No. 14-577

IN THE

Supreme Court of the United States

CARPENTER CO., ET AL.,

Petitioners,

v.

ACE FOAM, INC., ET AL., individually and on behalf of all others similarly situated,

and

GREG BEASTROM, ET AL., individually and on behalf of all others similarly situated,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION OF RESPONDENT DIRECT PURCHASER CLASS

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QUESTION PRESENTED

Did the court of appeals act within its discretion in denying a petition under Federal Rule of Civil Procedure 23(f) for permission to take an interlocutory appeal of a district court order granting certification of a class of plaintiffs that directly purchased flexible polyurethane foam from a group of manufacturers whose members are alleged to have conspired to fix the prices of such foam?

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, Respondent, a class of persons and entities that purchased flexible polyurethane foam "directly from Defendants and/or their co-conspirators from January 1, 1999 to July 31, 2010 for purchase from or delivery into the United States," Pet. App. 17a-18a (the "Direct Purchaser Class"), states that the representative plaintiffs of the Direct Purchaser Class are Ace Foam, Inc., Adams Foam Rubber Co. a/k/a Adams Foam Rubber Company, Inc., Cambridge of California, Inc., GCW Carpet Wholesalers, Inc. t/a Floors USA, Foam Factory, Inc., J&S Packaging, Inc., and VFP Acquisitions d/b/a Vanguard Foam and Packaging Company. None of these class representatives has a parent company, and no publicly-held company owns 10% or more of the stock in any class representative.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

BRIEF IN OPPOSITION OF RESPONDENT DIRECT PURCHASER CLASS

The Petition would make *de rigueur* this Court's review of a court of appeals' discretionary decision to deny permission to appeal, even though such a decision barely warranted this Court's review in *Dart Cherokee Basin Operating Co.* v. *Owens*, 574 U.S. __ (2014) (slip op.). This case is far less deserving of review than *Dart*, and this Court has never before granted certiorari in the specific context here: a court of appeals' denial of a petition for permission to take an interlocutory appeal of a class-certification order under Federal Rule of Civil Procedure 23(f). Certiorari should be denied.

First, whereas in *Dart* the Tenth Circuit's denial of permission to appeal would have caused the case to exit the federal courts and no subsequent case would present the underlying issue, such that the Tenth Circuit's legal rule would be "frozen in place for all venues within the Tenth Circuit," *Dart* slip op. 10, here the case will remain in the federal courts, the district court is free to revisit its class-certification order (Pet. App. 10a-11a), and Petitioners are free to appeal the order as of right after any final judgment in favor of the Direct Purchaser Class, thus giving the Sixth Circuit another chance to review any legal rules relied upon by the district court in certifying the Direct Purchaser Class, and this Court in turn a similar opportunity.

Second, whereas in *Dart* the Tenth Circuit's denial of permission to appeal offered scant explanation and appeared to rest entirely on that court's reliance on an erroneous rule of law, *Dart* slip op. 11, 14 n.8, the Sixth Circuit's denial here relied on three factors having nothing to do with the merits of class certification

(Pet. App. 9a-11a). The Petition here does not address those three factors in the questions presented, much less identify a circuit conflict on those factors.

Third, whereas the *Dart* respondent did not in its brief in opposition resist the petitioner's attempt to skip directly to the merits questions (disregarding the threshold question whether the Tenth Circuit abused its discretion in denying permission to appeal), *Dart* slip op. 7-8, 13, Respondent Direct Purchaser Class is raising that issue front and center in this brief in opposition.

But even if this Court were inclined—notwithstanding that the Sixth Circuit's denial of permission to appeal here does not present the unique circumstances that warranted review of the Tenth Circuit's denial in *Dart*—to proceed directly to the merits of class certification here, the Petition should still be denied.

As to Petitioners' first question presented, Petitioners themselves invited the district court to apply the very standard—whether "all or nearly all" class members could show injury, Dist. Ct. Dkt. 682 at 5—that they now challenge, and thus they waived the argument. In any event, the district court's test was "sufficiently narrow to exclude uninjured parties," Pet. App. 5a, and thus the alleged circuit split—which this Court recently declined to review in *BP Exploration & Production Inc.* v. *Lake Eugenie Land & Development, Inc.*, No. 14-123 (U.S. Dec. 8, 2014)—is not even implicated here.

As to the first part of Petitioners' second question presented, there is no circuit conflict over whether class certification may be appropriate where there are common issues of liability, notwithstanding the existence of individualized damages issues (even

assuming *arguendo* there are such individualized damages issues here). Rather, the courts of appeals have decided on a fact-specific, case-by-case basis whether the common issues of liability predominate.

As to the second part of Petitioners' second question presented, there is no circuit conflict on the propriety of class-wide damages models. The courts of appeals do not disagree on any rule of law; again, they accept or reject damages models based on fact-specific showings whether the proposed model can properly calculate damages on a class-wide basis.

But even if any of these questions warranted this Court's review, such review should await a final judgment, which should come shortly after the trial scheduled to begin on March 31, 2015. This Court should not disregard *Dart*'s carefully circumscribed approach and grant review now. The Petition should be denied.

STATEMENT

A. Factual Background

Petitioners are several members of a group of companies that dominate the domestic market for the manufacture and sale of flexible polyurethane foam ("flexible foam"). Pet. App. 19a. Respondent Direct Purchaser Class is defined to include all persons and entities that purchased flexible foam "directly from Defendants and/or their co-conspirators from January 1, 1999 to July 31, 2010 for purchase from or delivery into the United States." Pet. App. 17a-18a.[1]

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[1] This brief in opposition is submitted on behalf of Respondent Direct Purchaser Class. Respondents Greg Beastrom, et al. (the "Indirect Purchaser Class") were certified by the district court as a separate plaintiff class, and that Indirect Purchaser Class is

The Direct Purchaser Class alleges that Petitioners joined in a conspiracy to fix and to raise the price of flexible foam, and to allocate customers in that market, from 1999 to 2010. Pet. App. 23a-24a. The conspiracy came to light in 2010, when one company, Vitafoam, Inc., sought leniency from the Department of Justice in return for its admission that it was involved in an antitrust conspiracy. Pet. App. 24a.

The conspiracy allegations are based on Petitioners' price-increase announcements that were "'close in time and for the same or similar amounts and effective dates' throughout the Class Period." Pet. App. 41a. But the Direct Purchaser Class does not rely solely on parallel price announcements or pricing to prove the conspiracy. Rather, as the district court explained, there is overwhelming evidence that the price-increase announcements resulted from coordination among Petitioners. Pet. App. 42a. That evidence includes, *inter alia*, multiple emails and faxes between and among Petitioners showing that Petitioners shared information about the price increases before they were announced, and that the amount of the increases and their timing was coordinated. Pet. App. 42a-43a. That evidence also includes testimony in a related litigation by a representative of Vitafoam that Vitafoam "had 'communicated and reached understandings on the percentage amount and timing of price increases and market allocation in the sale of polyurethane foam.'" Pet. App. 44a; see also *ibid.* (identifying Petitioners "as the Vitafoam partners in these 'understandings'").

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represented by separate counsel and is filing a separate brief in opposition to the Petition. As explained *infra*, the class-certification issues differ in certain respects as to the Direct Purchaser Class and the Indirect Purchaser Class.

B. The District Court's Class-Certification Order

On April 9, 2014, the district court (Zouhary, J.) issued an opinion granting certification of two separate plaintiff classes—the Direct Purchaser Class and the Indirect Purchaser Class, see *supra*, at 3 n.1—under Rule 23(b)(3).[2] The district court's 128-page opinion examined all of the evidence and expert reports, as well as live testimony by the parties' respective experts at a class-certification hearing. Concerning Rule 23(b)(3)'s inquiry whether questions common to the class predominate over questions that are individualized as to different class members, the court held that liability, impact, and damages are all capable of class-wide proof.

As to liability, the district court explained, the Direct Purchaser Class's evidence included "the price increase letters [of Petitioners] themselves and patterns among [Petitioners] in issuing price increase letters, direct and indirect communications between [Petitioners] about pricing, certain [Petitioners'] stated refusal to pursue new customers through price competition during a period in which a price increase letter was in effect, [one foam seller's] 'admissions,' and deponents' Fifth Amendment invocations." Pet. App. 45a. The district court found that "[Petitioners] do not succeed in showing liability questions—however answered—cannot be answered through common proof." Pet. App. 48a.

As to impact, the district court explained that the conspiratorial conduct impacted all or nearly all direct

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[2] The district court rejected Petitioners' *Daubert* challenge to the Direct Purchaser Class's experts, Dr. Jeffrey Leitzinger and Dr. Matthew Gordon. See Dist. Ct. Dkt. 1101.

purchasers because Petitioners' price-increase announcements applied to virtually all such purchasers and the announcements typically were implemented through actual price increases with minimal purchaser-specific deviations. Pet. App. 55a-57a. The court rigorously examined the regression analysis of Dr. Jeffrey Leitzinger, which isolated the impact of Petitioners' price increase announcements on prices. Pet. App. 57a-61a. The court also rigorously reviewed and rejected the challenges of Petitioners' experts. Pet. App. 61a-105a.

As to damages, the district court held that "Direct Purchasers must show damages are 'susceptible of measurement across the entire class for purposes of Rule 23(b)(3),' though damages need not be 'exact.'" Pet. App. 105a (quoting *Comcast Corp.* v. *Behrend*, 133 S. Ct. 1426, 1433 (2013)). The court concluded that damages could be assessed on the basis of evidence common to the Direct Purchaser Class. Pet. App. 105a-115a.

C. The Court Of Appeals' Denial Of Petitioners' Petition To Take An Interlocutory Appeal Under Rule 23(f)

Petitioners filed a petition under Rule 23(f) for permission to take an interlocutory appeal of the district court's class-certification order. The court of appeals (Suhrheinrich, Siler, Gibbons, JJ.) unanimously denied the petition in a per curiam order, explaining that the class-certification order is not "appropriate for appellate review *at this time*" (Pet. App. 5a (emphasis added)), and thus recognizing that appellate review will be available after final judgment.

The court of appeals began by identifying four factors that guide the court's exercise of its discretion whether to grant such a petition:

> (1) whether the petitioner is likely to succeed on appeal under the deferential abuse-of-discretion standard;
>
> (2) whether the cost of continuing the litigation for either the plaintiff or the defendant presents such a barrier that subsequent review is hampered;
>
> (3) whether the case presents a novel or unsettled question of law; and
>
> (4) the procedural posture of the case before the district court.

Pet. App. 4a. The court of appeals further observed that "[o]ur 'unfettered' discretion is akin to the discretion of the Supreme Court in considering whether to grant *certiorari*; thus, we may consider any relevant factor we find persuasive." *Ibid.* (quoting Fed. R. Civ. P. 23 advisory committee's note (1998)). The court then applied these factors and exercised its discretion to deny the petition.

Beginning with the third factor, the court of appeals observed that Petitioners' arguments were amply addressed by the court's "current precedent" and therefore do not qualify as "nove[l]." Pet. App. 5a.

Turning to the first factor, the court of appeals found that Petitioners would be unlikely to succeed on the merits of an interlocutory appeal because they failed to "demonstrat[e] that the district court abused its discretion in certifying a class given the facts of the underlying case." *Ibid.* Regarding Petitioners' standing argument, the court assumed *arguendo* that

"Petitioners preserved their standing argument before the district court" (*ibid.*),[3] and proceeded to find that the district court indeed had used a "definition of the class … sufficiently narrow to exclude uninjured parties" (*ibid.*). Regarding Petitioners' damages argument, the court noted that Petitioners were unlikely to succeed, *inter alia*, "[b]ecause the district court required the classes' damages models to reflect their theories of the case." Pet. App. 7a.

Addressing the second factor, whether denying interlocutory appeal "would be the death knell of the litigation" (Pet. App. 9a-10a), the court of appeals concluded it would not be. The court noted a dispute between Petitioners and the Direct Purchaser Class concerning the amount of a potential damages award (Pet. App. 10a), and then stated that, "even if we adopt the Petitioners' calculation of the potential damages award, that factor alone does not warrant interlocutory review" (*ibid.*), including because, according to the district court, it is "by no means clear that [the Direct Purchaser Class's] proof would be sufficient to survive summary judgment or merit a favorable jury verdict" (*ibid.*). (The district court is scheduled to hold a hearing on Petitioners' pending summary-judgment motions on January 15, 2015. Dist. Ct. Dkt. 1407.)

Finally, the court of appeals found that the fourth factor ("the procedural posture of the case") also weighed against allowing an interlocutory appeal. The court explained that the district court "is aware

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[3] In the district court, Petitioners argued that the correct standard is whether "all or nearly all" class members suffered injury, Dist. Ct. Dkt. 682 at 5, the same standard they now challenge in the Petition.

that it may reopen its certification decision, given its acknowledgement that it may have to revisit its decision if one defendant's liability is limited." Pet. App. 10a-11a.

D. Further Proceedings Below

Petitioners subsequently asked the district court for a stay, pending this Court's disposition of Petitioners' not-yet-filed petition for a writ of certiorari, of notice to the Direct Purchaser Class concerning the class-certification decision as well as settlements with Petitioners Carpenter and Leggett & Platt (which are not participating in the Petition with respect to the Direct Purchaser Class, see Pet. ii). The district court denied the motion. Dist. Ct. Dkt. 1384. Petitioners then asked the court of appeals to "reopen" the case and to stay the class notice. The court of appeals denied Petitioners' motions. App. Dkt. 72. The trial of the Direct Purchaser Class's claims against the non-settling Petitioners is scheduled to begin on March 31, 2015. Dist. Ct. Dkt. 1407.

REASONS FOR DENYING THE WRIT

I. THE QUESTION WHETHER THE COURT OF APPEALS ACTED WITHIN ITS DISCRETION IN DENYING THE RULE 23(F) PETITION DOES NOT WARRANT THIS COURT'S REVIEW

Petitioners mistakenly assume that their Petition can proceed directly to the question whether class certification was proper here. That question was never before the court of appeals. The court of appeals was not deciding whether to affirm or to reverse the certification of the Direct Purchaser Class, but whether to grant Petitioners permission to take an

interlocutory appeal of the district court's class-certification order under Rule 23(f). This Court has never granted certiorari respecting a court of appeals' denial of a Rule 23(f) petition, and should not do so now for the first time.

Dart held that this Court has power to grant certiorari with respect to a court of appeals' discretionary denial of permission to appeal, but made clear that certiorari should be granted only in rare circumstances that, while present in *Dart*, are absent here.[4]

First, in *Dart*, the Tenth Circuit's denial of permission to appeal meant that the district court's remand order would be carried out and the case would exit the federal-court system for a state court; thus, the Tenth Circuit would have no further opportunity in that case to address the district court's underlying legal rule (*i.e.*, that a removing defendant must provide evidence of the amount in controversy in its notice of removal). *Dart*, slip op. 3. And the issue would not likely arise in any future case in the Tenth Circuit because "'any diligent attorney … would submit to the evidentiary burden [to include evidence of the amount in controversy in the notice of removal] rather than take a chance on remand to state court.'" *Id*. at 10 (quoting

[4] *Dart* involved a court of appeals' discretionary decision whether to allow an appeal of a remand order under 28 U.S.C. §1453(c)(1). A prior case, *Hohn* v. *United States*, 524 U.S. 236 (1998), involved a court of appeals' discretionary decision whether to grant a certificate of appeal to a habeas petitioner under 28 U.S.C. § 2253(c). In both situations, the court of appeals' determination was final so far as the federal courts were concerned. In the instant Rule 23(f) situation, by contrast, the court of appeals' determination is interlocutory and the district court's grant of class certification can plainly be reviewed by the court of appeals and by this Court after final judgment.

Dart Cherokee Basin Operating Co. v. *Owens*, 730 F.3d 1234, 1235 (10th Cir. 2013) (Hartz, J., dissenting from denial of rehearing *en banc*)). Thus, absent the Tenth Circuit granting rehearing *en banc* (which it did not do), or this Court granting certiorari (which it did do), the district court's rule would be "frozen in place for all venues within the Tenth Circuit." *Ibid.*

Here, by contrast, the Sixth Circuit's denial of permission to appeal does not freeze in place within the Sixth Circuit any of the district court's legal rulings underlying class certification. This case is not about to exit the federal-court system, but rather is proceeding toward a trial in federal district court. Moreover, the district court "may reopen its certification decision, given its acknowledgment that it may have to revisit its decision if one defendant's liability is limited" as a result of any rulings on Petitioners' pending summary-judgment motions to be decided before trial. Pet. App. 10a-11a. After any final judgment by the district court in favor of the Direct Purchaser Class, Petitioners can appeal the judgment as of right and raise any challenge to class certification at that time. And after the court of appeals resolves that appeal, Petitioners can file a petition for certiorari that directly and appropriately goes to the merits of class certification.[5]

Beyond this case, there is no concern that the district court's legal rulings on class certification will not arise again in the Sixth Circuit. Unlike removing

[5] As a general matter, the fact that the Petition arises in an interlocutory posture weighs against granting certiorari. See, *e.g.*, Stephen M. Shapiro et al., Supreme Court Practice 282-83 (10th ed. 2013); *Mount Soledad Mem'l Ass'n* v. *Trunk*, 132 S. Ct. 2535, 2536 (2012) (Alito, J., statement respecting denial of certiorari).

defendants in *Dart*-like situations who will err on the side of caution and include evidence on the amount of controversy in their notices of removal, defendants in class actions face no such quandary and are free to make any challenges to class certification that they wish to make.

Second, in *Dart*, the Tenth Circuit's terse denial of permission to appeal, see *Dart*, slip op. 3, very likely "relied on the legally erroneous premise that the District Court's decision was correct," *id.* at 9. Specifically, because the Tenth Circuit's approach to such petitions recognized the possibility that a legal rule leading to remand could preclude further review of that legal rule (a situation not present here, as explained above), the Tenth Circuit must have thought that legal rule correct in order to leave it in place by denying permission to appeal. *Id*. at 10.

Here, by contrast, the Sixth Circuit considered four factors, only one of which has to do with the merits of class certification. Pet. App. 4a. Petitioners do not suggest that the Sixth Circuit's identification of these factors was incorrect, or that there is any circuit conflict on what the factors should be.

Nor do any of Petitioners' questions presented address the three factors that do not bear on the merits of class certification, further underscoring why certiorari should be denied. Compare *Dart* slip op. 14 n.8 ("Our disposition does not preclude the Tenth Circuit from asserting and explaining on remand that a permissible ground underlies its decision to decline Dart's appeal."). As to "whether the case presents a novel or unsettled question of law" (Pet. App. 4a), the Sixth Circuit explained that "current [Sixth Circuit] precedent" already addressed the relevant issues, thus weighing against a grant of permission to take an

interlocutory appeal (Pet. App. 5a). As to "whether the cost of continuing the litigation for either the plaintiff or the defendant presents such a barrier that subsequent review is hampered" (Pet. App. 4a; see also Pet. App. 9a-10a (whether failure to grant appeal "would be the death knell of the litigation")), the Sixth Circuit noted that the Direct Purchaser Class's estimate of $2.8 billion in damages was well below the Petitioners' $9 billion figure, and that in any event Petitioners would have ample opportunity at the summary-judgment and trial stages to seek to limit liability and damages (Pet. App. 10a).[6] Finally, as to "the procedural posture of the case before the district court" (Pet. App. 4a), the court of appeals explained that the district court "may reopen its certification decision, given its acknowledgement that it may have to revisit its decision if one defendant's liability is limited" (Pet. App. 10a-11a).[7]

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[6] As explained in Point II, *infra*, having failed to raise the court of appeals' analysis of this factor in any of the questions presented, Petitioners have waived any such argument. In any event, as also explained in Point II, Petitioners' challenge to the court of appeals' analysis of this factor in the body of the Petition is incorrect and certainly does not demonstrate that the court abused its discretion, much less that there is a circuit conflict on that issue that might warrant this Court's review.

[7] Petitioners argue (Pet. 34-35) that courts of appeals should not be able to evade review by denying a Rule 23(f) petition, rather than granting a Rule 23(f) petition and then affirming a class-certification order on its merits, but that is exactly the scheme that the Rules Committee, this Court, and Congress chose in Rule 23(f): the court of appeals is vested with a gatekeeping role. See Fed. R. Civ. P. 23 advisory committee's note (1998) (describing court of appeals' discretion at the Rule 23(f) petition stage as "unfettered"). And the court of appeals in any event cannot evade this Court's review because the class-certification issue can be raised on appeal as of right after final

Third, *Dart* took pains to note that the respondent "did not contest the scope of our review." Slip op. 8; see also slip op. 12 ("Owens never suggested in his written submissions to this Court that anything other than the question presented accounts for the Court of Appeals' disposition."). Here, Respondent Direct Purchaser Class does contest the scope of review in this brief in opposition and respectfully submits that the Petition's questions presented put the merits cart before the permission-to-appeal horse.[8]

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judgment, and then thereafter in a petition for a writ of certiorari that would appropriately focus directly on the merits of class certification.

[8] *Amicus* DRI-The Voice of The Defense Bar ("DRI") should not be allowed to expand upon the Petition's questions presented—which improperly skip to the merits of class certification—by asking this Court to review the threshold question whether the court of appeals acted within its discretion under Rule 23(f) in denying the petition for permission to appeal. In any event, DRI fails persuasively to address any of the considerations discussed in text why the Petition does not warrant review under *Dart*'s carefully circumscribed approach. DRI essentially asks this Court to interpret Rule 23(f) as allowing an appeal as of right in which the courts of appeals must "present their substantive reasons" (DRI Br. 4) regarding class certification. But Rule 23(f) does not take that approach, instead vesting the courts of appeals with discretion whether to allow an appeal on the merits of class certification, and indeed analogizing that discretion to this Court's discretion in deciding whether to grant certiorari (in which page limits are reduced, oral argument is not heard, and unexplained denials are the norm). See Fed. R. Civ. P. 23 advisory committee's note (1998). And even though the "unfettered" nature of that discretion, *ibid.*, entitles the courts of appeals to formulate the relevant factors in "subtl[y]" different ways, *In re Lorazepam & Clorazepate Antitrust Litig.*, 289 F.3d 98, 104 (D.C. Cir. 2002), the Sixth Circuit recognizes all of them, see *In re Delta Air Lines*, 310 F.3d 953, 960 (6th Cir. 2002) (the "specific relevant factors articulated by our sister circuits will

II. THE PETITION'S CHALLENGE TO THE COURT OF APPEALS' "DEATH KNELL" ANALYSIS IS NOT PROPERLY RAISED AND IN ANY EVENT DOES NOT WARRANT THIS COURT'S REVIEW

Petitioners argue that the district court's certification of the Direct Purchaser Class will be the "death knell" of the litigation because Plaintiffs seek "more than $9 billion in treble damages." Pet. 4-5; see also *id.* at 13-14. But Petitioners waived the argument by not identifying the issue in their questions presented, and in any event it implicates no circuit conflict or other established basis for this Court to grant review.

As an initial matter, although the argument does go to one of the factors applied by the court of appeals in exercising its discretion to deny permission for an interlocutory appeal under Rule 23(f), the Petition does not address the point anywhere in the questions

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also guide our consideration"). As to application of those factors here, DRI mischaracterizes the court of appeals' order denying permission to appeal here as addressing only "'the merits of the issues' raised by the district court's class-certification ruling" (DRI Br. 13 (quoting Pet. App. 9a)), when in fact, as explained *supra*, at 12-13, the court of appeals relied on three factors having nothing to do with those merits. DRI barely addresses only one such factor (the "death knell" factor), and then only in the abstract (see DRI Br. 3, 6, 15), ignoring the court of appeals' analysis why that factor does not support allowing an interlocutory appeal here (see Pet. App. 9a-10a). See also Point II, *infra*. Finally, as to DRI's argument (DRI Br. 9-12) that this Court theoretically has jurisdiction to grant certiorari with respect to a court of appeals' order denying permission to appeal, but see *Dart* slip op. 2 (Thomas, J., dissenting), the Direct Purchaser Class does not dispute that point, but rather submits that the Petition plainly does not warrant this Court exercising that jurisdiction, which should be reserved only for the rarest of cases.

presented and the point is not fairly included in those questions. Accordingly, the argument is waived. See Sup. Ct. R. 14.1(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court."); *Wood* v. *Allen*, 558 U.S. 290, 304 (2010) ("'[T]he fact that [petitioner] discussed this issue in the text of [his] petition for certiorari does not bring it before us. Rule 14.1(a) requires that a subsidiary question be fairly included in the *question presented* for our review.'") (emphasis and second and third brackets in original) (quoting *Izumi Seimitsu Kogyo Kabushiki Kaisha* v. *U.S. Philips Corp.*, 510 U.S. 27, 31 n.5 (1993) (per curiam)). Again, the Petition's questions presented are exclusively concerned with the merits of class certification, and incorrectly disregard that the only question that could properly be presented is whether the court of appeals abused its discretion in denying permission to take an interlocutory appeal under Rule 23(f).

In any event, the body of the Petition does not demonstrate that the court of appeals' application of the death-knell factor (which again is only one of four factors governing the decision whether to permit an interlocutory appeal under Rule 23(f)) implicates any circuit conflict that might warrant this Court's review.

Nor does the Petition demonstrate that the court of appeals abused its discretion in applying this factor:

First, Petitioners improperly conflate the Direct Purchaser Class's and the Indirect Purchaser Class's claimed damages in arriving at Petitioners' $9 billion figure. See Pet. 4.[9] For the Direct Purchaser Class,

[9] Indeed, much of Petitioners' argument applies only to the Indirect Purchaser Class. See, *e.g.*, Pet. i (asserting that the class "include[s] hundreds of millions of members," as opposed to the

even after trebling, the potential damages are approximately $2.8 billion, not $9 billion. Pet. App. 10a.

Second, Petitioners presented no evidence to the court of appeals (or to this Court) to suggest they could not together afford to pay $2.8 billion—or even $9 billion. One Defendant alone, Mohawk Industries, has publicly stated that the potential damages for *all* of the pending foam cases would materially affect earnings only for a "given quarter or year." Mohawk Indus., Inc., Form 10-K at 16 (Feb. 28, 2014)[10]; see *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244, 251 (D.C. Cir. 2013) ("Public filings may offer useful guidance to the death-knell inquiry when they actually discuss a company's ability to satisfy a judgment ...."). Petitioners' only factual statement about their ability to pay $9 billion is the claim that $9 billion "is between *20 and 170 times* each Defendant's annual foam product revenues." Pet. 5 (emphasis added). However, *annual revenue* from the sale of foam products has nothing to do with the amount that each company *would be able to pay* in an adverse judgment.[11] As importantly, it fails to recognize that

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few thousand in the Direct Purchaser Class); Pet. 21 (arguing that "numerous members of the Indirect Purchasers class could not have been injured at all because price increases were not invariably and inflexibly passed on by wholesalers and retailers"). Thus, even if certiorari review were warranted as to the Indirect Purchaser Class (and it is not), it is not warranted as to the separately certified Direct Purchaser Class.

[10] See http://www.sec.gov/Archives/edgar/data/851968/000085196814000021/a4q201310kdocument.htm.

[11] Indeed, the Direct Purchaser Class's claimed damages of $2.8 billion is dwarfed by Petitioners' revenues in the relevant product markets during the conspiracy period. 6th Cir. A4219; A2994. (All references to "A" page numbers are to the sealed

the judgment would be split up among the six non-settling Petitioners that remain as defendants in the Direct Purchaser Class's case.

Third, while Petitioners posit that the cases will inevitably settle, the facts show the opposite. While Petitioners Carpenter and Leggett & Platt settled this year with the Direct Purchaser Class (see Pet. ii, 5), the majority of Petitioners have not settled notwithstanding the class-certification decision, the court of appeals' denial of the Rule 23(f) petition, and the impending trial in March 2015. Petitioners provide no evidence to suggest that they will suddenly cave into a settlement now when they have withstood any such pressure to date. See also, *e.g.*, *In re Urethane Antitrust Litig.*, No. 06-605 (10th Cir. Nov. 7, 2006) (denying Rule 23(f) appeal); *In re Urethane Antitrust Litig.*, No. 04-1616, 2013 WL 3879264 (D. Kan. July 26, 2013), *aff'd*, 768 F.3d 1245 (10th Cir. 2014) (antitrust class action proceeded to trial and final judgment as to defendant Dow Chemical Company).

III. EVEN IF THE MERITS OF THE CLASS-CERTIFICATION ORDER WERE PROPERLY PRESENTED NOW, THEY WOULD NOT WARRANT THIS COURT'S REVIEW

Even if Petitioners could ignore the threshold issue whether the court of appeals abused its discretion in denying permission to take an interlocutory appeal under Rule 23(f) (and the absence of any circuit split on that issue) and frame their Petition on the "merits" issue of whether class certification was appropriate,

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appendix filed with the court of appeals on consideration of Petitioners' Rule 23(f) petition.)

this Court's review still would not be warranted on either of the Petition's two questions presented, which we address in turn below.

A. This Case Does Not Implicate Any Supposed Circuit Conflict Over Whether Plaintiffs Must Prove At The Class-Certification Stage That All Class Members Suffered Injury

Petitioners argue (Pet. 14-22) that there is a split of authority over whether, as part of class certification, a court must determine that absent class members have antitrust standing. Review of that issue is unwarranted, however, because (1) Petitioners waived any argument that all members of a class (as opposed to "all or nearly all") must have an injury; (2) no circuit has rejected an "all or nearly all" standard; and (3) the district court's analysis would be correct even under the most stringent test applied by any circuit.

First, Petitioners waived any argument that the "all or nearly all" standard applied by the district court was incorrect, because Petitioners successfully advocated that the district court apply exactly this standard. Petitioners expressly argued in their opposition to class certification in the district court: "To certify a class, Plaintiffs must be able to demonstrate that *all or nearly all* of the putative class members were commonly impacted by an antitrust violation …. In this case, Plaintiffs must show that *all or nearly all* members of the proposed class were impacted." Dist. Ct. Dkt. 682 at 5 (emphases added); see also A6594, 6659 (Petitioners twice conceding at the hearing on class certification that "nearly all" is the correct test).[12]

[12] Although the court of appeals only noted and did not resolve the waiver issue (Pet. App. 5a ("Assuming that the Petitioners

The district court adopted exactly the language that Petitioners proposed and that Petitioners now contend is erroneous: "To show impact is susceptible of proof on a classwide basis, Direct Purchasers must show … that all or nearly all class members suffered injury." Pet. App. 49a. Having successfully advanced this formulation below, Petitioners cannot challenge it now. See, *e.g.*, *Genesis Healthcare Corp.* v. *Symczyk*, 133 S. Ct. 1523, 1529 (2013) (where party "conceded" issue "[i]n the District Court" and "the Court of Appeals," it "waive[d]" argument to the contrary in the Supreme Court); *Barany-Snyder* v. *Weiner*, 539 F.3d 327, 332 (6th Cir. 2008).[13]

Second, while Petitioners assert that there is a circuit split over whether Plaintiffs must frame the class definitions such that every single class member suffered injury, none of the cases Petitioners cite imposes that requirement. Petitioners cite four cases that supposedly held that "*all* members of a certified class must have standing to have their claims adjudicated in federal court." Pet. 16. The supposed circuit split is illusory, however, because those decisions generically refer to plaintiffs having to show injury without focusing on whether "nearly all" plaintiffs will suffice. No court has considered and

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preserved their standing argument before the district court ….")), given that the district court adopted Petitioners' proposed test word-for-word, there is no plausible argument that they can challenge that test on appeal.

[13] To the extent Petitioners attempt to turn this into a jurisdictional issue, no court has held that the presence of a single, uninjured class member deprives a court of jurisdiction—and once again, this additional, threshold question (on which there is no circuit split) weighs strongly against a grant of certiorari here.

then rejected the "all or nearly all" standard in favor of an "all" standard.

Third, even if the alleged circuit split existed,[14] this case would be an improper vehicle for addressing it because the district court's analysis would be correct under even the most stringent test of any circuit court. Petitioners allege (Pet. 16 (citing Pet. App. 49a)) that the district court relied on the less-stringent branch of this alleged split, embodied by such opinions as *Kohen* v. *Pacific Investment Management Co.*, 571 F.3d 672, 676-77 (7th Cir. 2009). Accordingly, Petitioners suggest (Pet. 16) that certiorari is warranted to resolve whether *Kohen* is the appropriate standard. Petitioners, however, ignore the substance of the district court's class-certification order and the court of appeals' order denying their Rule 23(f) petition. The court of appeals' order makes clear that the district court's "definition of the class is sufficiently narrow to *exclude uninjured parties*." Pet. App. 5a (emphasis added). Thus, even assuming there is a material difference of opinion between the circuits over absent-class-member standing, the Direct Purchaser Class's evidence satisfies the most stringent of those standards and thus demonstrates that this case is not a suitable vehicle for this Court's input.

Petitioners' assertion that this case implicates the supposed circuit split is based on their argument that the Direct Purchaser Class "contain[s] large numbers of members who have suffered no injury." Pet. 20. The district court held to the contrary, however, and there is no basis for this Court to disturb this factual finding.

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[14] This Court recently denied a petition for certiorari alleging this circuit conflict. See *BP Exploration & Production Inc.* v. *Lake Eugenie Land & Dev., Inc.*, No. 14-123 (U.S. Dec. 8, 2014).

In any event, Petitioners' characterization (Pet. 8-9) of the Direct Purchaser Class's expert as failing to find injury for even a majority of class members is incorrect.[15] The report, in fact, established that all or nearly all class members suffered injury because of Petitioners' price-fixing conspiracy.[16]

B. There Is No Circuit Conflict Over Whether A Class May Be Certified Notwithstanding Individualized Damages Questions

Petitioners next assert (Pet. 24-26) that there is tension between (1) the Fifth, Sixth, Seventh, and Ninth Circuits' post-*Comcast* recognition that class certification may be appropriate even in the face of some individualized damages questions, and (2) decisions from the D.C. and Tenth Circuits.

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[15] Indeed, much of Petitioners' argument—including the suggestion that named plaintiffs do not fit within the class definition—applies only to the Indirect Purchaser Class. See Pet. 10, 13. It therefore provides no basis at all to grant certiorari to review certification of the separate Direct Purchaser Class.

[16] Dr. Leitzinger's regression analysis calculated impact on Master Billing IDs ("MBIDs"), which group multiple purchases by an individual class member. That analysis showed that MBIDs representing 99% of the purchase volume by members of the class experienced some adverse impact within their purchases. Pet. App. 60a; 6th Cir. A4162, A4219. Dr. Leitzinger concluded that the overall regression results, together with his analysis of the economic conditions in the industry, supported the conclusion that all or virtually all class members had been injured. 6th Cir. A4161-62, A4181. Petitioners erroneously focus on disaggregated statistical significance for each class member (Pet. 8-9), but Dr. Leitzinger explained (and the district court accepted (Pet. App. 87a-88a)) that the frequency of positive regression results as a whole should be considered in deciding common impact (6th Cir. A6597-6606, A6125).

Petitioners are incorrect; there is no conflict, but rather simply fact-based determinations that do not warrant this Court's review.

In *Whirlpool* (Sixth Circuit), *Leyva* (Ninth Circuit), *Butler* (Seventh Circuit), and *Deepwater Horizon* (Fifth Circuit), the courts recognized that the class-certification process requires a rigorous analysis highly attuned to the specific case and facts. See *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 722 F.3d 838, 851-52 (6th Cir. 2013); *Leyva* v. *Medline Indus. Inc.*, 716 F.3d 510, 512-13 (9th Cir. 2013); *Butler* v. *Sears, Roebuck & Co.*, 727 F.3d 796, 799-802 (7th Cir. 2013); *In re Deepwater Horizon*, 739 F.3d 790, 808-19 (5th Cir. 2014), *cert. denied*, No. 14-123 (U.S. Dec. 8, 2014). Each court made the unremarkable follow-up observation that, as has been the law for decades and as *Comcast* did not change, there may be cases where individualized damage questions do *not* predominate over other common questions (such as liability). In such situations—the identification of which is highly dependent on case-specific facts and allegations—class certification is appropriate. *Whirlpool*, 722 F.3d at 859-61; *Leyva*, 716 F.3d at 513-14; *Butler*, 727 F.3d at 799-802; *Deepwater Horizon*, 739 F.3d at 815; see also *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541, 2558 (2011) ("[I]ndividualized monetary claims belong in Rule 23(b)(3).").

In *In re Rail Freight Fuel Surcharge Antitrust Litigation*, 725 F.3d 244 (D.C. Cir. 2013), the district court had rendered its class-certification decision *prior to* this Court's decision in *Comcast*. The D.C. Circuit did not reverse the grant of class certification, but vacated it, remanding the case so that the district court could consider *Comcast*. And, more specifically,

the D.C. Circuit determined that a question specific to the damages model at issue there—a question that the D.C. Circuit concluded was necessary to resolve under *Comcast*—had not yet been addressed by the district court, and so should be addressed on remand. *Id.* at 252-53.

The D.C. Circuit's decision is fully consistent with the other circuits' observations that a district court must review the specific facts before it determines whether common questions predominate. The specific question identified in *Rail Freight* was whether the damages model at issue there generated "false positives," *id*. at 253, by finding damages from contracts that defendants asserted could not have been affected by the alleged collusion—as noted, a question that the D.C. Circuit determined the district court, in its pre-*Comcast* ruling, had not addressed. That question is highly fact-dependent and indeed is still being addressed by the District Court for the District of Columbia on remand.

Similarly, the Tenth Circuit's decision in *Wallace B. Roderick Revocable Living Trust* v. *XTO Energy, Inc*., 725 F.3d 1213 (10th Cir. 2013), does not conflict with the view of other circuits. In *Wallace*, the court stated that "predominance may be destroyed if individualized issues will overwhelm those questions common to the class." *Id.* at 1220. The court recognized, however, that "there are ways to preserve the class action model in the face of individualized damages." *Ibid*. And the court ultimately held that "the district court is in the best position to evaluate" the issue. *Ibid.* There is nothing in this ruling that conflicts with the district court's decision here that "the presence of 'some individualized damages issues' will not preclude class

treatment if common issues otherwise predominate." Pet. App. 106a.

Petitioners also argue (Pet. 26-27) that the district court's certification order is inconsistent with *Comcast*, but the problem identified in *Comcast* (an expert damages analysis that could not be correlated to the sole remaining liability theory in the case after the three other theories had been deemed inadequate for class treatment, 133 S. Ct. at 1433-34) is absent here. The Direct Purchaser Class has one liability theory—price-fixing by means of coordinated price-increase announcements—and the Direct Purchaser Class's expert report and model focus exactly on measuring the impact and damages of that alleged scheme. Pet. App. 6a-7a. Simply put, the district court held that "damages are 'susceptible of measurement across the entire class for purposes of Rule 23(b)(3)'" (Pet. App. 105a (quoting *Comcast*, 133 S. Ct. at 1433)), and there is no basis for this Court to review this highly fact-specific determination at this interlocutory stage of the case.[17]

C. There Is No Circuit Conflict On The Propriety Of Class-Wide Damages Models

Petitioners are similarly incorrect when they claim (Pet. 27-33) that there is disagreement between the circuits over whether a class may prove damages through a class-wide damages model. Contrary to Petitioners' selective quotation of the various circuits' decisions, both the Second and Fourth Circuits have

[17] Once again, much of Petitioners' argument (Pet. 21-22) on this issue concerns only the damages model for the Indirect Purchaser Class, not the Direct Purchaser Class.

recently recognized that class-wide damages models are perfectly acceptable so long as they employ a methodology that "roughly reflect[s] the aggregate amount owed to class members." *Hickory Sec. Ltd.* v. *Republic of Argentina*, 493 Fed. App'x 156, 159 (2d Cir. 2012) (quoting *Seijas* v. *Republic of Argentina,* 606 F.3d 53, 58-59 (2d Cir. 2010)); accord, *Stillmock* v. *Weis Markets, Inc.*, 385 Fed. App'x 267, 272-73 (4th Cir. 2010) (certifying class where plaintiffs calculated class-wide damages by applying identical statutory damages to each class member). Moreover, the cases Petitioners cite held only that a classwide damages model failed in those cases accurately to assess damages, not that such models were always (or even usually) deficient. See *McLaughlin* v. *Am. Tobacco Co*., 522 F.3d 215, 231 (2d Cir. 2008); *Broussard* v. *Meineke Discount Muffler Shops, Inc*., 155 F.3d 331, 343 (4th Cir. 1998); *In re Hotel Tel. Charges*, 500 F.2d 86, 90 (9th Cir. 1974).

In any event, the damages model at issue here does not engage in the "averaging" (Pet. 30) that Petitioners claim to be improper. Rather, the damages model proffered by the Direct Purchaser Class's expert, Dr. Leitzinger, approximates individual damages on a master billing identification number ("MBID")-by-MBID basis, and that model certainly does not overstate the damages (if anything, it is conservative and understates them). See Pet. App. 109a-110a; see also Pet. App. 7a-8a (district court acted within its discretion in admitting Dr. Leitzinger's impact opinions following its *Daubert* analysis). Therefore, this case presents no issues with use of a classwide damages model, regardless of which circuit's essentially identical formulation of the test is applied.

Furthermore, Petitioners' suggestion that the model will allow an award of damages to class members "regardless of the actual amount of damages (if any) they actually incurred" (Pet. 11; see also Pet. 28), fundamentally misconstrues the role of the model. As the district court explained, "the damages methodology does *not* award damages; it *calculates* damages on a classwide basis." Pet. App. 110a. The allocation of damages among class members will take place later *if* the Direct Purchaser Class withstands Petitioners' summary-judgment motion and prevails at trial. *Ibid.*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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