers, who complained in written submissions about the abrupt shift in the competitive environment. Finally, the district court 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.

As to Dr. Rausser's legacy decomposition analysis, once again the district court accepted that there were, in fact, thousands of contracts designated as "legacy" that were adopted or amended during the Class Period (and thus would have been impacted by the conspiracy), but quibbled with Dr. Rausser's exclusion of certain legacy shipments for which there was not enough information to conduct this analysis. The district court overlooked entirely Dr. Rausser's point that his percentages ***understated*** the problem with Defendants' designation of legacy shipments, as shown when he performed a more accurate analysis for the one Defendant, NS, where such analysis was possible. [Rausser.Supp.Rpt.at.38-39]. The district court accepted this point in support of its *Daubert* ruling ([Opinion.at.55-56]), but inexplicably ignored it in deciding that the numbers were unpersuasive.

Furthermore, the court agreed that over 37% of the so-called legacy shipments did not fit the "legacy" category because the fuel-surcharge provisions applying to those shipments had been imposed by Defendants during or after the formation of

the conspiracy. [Opinion.at.178]. Nevertheless, the court faulted Dr. Rausser for his analysis that 42% of legacy shipments moved under contract provisions requiring the shipper to pay the fuel surcharge in existence at the time of the shipment as opposed to a fuel surcharge specifically agreed upon before the alleged conspiracy began. [Opinion.at.179]. Specifically, the court objected that Dr. Rausser had not also determined "how many of these legacy contracts were in fact adjusted" to allegedly conspiratorial fuel surcharges. [Opinion.at.181]. But Dr. Rausser performed the analyses that were possible given the available data, and explained why the specific fuel-surcharge formulas the district court focused on were impacted by the conspiracy. [Rausser.Supp.Reply.Rpt.at.82-84]. Moreover, the district court's desired analysis was unnecessary given Dr. Rausser's bedrock opinion that Defendants had mischaracterized these purported legacy shipments as categorically immune from the effects of the conspiracy.

The district court also ignored the critical point that, even if the prices were not adjusted upward, absent conspiracy, competition likely would have forced them downward (whether as discounts, rollbacks, or other relief), as they had been previously. The collusive elimination of discounting violates the antitrust laws just like any other type of price-fixing. *See Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 648 (1980); *Socony-Vacuum*, 310 U.S. at 221. As described *supra* at 6-9, there is compelling evidence of Defendants' across-the-board fuel-surcharge reductions

in the months preceding the conspiracy, which stopped by mid-2003.

In sum, the district court's finding that Dr. Rausser's model was unreliable again illustrates the impropriety of the test he applied. The supposed problem with damages for legacy shipments was that they could not have been adversely affected by the conspiracy. But Dr. Rausser showed unequivocally through Defendants' own data that more than 80% of legacy shipments were miscategorized, and he explained, with considerable support from the documentary evidence, why he would expect injury to the few remaining legacy contracts as well. The district court's finding that this explanation was unpersuasive on the merits exceeded its authority under Rule 23(b)(3) and improperly usurped the province of the jury.

3. The District Court Erred In Finding The Evidence Of Classwide Damages Unpersuasive

Because of its misgivings about the persuasiveness of Dr. Rausser's model with respect to intermodal and legacy shipments, the district court also held that it could not be "certain" that the damages calculated for carload shippers were accurate. [Opinion.at.204]. That was legal error for the same reasons discussed above: having survived *Daubert*, the model was classwide evidence that should not have been disregarded in the predominance inquiry. It was also erroneous because courts have long recognized that certainty in antitrust damages (the perfect reconstruction of a "but-for" world without collusion) is impossible—and unnecessary. *Comcast*, 569 U.S. at 35 ("Calculations need not be exact") (citing

Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 563 (1931)); *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 legal error. *See, e.g.*, *Tyson*, 136 S. Ct. at 1045; *Rail Freight*, 725 F.3d at 252; *Kleen Prods.*, 831 F.3d at 929.

II. THE DISTRICT COURT ERRED IN DENYING CLASS CERTIFICATION BASED ON THE PRESENCE OF KNOWN, POTENTIALLY UNINJURED CLASS MEMBERS

A. Potentially Uninjured Class Members Do Not Preclude Class Certification If They Can Be Excluded From Recovery

The possibility that the conspiracy ultimately did not injure some small fraction of class members provides no basis to deny class certification. The Supreme Court granted certiorari in *Tyson* to decide this very issue, where a 3,300-member class included hundreds of uninjured persons. 136 S. Ct. at 1043-44, 1049. But the petitioner ultimately "concede[d]" that the presence of uninjured class members does not necessarily preclude 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.

Moreover, even before *Tyson*, nearly all circuit courts to consider the issue recognized that a small percentage of potentially uninjured class members does not preclude class certification. As the Seventh Circuit explained, in a class action challenging dishwashers with an alleged defect that caused mold, if some class members "did not experience a mold problem, … that is an argument not for refusing to certify the class but for certifying it and then entering a judgment that will largely exonerate Sears …." *Butler v. Sears, Roebuck & Co.*, 702 F.3d 359, 362 (7th Cir. 2012), *reinstated on remand*, 727 F.3d 796, 799 (7th Cir. 2013) (reiterating the same point on remand post-*Comcast*); *see also DG ex rel. Stricklin v. Devaughn*, 594 F.3d 1188, 1198 (10th Cir. 2010) ("[C]ertification requirements neither require all class members to suffer harm ... nor Named Plaintiffs to prove class members have suffered such harm."); *Mims v. Stewart Title Guar. Co.*, 590 F.3d 298, 308 (5th Cir. 2009) ("Class certification is not precluded simply because a class may include persons who have not been injured by defendant's conduct.") (citation omitted). Only one circuit court has taken the absolutist view that all class members must be able to prove injury at the class-certification stage. *See Avritt v. Reliastar Life Ins. Co.*, 615 F.3d 1023, 1034 (8th Cir. 2010).

No circuit court has yet considered the impact of *Tyson* on the uninjured-class-member issue, but district courts after *Tyson* have recognized that the existence of uninjured class members is not an impediment to class certification so long as class

members who do not succeed in proving injury can be excluded from recovery. *See Ridgeway v. Wal-Mart Stores, Inc.*, 2016 WL 4529430, at *13 (N.D. Cal. Aug. 30, 2016); *Cope v. Let's Eat Out, Inc.*, 319 F.R.D. 544, 552 (W.D. Mo. 2017).

This Court also has not resolved the issue. While the previous opinion in this case made a passing reference to "all class members" suffering injury, 725 F.3d at 252, it did not directly address the uninjured-class-member issue. 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." [Opinion.at.183]. Thus, it cannot be treated as a definitive holding. And even if Defendants were correct that this Court somehow *sub silentio* sided with the one court in the minority of a circuit split, *Tyson* now forecloses any such test.

B. The District Court's Arbitrary 5-6% Threshold For Uninjured Class Members Has No Legal Basis

While correctly rejecting any rule that "all class members" must prove injury at the class-certification stage, the district court erred as a matter of law in holding that "5% to 6% constitutes the outer limits of a *de minimis* number of uninjured class members" for satisfying predominance. [Opinion.at.192]. Nothing in Rule 23(b)(3) justifies an arbitrary cap of 5-6%, especially where (as here) the purportedly uninjured class members represent a vanishingly small number of shipments and revenues (less than one-tenth of one percent). Assessing Rule 23(b)(3) predominance is "not bean counting." *Butler*, 727 F.3d at 801.

As *Tyson*'s guidance suggests, if uninjured class members can be identified at the end of a case, even post-trial, then their presence does not pose an issue for class certification so long as they do not eventually recover damages after trial. 136 S. Ct. at 1049-50. Pre-*Tyson* decisions expressly recognized as much. *See, e.g.*, *Butler*, 702 F.3d at 362; *In re Nexium Antitrust Litig.*, 777 F.3d 9, 25, 35-36 & n.32 (1st Cir. 2015) (upholding certification over dissent's complaint that certified class could include 24,000 uninjured members). This principle aligns with Rule 23(b)(3)'s predominance requirement, which asks not what percentage of class members will ultimately succeed in proving their claims, but whether the claims are ***capable*** of proof predominantly on a classwide basis. 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. This predominance analysis is "more [] qualitative than quantitative …." 2 William B. Rubenstein, NEWBERG ON CLASS ACTIONS § 4:50, at 1997 (5th ed. 2012)).

C. The Presence Of Supposedly Uninjured Class Members Here Does Not Preclude Predominance

Common issues predominate in this litigation despite the presence of a small number of supposedly uninjured class members. This group represents a vanishingly small number of shipments and revenues. A jury should decide whether they were

in fact injured, given the evidence that small shippers were in fact harmed by the conspiracy, and if not, they may be excluded from recovery upon remand.

First, Dr. Rausser showed that the supposedly uninjured class members accounted for 0.04% of Defendants' total Class Period revenues and merely 5,000 out of more than 5 million Class Period shipments ([Rausser.Supp.Reply.Rpt.at.115])—less than one-tenth of one percent of the shipments and the revenue at issue in this case. Any dispute over the impact of Defendants' conspiracy as to that tiny fragment of the class cannot predominate over the common issue of whether the conspiracy harmed all other class members, who represent nearly all of the shipments and revenue at issue in this litigation.

The district court recognized that the supposedly uninjured class members represented a miniscule amount of shipments and revenue. [Opinion.at.198-99]. It nonetheless believed that only the number of ***class members*** matters, despite Rule 23(b)(3)'s requirement of only the predominance of common "questions." [Opinion.at.198]. Thus, the district court's reasoning flowed entirely from its legal error in holding that there is a hard ceiling of 5-6% on potentially uninjured class members.

Second, the district court failed to examine the issue of uninjured class members through the lens of classwide proof. Instead, the district court made a factual finding that approximately 12% of the class was actually uninjured because

they had negative damages under Dr. Rausser's model. [Opinion.at.196]. As discussed *supra* at 22-30, the district court erred in turning the Rule 23(b)(3) predominance inquiry into a merits assessment.

Even apart from that error, the district court improperly disregarded substantial classwide proof that class members with negative damages under the model were, in fact, injured. Dr. Rausser and Dr. McClave explained—and this fact is undisputed—that the shippers with negative damages in the model almost all have very small numbers of shipments (many had two shipments or fewer during the Class Period). As Dr. Rausser explained, [redacted] [Rausser.Supp.Reply.Rpt.at.18-19, 106-08]. The admissible expert testimony and "strong" documentary evidence on this issue warrants evaluation by the jury at trial.

Moreover, as Dr. Rausser explained, the damages model shows negative damages for these shippers because of expected statistical noise from limited data points (here, often as few as one or two shipments). [Rausser.Supp.Reply.Rpt.at.18-19, 106-08]; [Class.Cert.Hr'g.Tr.(Sept.28,2016).at.611-18]. If a shipper has only one or two shipments during the entire Class Period, then the probability is greater (as a matter of statistics) that normal statistical noise will affect the model's treatment of those shipments, and that the shipper will more likely end up with

overall negative damages than a shipper with many shipments. [Rausser.Supp.Reply.Rpt.at.107-08]; [Class.Cert.Hr'g.Tr.(Sept. 28, 2016).at.614-18]. Thus, Dr. Rausser concluded that [redacted] [Rausser.Supp.Reply.Rpt.at.19]. Even Defendants' own expert (Dr. Kalt) admitted that the presence of negative damages for individual class members does not mean [redacted] [Dkt.711-21.TD.Ex.112.at.280-81].

Dr. McClave's analysis corroborated Dr. Rausser's conclusion. For instance, when Dr. McClave applied the model to shippers with at least two transactions, [redacted] of those class members (representing [redacted] of Class Period revenue) had at least one positive overcharge. [Dkt.711-2.Supplemental.Expert.Report.of.James.McClave.Ph.D.("McClave.Supp.Rpt.").at.17-23]; [Class.Cert.Hr'g.Pls.Ex.2.at.McClave-17]. Dr. McClave conducted a corroborating analysis—entirely ignored by the district court—that showed that [redacted]. [McClave.Supp.Rpt.at.25-26]. This finding is [redacted] [McClave.Supp.Rpt.at.25]. Indeed, it defies common sense and economic reality

that the shippers with fewest shipments and thus the least leverage would not be impacted by the conspiracy.

The district court recognized that some of the shippers with negative damages in the model were likely injured and that negative damages in the model could be "[p]rediction error." [Opinion.at.196]. The court also did not find that *any* of the relevant expert testimony from Dr. Rausser or Dr. McClave on prediction error failed to satisfy *Daubert* or was otherwise inadmissible. Nonetheless, the district court rejected their opinions on the merits. [Opinion.at.197] ("Even accounting for prediction error, the Court finds that there is no principled way to conclude that all — or even substantially all — of the roughly 2,000 class members for whom the model shows no injury were in fact injured."); [Opinion.at.200] ("[T]he Court concludes that plaintiffs have failed to establish that all or virtually all class members were injured by the alleged conspiracy.").

This was error because, again, Rule 23(b)(3) does not ask whether the plaintiffs have successfully proven injury to all (or all but 5-6%) of class members, but rather whether their claims are ***capable*** of classwide proof. *See, e.g.*, *Kohen v. Pac. Inv. Mktg. Co., LLC*, 571 F.3d 672, 678 (7th Cir. 2009); *see also Amgen*, 568 U.S. at 466. As the Seventh Circuit has explained, "[t]his distinction"—between those who might have been harmed and those who categorically *cannot* have been harmed—"is critical for class certification purposes." *Messner*, 669 F.3d at 825.

"[I]f a proposed class consists largely (or entirely, for that matter) of members who are ultimately shown to have suffered no harm, that may not mean that the class was improperly certified but only that the class failed to meet its burden of proof on the merits." *Id.* (internal citation omitted). Thus, where (as here) all class members could have been harmed and have put forward classwide evidence to support their injury, a court cannot deny class certification simply because it is not convinced by the underlying evidence.

Finally, even if these purportedly uninjured class members ultimately cannot prove injury and damages with classwide evidence, the solution would not be to bar class certification but rather to deny them recovery at trial. Moreover, the district court could also exclude these particular shippers (all of which are identified) from the class or create a sub-class of them. *Butler*, 702 F.3d at 362-63 ("Should it turn out as the litigation progresses that there are large differences in the mold defect among the five differently designed washing machines, the judge may wish to create subclasses; but that possibility is not an obstacle to certification …."); *Suchanek v. Sturn Foods, Inc.*, 764 F.3d 750 (7th Cir. 2014) ("[I]n circumstances such as these, involving minor overbreadth problems that do not call into question the validity of the class as a whole, the better course is not to deny class certification entirely but to amend the class definition as needed to correct for the overbreadth.") (quotation marks omitted).

For all these reasons, the district court's ruling on uninjured class members also warrants reversal.

CONCLUSION

This Court should reverse, or, in the alternative, vacate and remand, the decision below denying certification of the class.

Dated: March 26, 2018

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, New York 10010
Telephone: (212) 849-7000

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 12,997 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). This brief also 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 the brief has been prepared in a proportional typeface using Microsoft Word 2013 in 14-point Times New Roman font.

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

CERTIFICATE OF SERVICE

I hereby certify that on March 26, 2018, I caused a true and correct copy of the foregoing Proof Brief of Plaintiffs-Appellants, Public Copy, to be served by CM/ECF on counsel of record for all parties.

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

ADDENDUM OF PERTINENT STATUTORY PROVISIONS AND RULES

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The Rules Enabling Act, 28 U.S.C. § 2072:

> (a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals.
>
> (b) Such rules shall not abridge, enlarge or modify any substantive right. ….

Rule 23 of the Federal Rules of Civil Procedure:

> (b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:
>
> …
>
> (3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:
>
> (A) the class members' interests in individually controlling the prosecution or defense of separate actions;
>
> (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
>
> (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
>
> (D) the likely difficulties in managing a class action.