No. 22-8009

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

SCOTT and RHONDA BURNETT *et al.*,
Plaintiffs-Respondents,

v.

NATIONAL ASSOCIATION OF REALTORS, *et al.*,
Defendants-Petitioners.

Appeal from the United States District Court for the
Western District of Missouri
Hon. Stephen R. Bough
(Case No. 19-CV-332-SRB)

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

DATED: May 16, 2022

Michael S. Ketchmark
Scott A. McCreight
11161 Overbrook Road, Suite 210
Leawood, KS 66211
(913) 266-4500
mike@ketchmclaw.com
smccreight@ketchmclaw.com

[Additional Counsel Listed on Signature Page]

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

INTRODUCTION

Interlocutory appeals under Fed. R. Civ. P. 23(f) are "disfavored" because they are "inherently disruptive, time-consuming, and expensive." *Prado-Steiman v. Bush*, 221 F.3d 1266, 1276 (11th Cir. 2000). The Courts of Appeals stress that granting a Rule 23(f) petition is "the exception, not the norm," *In re Delta Air Lines*, 310 F.3d 953, 960 (6th Cir. 2002), and "the standards of Rule 23(f) will rarely be met." *Sumitomo Copper Litig. v. Credit Lyonnais, Ltd.*, 262 F.3d 134, 140 (2d Cir. 2001). In fact, Rule 23(f) appeals generally are limited to three circumstances: (1) when there is a "death-knell" situation; (2) when certification presents an unsettled issue of fundamental law; and (3) when the certification decision is manifestly erroneous. *In re Lorazepam & Clorazepate Antitrust Litig.*, 289 F.3d 98, 99-100 (D.C. Cir. 2002).[1] But Defendants barely mention these standards, let alone try to meet them.

Instead, Defendants accuse the District Court of performing "no inquiry at all" before granting class certification. Pet. at 1. The record shows that's simply not true. Although Defendants fail to mention it, the

[1] *Accord Vallario v. Vandehey*, 554 F.3d 1259, 1263-64 (10th Cir. 2009); *Chamberlain v. Ford Motor Co.*, 402 F.3d 952, 959 (9th Cir. 2005).

District Court conducted *an evidentiary hearing* in which both Plaintiffs' expert (Dr. Craig Schulman) and Defendants' expert (Dr. Lauren Stiroh) testified. D.E. 732. During this hearing, Defendants had a chance to cross-examine Dr. Schulman about any alleged faults in his analysis. But they declined to ask him *a single question*. *Id.* Plaintiffs, by contrast, cross-examined Dr. Stiroh at length and severely impeached her testimony, causing her to admit that her opinion about a potential alternative benchmark hinged on a single year of data from a single Defendant. *Id.* The District Court itself questioned the witnesses.

After receiving this evidence, along with more than 200 pages of expert reports, the District Court took the matter under advisement. Then it issued an opinion making the exact finding Defendants now claim was lacking: "the Court finds Dr. Schulman's opinion and testimony persuasive for the purposes of establishing that Plaintiffs' theory of impact could be proven through common evidence." D.E. 741 at 24. The District Court also cited and applied the very case that Defendants hold up as articulating the proper standard for class certification. *Id.* (citing *In re Pre-Filled Propane Tank Antitrust Litig.*, No. 14-02567-MD-W-GAF, 2021 WL 5632089, at *5 (W.D. Mo. Nov. 9, 2021)). Put simply, the

District Court followed no "utterly inconsistent approach" to existing case law. Pet. at 4-5. The District Court applied that law, made a carefully reasoned examination of the case-specific factual matters presented, and exercised its broad discretion. Defendants may be disappointed in the result, but this case presents no unique or exceptional circumstances to justify extraordinary review under Rule 23(f).[2]

FACTUAL BACKGROUND

This antitrust case challenges a set of anticompetitive rules that require home sellers to pay the broker who represents the buyer of their home. These rules "dominate[] the residential housing market, dictating how real estate agents are compensated and whether one can practically sell a home without paying a small fortune in fees."[3] Plaintiffs and the

[2] Defendants enlisted the U.S. Chamber of Commerce to file an amicus brief on their behalf. The Chamber files such briefs on demand for its members – its website lists 24 examples in the last month alone. *See* https://www.chamberlitigation.com/recent-activity. The Chamber's brief simply parrots Defendants' own arguments and requires no separate response.

[3] Roger P. Alford & Benjamin H. Harris, Anticompetition in Buying and Selling Homes, Regulation Vol 44, No. 2 (Cato Institute, Summer 2021), available on-line at https://www.cato.org/regulation/summer-2021/anticompetition-buying-selling-homes. Mr. Alford was Deputy Assistant Attorney General for International Affairs with the Antitrust Division of the U.S. Department of Justice from 2017 to 2019.

Class Members are home sellers in four Missouri-based MLS markets who seek a refund of these illegal fees.

Defendants' Petition focuses solely on arguing whether common issues predominate over individual ones, particularly for showing antitrust injury. As in most antitrust cases, this issue involves a benchmark analysis that "'construct[s] a hypothetical market, a but-for market, free of the restraints and conduct alleged to be anticompetitive.'" *Blades v. Monsanto Co.*, 400 F.3d 562, 569 (8th Cir. 2005) (quoting *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1055 (8th Cir. 2000)).

I. Dr. Schulman's Benchmark Analysis.

To show predominance of common issues for antitrust injury, Plaintiffs produced testimony from Dr. Craig Schulman. Dr. Schulman is an expert economist who specializes in industrial organization, antitrust economics, international economics, and econometrics. Dr. Schulman submitted a 131-page expert report in which he detailed exactly how the challenged rules caused injury to every Plaintiff and Class Member, and how such harm can be shown using common evidence. D.E. 459-23.

In reaching his conclusions about injury, Dr. Schulman employed the benchmark methodology (also called "yardstick"). *Id.* at 108. A benchmark analysis compares the economic outcomes of class members "in a hypothetical market free of all antitrust violations" with their outcomes "in the market infected by the anticompetitive conduct." *Nat'l Farmers' Org., Inc. v. Associated Milk Producers, Inc.*, 850 F.2d 1286, 1306 (8th Cir. 1988). Far from posing an "evasion" or "circumvention" of the Rule 23 requirements, Pet. at 9-10, the benchmark methodology is "a generally accepted method for measuring antitrust damages." *SourceOne Dental, Inc. v. Patterson Cos., Inc.*, No. 15-cv-5440, 2018 WL 2172667, at *4 (E.D.N.Y. May 10, 2018).[4]

Following the standard procedure in all benchmark analyses, Dr. Schulman began by selecting the appropriate benchmark, that is, the most similar real estate market that is free of the challenged rules.

[4] *See also Eleven Line, Inc. v. N. Tex. State Soccer Ass'n, Inc.*, 213 F.3d 198, 207 (5th Cir. 2000) ("the two most common methods of quantifying antitrust damages are the 'before and after' and 'yardstick' measures'"); *In re NASDAQ Market-Makers Antitrust Litig.*, 169 F.R.D. 493, 521 (S.D.N.Y. 1996) (identifying "before and after" and "yardstick" methods as accepted methodologies for measuring damages in antitrust cases) (quoting ABA Antitrust Section, *Antitrust Law Developments,* 669–73 (3d ed.1992)).

Unfortunately, Defendants impose the same challenged rules throughout the country, so no domestic comparator is possible. D.E. 459-23 at 108-09. Similar rules exist in Canada. *Id.* at 130. For this reason, anyone applying a benchmark analysis must look abroad to find the most appropriate comparator.

Dr. Schulman chose Australia. *Id.* at 109-13. Although Defendants criticize that choice throughout their Petition, *their own study* agrees that Australia is a proper comparator. Defendants commissioned a 2015 study that they called the "D.A.N.G.E.R. Report."[5] This Report "seeks to describe as many of the threats and dangers as possible that may affect the real estate industry." D.E. 582-1. One such danger, listed as "critical" and a "game changer," is Danger A2, "Commissions Spiral Downward," which expresses fear over "a gradual downward slide or a realignment of fees as charged in other countries in the world." *Id.* The Report highlights six countries as comparators to the U.S.: Australia, the United Kingdom, Belgium, the Netherlands, Singapore, and Germany. *Id.* As Dr. Schulman observed, all six countries "are well-developed, market-

[5] The D.A.N.G.E.R. Report stands for "Definitive Analysis of Negative Game Changers Emerging in Real Estate." D.E. 582-1.

based, rule-of-law countries where property rights are well established," which makes them much like the U.S. and therefore candidates for benchmark status. D.E. 459-23 at 104.

The challenged rules don't exist in any of the D.A.N.G.E.R. countries, and sellers in these countries don't pay buyer broker commissions. D.E. 553-4 at 61. The experience of each D.A.N.G.E.R. country therefore supports Dr. Schulman's conclusion that without the challenged rules, sellers wouldn't pay buyer brokers anything. But Dr. Schulman did not stop there. He refined his analysis to determine which D.A.N.G.E.R. country is most like the U.S., and therefore the best benchmark. He considered factors such as economic freedom, respect for property rights, household income, homeownership rates, and turnover of the housing stock. D.E. 459-23 at 109-13. These factors point to Australia as the best comparator. Both countries are former British colonies; they share a heritage and language; they have a similar common law legal system; and they are very similar on the various economic indices. *Id.*

In Australia, sellers pay much lower commission rates than U.S. sellers, typically between 2% to 2.5%. *Id.* at 112. Buyer brokers are used

infrequently, in as little as 1% to 5% of transactions. *Id.* at 109-10. And when buyer brokers are used, the buyer pays the broker, not the seller. *Id.* at 110. Dr. Schulman concluded that this is the but-for world that would exist without the challenged rules. Comparing this but-for world to actual conditions, *every* seller in the Class suffered antitrust injury because they were overcharged and forced to pay an improper commission to a buyer broker. Dr. Schulman's analysis showed that this injury can be proved at trial using class-wide evidence, and common issues relating to injury and damages therefore predominate over individual issues.

II. Defendants' Disagreements with Dr. Schulman's Benchmark Analysis.

Defendants' attack on Dr. Schulman's benchmark analysis was limited. Defendants did not dispute Dr. Schulman's professional qualifications or his ability to provide economic opinions. D.E. 554. Defendants also did not dispute that the benchmark methodology is common in antitrust cases for evaluating injury and damages. *Id.* Defendants' own expert, Dr. Lauren Stiroh, has used the benchmark methodology herself in other cases. Instead, Defendants focused their argument on whether Australia was the appropriate benchmark.

Defendants claimed that Dr. Schulman ignored a "key confounding difference" between the United States and Australia because "cooperative compensation dates back more than 100 years to the creation of the first MLS and was a firmly entrenched practice prior to the 1996 adoption of the Cooperative Compensation Rule in its current form." *Id*. at 2, 10. But Dr. Schulman showed that such "cooperation" has long been just another word for price-fixing, much like members of the OPEC Cartel cooperate in fixing prices. D.E. 582-5 at 3-4. Indeed, this history – itself the subject of repeated federal investigations, lawsuits, and injunctions – was exactly why Dr. Schulman had to look outside the U.S. for a benchmark in the first place.[6] D.E. 459-23 at 103-04 ("no market exists in the U.S. in which NAR influence is not felt," and "there has been no period over . . . several decades in which the challenged conduct, or similar anticompetitive conduct, did not occur in the U.S."). The whole point of examining conditions in Australia and the other D.A.N.G.E.R. countries is because they do not share this same anti-competitive history. *Id*.

[6] Plaintiffs provided a detailed overview of Defendants' price-fixing history in their opposition to Defendants' *Daubert* motion. D.E. 582 at 23-26.

Although they refused to select their own benchmark, Defendants proposed an alternative market that they deemed "informative" – the Northwest MLS. D.E. 637-2 at 10. The Northwest MLS, which covers parts of Washington state, stopped forcing sellers to pay buyer broker commissions in October 2019. D.E. 637 at 29. Defendants claimed that Dr. Schulman's analysis must be wrong because real estate practices in the Northwest MLS did not transform right afterward. But Dr. Schulman pointed out that eliminating the Challenged Rules "would be a disruptive event, and it would take considerable time to change the way people think about how the market works and for the information to disseminate. I wouldn't expect it to happen overnight." D.E. 554-3 at 51-52. He supported that opinion with four concrete examples of other U.S. industries experiencing such disruption: travel agencies, stock brokerages, cable television, and hard-wired telephones. *Id.* In each case, the market adapted to disruption slowly, over the course of years. For these reasons, Australia remained a far superior benchmark to the Northwest MLS.

III. The District Court's Evidentiary Hearing and Class Certification Order.

Defendants suggest throughout their Petition that the District Court abdicated its responsibility to conduct a rigorous analysis of the class certification requirements. Pet. at 3. Nothing could be further from the truth. The District Court received more than 180 pages of briefing on certification, with dozens of exhibits submitted by both sides. The parties submitted over 200 single-spaced pages of expert reports. And the District Court held an evidentiary hearing at which both Dr. Schulman and Dr. Stiroh appeared live to testify. D.E. 732. The District Court allowed full cross-examination at this hearing. But Defendants did not ask Dr. Schulman a single question. *Id.* Plaintiffs, on the other hand, did cross-examine Dr. Stiroh. *Id.* During that cross, Dr. Stiroh admitted that her opinion about the Northwest MLS hinged on only a single year of data from a single Defendant. The District Court also questioned the witnesses during this hearing.

After taking the matter under advisement, the District Court issued its Order granting class certification.[7] In that Order, the District

[7] Defendants suggest that the District Court acted hastily. Pet. at 12 (stating that the Order came "just four days" after the evidentiary

Court expressly found Dr. Schulman's testimony to be "based on sufficiently reliable methods," and "persuasive for the purposes of establishing that Plaintiffs' theory of impact could be proven through common evidence." D.E. 741 at 24-25. The District Court also found that Dr. Stiroh's challenge to Dr. Schulman's benchmark was itself based on "evidence common to the class," which further showed that Plaintiffs' theory of antitrust impact could be proved through common evidence. *Id.* at 25. This Petition followed.

ARGUMENT

I. PETITIONERS MAKE NO ATTEMPT TO MEET THE STANDARDS FOR IMMEDIATE REVIEW UNDER RULE 23(f)

Interlocutory appeals under Fed. R. Civ. P. 23(f) are "generally disfavored" because they are "inherently disruptive, time-consuming, and expensive." *Prado-Steiman v. Bush*, 221 F.3d 1266, 1276 (11th Cir. 2000).[8] Courts exercise "restraint in accepting Rule 23(f) petitions,"

---

hearing). But the parties completed briefing and expert reports three *months* before the Order issued, and Defendants' evidence at the hearing duplicated their earlier filings.

[8] This Court has not adopted a particular standard for review of petitions under Rule 23(f). However, in *Elizabeth M. v. Montenez*, 458

granting them only if there is a "compelling need for resolution of the legal issue sooner rather than later." *Prado-Steiman*, 221 F.3d at 1274. Thus, Rule 23(f) appeals are "the exception, not the norm." *In re Delta Air Lines*, 310 F.3d 953, 960 (6th Cir. 2002).

Courts generally limit Rule 23(f) review to three narrow circumstances: (1) when there is a "death-knell" situation; (2) when certification presents an unsettled issue of fundamental law; and (3) when the certification decision is manifestly erroneous. *Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 293 (1st Cir. 2000); *In re Lorazepam & Clorazepate Antitrust Litig.*, 289 F.3d 98, 99-100 (D.C. Cir. 2002). These standards for Rule 23(f) review "will rarely be met" – an "approach that will prevent the needless erosion of the final judgment rule and the policy values it ensures, including efficiency and deference." *In re Sumitomo Copper Litig. v. Credit Lyonnais Rouse, Ltd.*, 262 F.3d 134, 140 (2d Cir. 2001). Defendants' Petition meets none of these standards.

F.3d 779, 783 (8th Cir. 2006), the Court cited *Prado-Steiman* with approval.

First, Defendants offer "no showing that [they] lack[] the resources to defend this case to a conclusion and appeal if necessary or that doing so would run the risk of ruinous liability." *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 960 (9th Cir. 2005). Although Defendants make passing reference to the amount of damages at issue, their "claims are conclusory and are not backed up by declarations, documents, or other evidence demonstrating potential liability or financial condition." *Id.* In fact, Defendants are the largest nationwide companies in real estate, with multiple billions in assets. Two are publicly traded, and another is owned by Berkshire Hathaway. Class certification will not force Defendants to settle rather than defend this action.

Second, Defendants identify no unsettled issue of fundamental law requiring immediate review.[9] The District Court applied this Court's precedent in *Blades v. Monsanto*, 400 F.3d 562 (8th Cir. 2005), as well as the Supreme Court's precedent in *Comcast Corp v. Behrend*, 133 S. Ct. 1426 (2013). D.E. 741 at 8, 19, 20, 21, 23, 31, 32, 34-35 (citing and

[9] *See, e.g.*, *Mowbray*, 208 F.3d at 294 ("a creative lawyer almost always will be able to argue that deciding her case would clarify some 'fundamental' issue"); *see also Prado-Steiman*, 221 F.3d at 1272 (echoing *Mowbray*'s "worry" that the unsettled issue prong "might encourage too many disappointed litigants to file fruitless Rule 23(f) applications").

applying *Blades* and *Comcast*). There is nothing novel or unsettled about the District Court's application of *Blades*, *Comcast*, or any other class certification standards, and Defendants' mere disagreement with the District Court's conclusions is insufficient reason to grant extraordinary review.

Third, Defendants allege no manifest error. Manifest error is a "high bar" and "requires a showing that the district court failed to apply the correct legal standard, reached a decision squarely foreclose[d] by precedent, or otherwise committed an error that is plain and indisputable, and that amounts to a complete disregard of the controlling law or the credible evidence in the record." *In re District of Columbia*, 792 F.3d 96, 98 (D.C. Cir. 2015). Given the District Court's thorough Order and its expansive evidentiary hearing, there is no basis for such a conclusion in this case.

II. THE DISTRICT COURT APPLIED THE CORRECT LEGAL STANDARD AND ACTED WELL WITHIN ITS DISCRETION IN GRANTING CERTIFICATION

The district courts have considerable discretion in deciding whether to grant class certification. *In re Wholesale Grocery Prods. Antitrust Litig.*, 752 F.3d 728, 736 (8th Cir. 2014). Such discretion is abused only

if it "rests its conclusion on clearly erroneous factual findings or if its decision relies on erroneous legal conclusions." *Id.* (quoting *Wedow v. City of Kansas City, Mo.*, 442 F.3d 661, 676 (8th Cir. 2006)). The District Court's Order here did neither. Rather, the District Court "'closely scrutinize[d] [the] factual evidence and expert reports that demonstrate that impact can be proven on a classwide basis,'" D.E. 741 at 24 (quoting *Pre-Filled Propane Tank*, 2021 WL 5632089, at 5), while refusing "'to engage in [a] free-ranging merits inquir[y].'" *Id.* at 8 (quoting *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 466 (2013)). That's exactly the proper standard.

A. Rule 23 Requires the Court to Conduct a Rigorous Analysis of the Methods of Proof to Be Used at Trial, Not the Case Merits.

The requirements for class certification are well-established. A district court must undertake "a rigorous analysis" to make certain the requirements of Rule 23 are met. *Bennett v. Nucor Corp.*, 656 F.3d 802, 814 (8th Cir. 2011). Such analysis includes ensuring "that the element of antitrust impact is capable of proof at trial through evidence that is common to the class rather than individual to its members." *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 311-12 (3d Cir. 2008).

True, this determination may involve "[w]eighing conflicting expert testimony" and "[r]esolving expert disputes." *Id.* at 323-24. But such weighing of experts is "limited to resolving whether the evidence establishes that a common question is *capable* of class-wide resolution, not whether the evidence in fact establishes that plaintiffs would win at trial." *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 667 (9th Cir. 2022) (emphasis in original). Although there may be some overlap with the merits of the case, "'[m]erits questions may be considered [only] to the extent [] that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied.'" *Id.* (quoting *Amgen*, 568 U.S. at 466).

Separating common issues from individual ones requires looking at the evidence needed to resolve them. "An individual question is one where members of a proposed class will need to present evidence that varies from member to member, while 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 Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 453 (2016) (internal quotation omitted). Thus, the district court's task is to "make a 'rigorous

assessment of the available evidence and the method or methods by which plaintiffs propose to use the [class-wide] evidence to prove' the common question in one stroke." *Olean Wholesale Grocery Coop.*, 31 F.3d at 666 (quoting *In re Hydrogen Peroxide*, 552 F.3d at 312). If each class member would use the same evidence if their cases were heard individually, then their claims are common and capable of class-wide resolution. *See id. at 667; see also Tyson Foods*, 577 U.S. at 455.

These standards apply equally to evaluating expert testimony. Almost all cases present conflicting expert opinions, just as here. When that occurs, the district court determines whether the proffered "'expert evidence is persuasive, which may require the Court to resolve methodological disputes.'" *Pre-Filled Propane Tank*, 2021 WL 5632089, at *5 (quoting *In re High-Tech Employee Antitrust Litig.*, 985 F. Supp. 2d 1167, 1186-87 (N.D. Cal. 2013)). But again, that examination is confined solely to considering whether the expert's analysis "'supports a finding that plaintiffs' theory of impact is susceptible to common proof a trial through available evidence common to the class.'" *Id.* (quoting *In re Mushroom Direct Purchaser Antitrust Litig.*, 319 F.R.D. 158, 201 (E.D. Pa. 2016)). If both experts rely on common evidence to support their

positions – evidence that does not vary between class members – then the resolution of any remaining disputes goes to the merits and is resolved by the jury. That's precisely what happened here.

B. The District Court Properly Found Dr. Schulman's Methods of Proof Persuasive.

The District Court's Order carefully tracks these well-established standards. In particular, the Order:

- applies the rigorous analysis test, D.E. 741 at 8;
- acknowledges that merits questions may be considered, but only as needed to determine whether the Rule 23 requirements are met, *id*. at 8-9;
- agrees that Plaintiffs must show, through common evidence, that all class members suffered antitrust injury, *id*. at 22;
- finds "Dr. Schulman's testimony is based on sufficiently reliable methods," *id*. at 25; and
- "finds Dr. Schulman's opinion and testimony persuasive for the purposes of establishing that Plaintiffs' theory of impact could be proven through common evidence," *id*. at 24.

Thus, Defendants' claim that the District Court failed to perform a rigorous analysis, or followed an "utterly inconsistent approach" to existing case law, is wrong. Pet. at 4-5.

As Defendants' Petition makes clear, their attack on Dr. Schulman's testimony was very narrow. Defendants did not dispute Dr. Schulman's qualifications to give opinions, or the fact that the benchmark methodology is widely accepted by the federal courts to show antitrust injury. Nor did they dispute that Dr. Schulman's benchmark model is directly tied to Plaintiffs' theory of harm, showing that every class member suffered injury. Defendants merely disputed Dr. Schulman's choice of the appropriate benchmark.

The District Court scrutinized Dr. Schulman's choice of Australia as the benchmark. For example, the District Court: (1) allowed both sides to present testimony during an evidentiary hearing; (2) allowed Defendants the opportunity to cross-examine Dr. Schulman (although they declined to do so); (3) received extensive expert reports from both Dr. Schulman and Dr. Stiroh; and (4) considered the fact that Defendants themselves identified Australia as a benchmark in their D.A.N.G.E.R.

Report. D.E. 741 at 23-24.[10] Based on all of this evidence, the District Court made a factual finding that Dr. Schulman's opinions were persuasive, and that they showed Plaintiffs have a valid method for proving antitrust impact at trial through common evidence. *Id.* at 24. The District Court did not simply assume Plaintiffs' allegations to be true; it drew plausible conclusions from the evidence presented. Given the District Court's thorough decision, Defendants' characterization of the Order as a "bare conclusion, without explanation," is meritless. Pet. at 6. The District Court may have disappointed Defendants in its result, but it certainly analyzed the issues and explained its conclusions.

C. The District Court Had No Need to Resolve the "Battle of Experts" Because Dr. Stiroh Based Her Own Criticisms on Common Evidence.

Defendants argue that the District Court improperly "treated the parties' respective arguments as an evidentiary stalemate." Pet. at 13. But that's not what the District Court said at all. The *only* time the District Court declined to address the merits of the parties' competing arguments was in the selection of "Australia as an Adequate Benchmark

[10] "The use of Defendants' own forecasts to model a but-for world has been held to be a sound economic methodology." *In re Namenda Direct Purchaser Antitrust Litig.*, 331 F. Supp. 3d 152, 182 (S.D.N.Y. 2018).

Country." D.E. 741 at 25. And that was because, even under Defendants' own theory, selecting an appropriate benchmark was a class-wide issue to be proved using common evidence.

A key question in determining predominance is whether each class member would use the same central evidence if their cases were heard individually. If the answer is yes, then the claims are common and capable of class-wide resolution. *See Olean Wholesale Grocery Coop.*, 31 F.3d at 667*; see also Tyson Foods*, 577 U.S. at 455. Here, all the benchmark-selection evidence is common. Any class member bringing an individual case would use the same evidence to show that: (1) Defendants' own D.A.N.G.E.R. Report highlighted Australia as a proper comparator to the U.S.; (2) all the D.A.N.G.E.R. countries, including Australia, are well-developed, market-based, rule-of-law countries where property rights are well-established; and (3) Australia shares a similar history to the U.S. and is very similar based on various economic indices. D.E. 741 at 24. Likewise, as the District Court noted, all of Dr. Stiroh's criticisms over the selection of Australia would be the same in each case:

> Dr. Stiroh supports her position by analyzing United States' economic data and the history of the United States real estate market which she compared to Australia and Germany data.

> In other words, Dr. Stiroh challenged Dr. Schulman's analysis through use of evidence common to the entire class.

Id. at 25. The issue is not which expert's benchmark selection ultimately will carry the day; that will be determined by the jury at trial. The issue is what type of evidence each expert will use to persuade the jury that their benchmark selection is the correct one, and the answer is class-wide common evidence. Nothing more is needed to show that common issues predominate and the Rule 23(b)(3) requirements are satisfied.

III. DEFENDANTS IDENTIFY NO "INCONSISTENT STANDARDS" AMONG THE DISTRICT COURTS OF THIS CIRCUIT

Defendants also argue that this Court has failed to provide "clear guidance" on the requirements for class certification, leading "district courts in this Circuit to apply inconsistent standards." Pet. at 1. Again, not true. Defendants cite only a single example of this supposed inconsistency – comparing the District Court's opinion here with another opinion issued by the Western District of Missouri, *In re Pre-Filled Propane Tank Antitrust Litig.*, No. 14-02567-MD-W-GAF, 2021 WL 5632089 (W.D. Mo. Nov. 9, 2021). But these two cases employ no inconsistent standards. In fact, the District Court specifically applied the same certification standards as in *Pre-Filled Propane Tank*, citing the

case twice by name. D.E. 741 at 22, 24. The only difference between the two cases is that in *Pre-Filled Propane Tank*, the fact-specific application of the standards led the court to deny certification rather than grant it. This Court, in *Blades* and other class cases, has provided the district courts with all the guidance they need to apply Rule 23. No extraordinary review is needed to provide still more explanation.

IV. THE DISTRICT COURT CORRECTLY DENIED DEFENDANTS' *DAUBERT* MOTION

Defendants lastly argue that immediate review is needed to provide "clarification" on the role of *Daubert* motions in deciding class certification. Pet. at 22. No one is confused on this point. This Court established its standards for evaluating class expert testimony in *In re Zurn Pex Plumbing Prods. Liab. Litig.*, 644 F.3d 604, 611-14 (8th Cir. 2011). And the Court reaffirmed those standards post-*Comcast* in *Smith v. ConocoPhillips Pipe Line Co.*, 801 F.3d 921, 925 n.2 (8th Cir. 2015) ("*Zurn* is a binding and well decided precedent which we need not revisit here"). The *Zurn* standards are clear and have been used with no problem for over ten years. They require no further examination.

Even if the Court wished to revisit *Zurn*, this case would provide a poor vehicle for doing so. Under any standard, Defendants' challenge to

Dr. Schulman's opinions was not even close.[11] Defendants didn't contest Dr. Schulman's qualifications to offer economic opinions. Nor did they disagree with the general validity of the benchmark methodology. *See SourceOne Dental, Inc. v. Patterson Cos., Inc.*, No. 15-cv-5440, 2018 WL 2172667, at *4 (E.D.N.Y. May 10, 2018) (benchmark methodology is "a generally accepted method for measuring antitrust damages"); *In re Elec. Books Antitrust Litig.*, No. 11-MD-2293, 2014 WL 1282293, at *25 (S.D.N.Y. March 28, 2014) (same, collecting cases). Defendants just disagreed with Dr. Schulman's choice of Australia as a benchmark. Such choice goes to the weight of a benchmarking analysis, not its admissibility.

Defendants' challenge to Dr. Schulman's testimony is made even weaker by their decision to forgo cross-examining him at the certification hearing. The purpose of a *Daubert* inquiry is "to weed out unreliable methodologies – 'junk science' – not to be a substitute for cross-examination about the validity of an analysis that uses established

[11] In fact, the District Court made clear that it (1) applied the *Daubert* standards to determine the admissibility of Dr. Schulman's testimony; and (2) went beyond those standards in finding the Rule 23(b)(3) predominance inquiry satisfied. D.E. 741 at 23 n.14.

methodologies." *In re Namenda Indirect Purchaser Antitrust Litig.*, 338 F.R.D. 527, 546 (S.D.N.Y. 2021). The District Court gave Defendants a full opportunity to cross-examine Dr. Schulman, but they failed to ask him a single question. Perhaps it was because Dr. Schulman's benchmark opinion used a methodology widely recognized by the federal courts, and that fact alone "ends the *Daubert* inquiry." *Id.* Whatever the reason, Defendants must live with the consequences of their strategy. They cannot now use *Daubert* to replace the cross-examination they chose to waive at the certification hearing.

CONCLUSION

Defendants cannot point to any error by the District Court, much less "manifest" error that might warrant immediate review. The District Court's Order fully tracks Rule 23 and this Court's cases interpreting it. The District Court acted well within its broad discretion in granting certification, and the Court should deny Defendants' Rule 23(f) Petition.

Dated: May 16, 2022

Respectfully submitted,

KETCHMARK & McCREIGHT, P.C.

/s/ Scott A. McCreight

Michael S. Ketchmark
Scott A. McCreight
11161 Overbrook Road, Suite 210
Leawood, KS 66211
(913) 266-4500
mike@ketchmclaw.com
smccreight@ketchmclaw.com

Eric L. Dirks
Matthew L. Dameron
Amy R. Jackson
Courtney M. Stout
WILLIAMS DIRKS DAMERON LLC
1100 Main Street, Suite 2600
Kansas City, MO 64105
(816) 945-7110
matt@williamsdirks.com
dirks@williamsdirks.com
amy@williamsdirks.com
cstout@williamsdirks.com

Brandon J.B. Boulware
Jeremy M. Suhr
Erin D. Lawrence
BOULWARE LAW LLC
1600 Genessee, Suite 416
Kansas City, MO 64102
(816) 492-2826
brandon@boulware-law.com
jeremy@boulware-law.com
erin@boulware-law.com

Counsel for Plaintiffs/Respondents
and the Class

CERTIFICATE OF COMPLIANCE

This response contains 5,056 words, excluding the portions exempted by Federal Rules of Appellate Procedure 5(c) and 32(f). The response's type size and typeface comply with Federal Rules of Appellate Procedure 32(a)(5) and (6).

/s/ Scott A. McCreight

Scott A. McCreight
Counsel for Plaintiffs/Respondents
and the Class

CERTIFICATE OF SERVICE

I hereby certify that on May 16, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Scott A. McCreight

Scott A. McCreight
Counsel for Plaintiffs/Respondents
and the Class