26-8001

In the United States Court of Appeals
FOR THE SEVENTH CIRCUIT

TEAM SCHIERL COMPANIES AND HEARTLAND FARMS, INC.
Plaintiffs-Petitioners

v.

ASPIRUS, INC. AND ASPIRUS NETWORK, INC.
Defendants-Respondents

On Petition for Permission to Appeal December 19, 2025 Order of the United States District Court for the Western District of Wisconsin (Peterson, C.J.), No. 22-cv-00580

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

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January 12, 2026

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INTRODUCTION

The Petition does not present any important or unsettled issue of class-action law or the proper application of *Daubert* at the class-certification stage. It instead seeks interlocutory review of a routine *Daubert* ruling excluding Dr. Jeffrey Leitzinger's opinions, which in turn led the District Court to deny class certification under Rule 23(b)(3)—a ruling Plaintiffs do not even challenge. ("Op.") at 2, 17-20, Dkt. 230. The Petition identifies no important or unsettled legal question warranting immediate review, nor do Plaintiffs contend that the denial of class certification sounds a "death knell" for the case. *Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 833-35 (7th Cir. 1999). Instead, the Petition consists of fact-bound disagreements with the District Court's application of settled *Daubert* principles, coupled with mischaracterizations of the Opinion, selective treatment of the record, and assertions contradicted by Leitzinger's own sworn testimony. That is not what Rule 23(f) is for, and it confirms that immediate, interlocutory review is not warranted.

The Petition advances two grounds for immediate review, neither of which has merit. *First*, Plaintiffs contend that the Opinion imposed a

bright-line "perfection" or "purity" requirement—namely, that a comparator group in an expert's yardstick analysis of the challenged conduct in an antitrust case must always be entirely free of the alleged conduct to be admissible. Petition ("Pet.") at 2-3, 11-17. The Opinion nowhere sets such a standard. On the contrary, the District Court agreed with Plaintiffs that "courts generally do not require experts to demonstrate that their yardstick is entirely free from the anticompetitive conduct" and that courts tend to admit models that "underestimate antitrust impact." Op. at 11-12. But, as the Court explained, "that general principle isn't helpful here," because Leitzinger had no factual support for and did not attempt to validate his foundational assumptions that the alleged conduct was absent from his comparator group or that the effect would always render the results "overly conservative." *Id.* at 11. Even after he was forced to admit that his yardstick was tainted, Leitzinger did nothing to revisit his assumption. *Id.*

The District Court's review of the record, reflected in its decision, showed that Leitzinger had no way of knowing whether he was in fact making the comparison he claimed to be making—between a group that

did not engage in the alleged conduct and one that did. He also had no support for his assumption that any "taint" in his model made it conservative. That lack of factual grounding rendered the yardstick inadmissible *ipse dixit*.

Second, Plaintiffs argue that the District Court "demand[ed] certainty rather than reliability," Pet. at 3, when it faulted Leitzinger for failing to control for two attributes this Court has identified as "the most important" in evaluating healthcare pricing in antitrust cases: quality and market share. *Blue Cross & Blue Shield United of Wis. v. Marshfield Clinic*, 152 F.3d 588, 593 (7th Cir. 1998). That characterization is incorrect.

The District Court carefully examined Leitzinger's shifting explanations of what his regression did and did not control for—and thus what it was actually capable of measuring. In the end, Leitzinger conceded that quality differences among healthcare providers can and do affect prices, that those effects are present in his data, and that he had no way to control for them. That matters in a yardstick regression calculation that supposedly measures the price effects of the challenged conduct because the relationship between quality and price is

straightforward: higher-quality providers can command higher prices, and charging a quality premium is not anticompetitive. As for market share, Leitzinger similarly admitted that this too could have a price effect and is preferred in some settings but did not include it here, as the District Court correctly observed. Op. at 17.

A yardstick regression model such as Leitzinger's that cannot differentiate between whether price changes supposedly caused by the challenged conduct and those caused by other significant market forces is unreliable. The absence of any controls for quality or market share exposed a critical methodological gap: the yardstick regression could not differentiate whether price effects were due to high-quality providers or the challenged conduct. Leitzinger made his causal connection "only by the *ipse dixit* of the expert," which is "properly excluded under Rule 702." *Manpower, Inc. v. Ins. Co. of Pa.*, 732 F.3d 796, 806 (7th Cir. 2013).

The District Court's *Daubert* decision reflects a straightforward application of *Daubert* to a fundamentally flawed yardstick regression model. Beyond that, the Court can affirm on any basis in the record—

and there are multiple such grounds here. This is not a proper candidate for Rule 23(f) review and the Petition should be denied.

STATEMENT OF THE CASE

I. The Defendants

Defendant Aspirus, Inc. ("Aspirus") is a nonprofit, community directed health system based in Wausau, Wisconsin. Defendant Aspirus Network Inc. ("ANI"), a subsidiary of Aspirus, operates a Clinically Integrated Network ("CIN") of primary and specialty care physicians, hospitals, and healthcare professionals that work together to improve quality, increase patient satisfaction, and lower the overall cost of care.

To support its clinical objectives, ANI is designated by its members as an agent to contract with insurers and health plans on their behalf. ANI members can (and do) contract independently of ANI, as provided for in ANI's participating provider agreement. ANI's contracting services are lawful as "part of a larger endeavor whose success they promote." *E.g.*, *Polk Bros., Inc. v. Forest City Enters., Inc.*, 776 F.2d 185, 189 (7th Cir. 1985). ANI's contracting practices are similar to those of other CINs across the country.

II. Procedural History

On October 12, 2022, Plaintiffs, Team Schierl Cos. and Heartland

Farms, Inc., filed their Complaint on behalf of themselves and a putative class of alleged direct purchasers of Defendants' inpatient and outpatient healthcare services alleging a "multifaceted anticompetitive scheme." *See* Compl. ¶¶ 13(a)-(f), 92, Dkt. 1.[1]

After months of discovery, Plaintiffs' expert reports revealed a substantial narrowing of Plaintiffs' theories to focus on ANI's joint contracting with limited exclusivity, which Plaintiffs labeled the "Challenged Conduct." Dkt. 186, 188 at 2-3 & n.2. Plaintiffs contend the effect of the Challenged Conduct was to inflate the reimbursement rates that insurance companies and other third-party payors negotiated and agreed to pay for a subset of ANI members' outpatient services in certain parts of Wisconsin. *Id.* at 4-6.

On July 2, 2025, Plaintiffs moved to certify a class under Rule 23(b)(3) consisting of "[a]ll Payors whose funds were used to pay Defendants and/or their Co-Conspirators for in-network outpatient professional services provided in North-Central Wisconsin, during the period October 11, 2018, up to and including June 30, 2023." *Id.* at 3; *see*

[1] All docket citations refer to documents filed on the District Court's docket (No. 22-cv-00580) unless otherwise noted.

also Dkt. 214, 216 at 19-21 (discussing additional procedural history). Because data from many insurers was unavailable, Plaintiffs also proposed a narrower alternative class of "[a]ll Payors whose funds were used to pay Defendants and/or their Co-Conspirators for in-network outpatient professional services provided in North-Central Wisconsin, during the period October 11, 2018, up to and including June 30, 2023 and who used The Alliance, Anthem, Security Health Plan, UnitedHealthcare, and/or UnitedHealthcare Management Resources as a Network Vendor and/or TPA." Dkt. 186, 188 at 3 n.3.

Plaintiffs' motion for class certification "relies heavily on Leitzinger's opinions." Op. at 4. Leitzinger is a paid litigation consultant at Econ One Research, where he focuses on the economics of markets. Dkt. 191 ¶¶ 1-3. In this case, he opines on the composition of Plaintiffs' alternative class (but not their primary class), the amount of purported aggregate damages for their alternative class (which he says can be extrapolated to the primary class), and whether common evidence can be used to establish classwide antitrust impact. Dkt. 196, 197 at 3-4.

To reach these opinions, Leitzinger first created a regression model using a "yardstick" methodology (hereinafter, his "yardstick model")

that he uses to estimate aggregate damages, i.e., the total amount of overpayment purportedly paid by the class as opposed to individual overpayments. Next, he devised a two-step in-sample prediction process that uses inputs from his yardstick model to attempt to assess impact to class members. *Id*. at 5. These are the only analyses he offers to quantify the overcharge resulting from the alleged conduct and its supposed affect on the class. *Id*.

On July 2, 2025, Defendants moved under Federal Rules of Evidence 702 and 403 to exclude Leitzinger's yardstick model, his opinions regarding classwide impact (including his two-step in-sample prediction analysis), and his damages calculations based on his extrapolation analysis. Op. at 5; *see also* Dkt. 196, 197 at 3-4.

III. The Decision Below

On December 19, 2025, the District Court granted Defendants' motion to exclude Leitzinger's opinions and, on that basis, denied Plaintiffs' motion for class certification. Op. at 2. As discussed below, the District Court performed its gatekeeping function under *Daubert*, *Kumho Tire*, and *Gopalratnam*, *id*. at 4, and excluded Leitzinger's yardstick model, *id*. at 8-17. The District Court then denied Plaintiffs'

motion for class certification because "[t]he exclusion of Leitzinger's damages model is fatal to plaintiffs' ability to satisfy the predominance requirement under Rule 23(b)(3)." *Id.* at 19; *see also id.* at 2.

ARGUMENT

I. Immediate Review of the Opinion Is Unwarranted.

But for a footnote in which Plaintiffs cite Rule 23(f) as the basis for appellate jurisdiction, the Petition does not even mention Rule 23(f) let alone explain how its requirements are satisfied here.

This Court has "identified three situations" when an appeal under Rule 23(f) may be appropriate. The first two are when a class certification is a "death knell" for one side or the other, and the third is when the appeal "advances class action law." *Reliable Money Ord., Inc. v. McKnight Sales Co.*, 704 F.3d 489, 497 (7th Cir. 2013) (citing *Blair*, 181 F.3d at 834-35). None of these circumstances are present here.

Plaintiffs have essentially conceded that the Opinion does not sound the "death knell" of this litigation. After filing their Petition, they informed the District Court that they intend to continue litigating their claims regardless of the outcome of this Petition. Dkt. 234 at 2 ("Plaintiffs will, at a minimum, continue litigating this case on the merits on their own behalf . . . .").

Thus, to justify interlocutory review, Plaintiffs must demonstrate that the Opinion raises "fundamental issues about class actions" that cannot await resolution by this Court following final judgment. *Blair*, 181 F.3d at 835; *see Jefferson v. Ingersoll Int'l Inc.*, 195 F.3d 894, 897 (7th Cir. 1999) (Rule 23(f) appeal appropriate where issue was "important, unresolved, and has managed to escape resolution by appeals from final judgments"). But the Petition "does not raise a novel issue of class-certification law," *Howard v. Pollard*, 814 F.3d 476, 478 (7th Cir. 2015), or one that would "clarify class action law," *Driver v. AppleIllinois, LLC*, 739 F.3d 1073, 1076 (7th Cir. 2014).

Rather, as reflected in the three Questions Presented, *see* Pet. at 4, Plaintiffs are focused entirely on perceived errors by the District Court in its fact-intensive *Daubert* decision. Rule 23(f) does not permit interlocutory review of issues that relate solely to expert admissibility issues under Federal Rule of Evidence 702. *Andrews v. Chevy Chase Bank*, 545 F.3d 570, 577 n.2 (7th Cir. 2008) (quoting *In re Lorazepam & Clorazepate Antitrust Litig.*, 289 F.3d 98, 107 (D.C. Cir. 2002) ("[Rule 23(f) interlocutory] review is limited to issues that relate to class certification.")); *Blair*, 181 F.3d at 835 (explaining a primary

justification for Rule 23(f) was concern over the perceived lack of a substantial body of case law addressing the Rule 23 standards).

Nor was Rule 23(f) designed to provide mid-case review of the types of "familiar and almost routine" case-specific *Daubert* issues decided by the District Court in this case. Fed. R. Civ. P. 23 advisory committee's note to 1998 amendment; *see Prado Steiman ex rel. Prado v. Bush*, 221 F.3d 1266, 1275-76 (11th Cir. 2000) ("[A] class certification decision which turns on case-specific matters of fact and district court discretion—as most certification decisions indisputably do—generally will not be appropriate for interlocutory review." (cleaned up)); *see also In re Delta Air Lines*, 310 F.3d 953, 960 (6th Cir. 2002) (inappropriate to use Rule 23(f) to review "the application of well-established standards to the facts of a particular case"); *Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 294 (1st Cir. 2000) (similar).

This Court recently denied a Rule 23(f) petition in a closely-analogous circumstance in which plaintiffs sought interlocutory review of a district court's (1) routine application of *Daubert* principles to the specific facts of the case, and (2) denial of class certification based on the court's *Daubert* decision. Pet. at 2, *Series 17-03-615 v. Express*

Scripts, Inc., No. 24-8015 (7th Cir. May 20, 2024), Dkt. 1; *Id.*, Dkt. 6 (order denying petition). As here, the district court excluded an expert's opinion on classwide damages because, among other reasons, the expert's selection of his "counterfactual yardstick" was "fundamentally unreasoned." *Series 17-03-615 v. Express Scripts, Inc.*, No. 20-cv-50056, 2024 WL 1834311, at *4 (N.D. Ill. Apr. 26, 2024).

And like here, the district court then denied plaintiffs' motion for class certification because, without the expert's damages model, plaintiffs could not satisfy Rule 23(b)(3)'s predominance requirement. *Compare Express Scripts*, 2024 WL 1834311, at *4 (quoting companion case reaching the same result, *City of Rockford v. Mallinckrodt ARD, Inc.*, No. 17-cv-50107, 2024 WL 1363544, at *7 (N.D. Ill. Mar. 29, 2024)), *with* Op. at 8, 13-14, 17 (relying on *Mallinckrodt* to exclude Leitzinger's yardstick model).

In *Express Scripts*, this Court declined to take up the same core issues presented in this case—namely, whether the district court "failed to conduct a proper *Daubert* analysis and impermissibly stepped in the shoes of the factfinder in excluding [the expert's] damages model." *Compare Express Scripts* Pet. at 3, *with* Pet. at 3-4 (arguing the District

Court misapplied *Daubert*). That denial reflects the well-established principle that a "class certification decision which turns on case-specific matters of fact and district court discretion" should not be granted immediate review. *Prado*, 221 F.3d at 1275-76. The same is true here.[2]

In sum, the Petition "does not raise a novel issue of class-certification law and [] the petitioners do not establish that the denial of class certification signals the death knell of their action." *Howard*, 814 F.3d at 478. The Petition should be denied.

II. The District Court Did Not Abuse its Discretion in Excluding Leitzinger's Opinions.

This Court reviews district court decisions on the admissibility of expert testimony with deference and only reverse when the lower court has abused its discretion. *See United States v. Protho*, 41 F.4th 812, 820

[2] Plaintiffs seemingly suggest there is a fourth ground to grant interlocutory review "when there is a 'significant probability that the order was erroneous.'" Pet. at 11 (quoting *Arnold Chapman & Paldo Sign & Display Co. v. Wagener Equities Inc.*, 747 F.3d 489, 491 (7th Cir. 2014)). This misstates *Chapman*. There, this Court evaluated whether class certification would unduly coerce defendants to settle, that is, whether it functioned as a death knell. *Chapman*, 747 F.3d at 491. In that context, the Court explained that "[e]ven if the defendants could prove that they'll be forced to settle unless we reverse the class certification order, they would have to demonstrate a significant probability that the order was erroneous" because, "[h]owever dramatic the effect" of the decision, "there's no point to an interlocutory appeal" if the "ruling is impervious to revision." *Id*. That observation does not create a fourth standalone basis for granting interlocutory review. In any event, there is no "significant probability" that the Opinion here was erroneous.

(7th Cir. 2022). The District Court did not abuse its discretion in excluding Leitzinger's opinions.[3]

A. The Opinion Properly Applied Rule 702 and *Daubert*.

The gravamen of the Petition is the charge that the District Court "fundamentally misapplied *Daubert*." Pet. at 1-4, 11. That contention fails because the District Court properly applied *Daubert*, consistent with the guidance provided by this Court's Rule 702 precedent. Op. at 4-17.

This Court provides district courts flexibility when determining whether expert testimony is admissible. The Court has explained that "[t]o apply the proper legal standard" when evaluating expert testimony, "judges merely need to follow *Daubert* in making a Rule 702 determination." *Kirk v. Clark Equip. Co.*, 991 F.3d 865, 872 (7th Cir. 2021) (quotation marks omitted). That is, courts must conduct "some form" of a *Daubert* analysis; "the *Daubert* standard does not have to be recited mechanically." *Gopalratnam v. Hewlett-Packard Co.*, 877 F.3d 771, 782 (7th Cir. 2017). "Given [the] flexibility [of the *Daubert*

[3] If the Court grants this Petition, Defendants respectfully request that the parties be granted an opportunity to fully brief the merits of class certification and the exclusion of Leitzinger's opinions, including the numerous alternative, independent grounds for affirming the District Court's decision.

framework], district courts have 'broad latitude' in deciding both 'how to determine reliability' and in 'the ultimate reliability determination.'" *Protho*, 41 F.4th at 821. A district court abuses its discretion only when it ignores *Daubert* entirely, analyzes only a single *Daubert* factor, or provides mere "conclusory statements of admissibility or inadmissibility." *Kirk*, 991 F.3d at 872; *Gopalratnam*, 877 F.3d at 782-83.

The District Court clearly did not abuse its discretion here. It set out the applicable legal standards under Rule 702 and *Daubert* and then applied them. Op. at 4-17. The District Court fully discharged its "gatekeeping function under *Daubert*" and Seventh Circuit law by applying the Supreme Court's "three-part test" for the admissibility of expert testimony. *Id*. at 4-5. In doing so, it did not "demand[] certainty," "perfect proof," or "unimpeachable" analysis. *Compare* Pet. at 1-2, *with* Op. at 5 ("The inquiry does not ask whether the expert's ultimate conclusions are correct."). Rather, it focused on *reliability*. *Id*. at 7-8.

The District Court undertook a detailed review of the record and concluded that Leitzinger's yardstick model did not *reliably* and "*reasonably* estimate" harm from the anticompetitive conduct, *id*. at 7

(emphasis added), because Leitzinger failed to provide "sound reasoning" for the selection of his yardstick and the variables his model includes as controls, *id.* at 8, 17.

The District Court did exactly what this Court instructed lower courts to do in *Am. Honda Motor Co. v. Allen*, 600 F.3d 813, 814 (7th Cir. 2010), and *Arandell Corp. v. Xcel Energy Inc.*, 149 F.4th 883, 894 (7th Cir. 2025). It applied the *Daubert* framework and "conclusively rul[ed] on the admissibility of an expert opinion prior to class certification . . . because that opinion [was] essential to the certification decision." *Am. Honda Motor Co.*, 600 F.3d at 814. The District Court's decision should not be disturbed. *Burns v. Sherwin-Williams Co.*, 78 F.4th 364, 373 (7th Cir. 2023).

B. The District Court Did Not Abuse Its Discretion In Concluding That Leitzinger Failed to Identify a Reliable Yardstick.

The District Court did not abuse its discretion in concluding that Leitzinger's yardstick model is unreliable because he "failed to provide a consistent or well-reasoned explanation for why" his model uses a "valid comparator group," i.e., "yardstick."[4] Op. at 17.

[4] "A yardstick model is a common methodology to estimate the impact of alleged anti-competitive conduct on prices" that "uses prices in a market unaffected by the

Plaintiffs' central argument is that the District Court improperly imposed a bright-line "purity requirement"—i.e., an expert's yardstick must be free of the alleged conduct to be admissible—contrary to the approach of some other district courts. Pet. at 11-17. That argument ignores the District Court's express agreement with Plaintiffs that "courts generally do not require experts to demonstrate that their yardstick is entirely free from the anticompetitive conduct" and that yardsticks that understate antitrust impact are generally admitted. Op. at 11-12.

The District Court did not exclude Leitzinger's opinions because they failed some "purity requirement" but rather because Leitzinger has no reliable way to determine the extent to which his yardstick is tainted or how that affects his results. Op. at 8-13. There is thus no conflict between the District Court's ruling and the district court decisions cited by Plaintiffs below and in their Petition.

At his deposition, Leitzinger admitted that he did not know (and had no methodology to determine) which providers in his yardstick engaged

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challenged conduct 'as a yardstick against which outcomes in the affected market be compared.'" Op. at 6 (citations omitted).

in the Challenged Conduct. Dkt. 224, 226 at 10; Dkt. 190 at 151:11-152:23. Nor did he test for that when constructing his yardstick—meaning he has no basis to assess how pervasive the problem is. Dkt. 224, 226 at 10; Dkt. 190 at 186:8-22, 195:22-196:12.

Leitzinger tried to salvage his unreliable yardstick model by offering a new opinion at his deposition that, while not preferable, it is acceptable to use a yardstick that is impacted by the Challenged Conduct to some degree. Dkt. 224, 226 at 10; Dkt. 190 at 141:10-142:12, 144:14-145:7, 146:25-147:11, 153:14-17. But he admitted he has no standard for what an acceptable amount of yardstick contamination is, no methodology to measure it, and no academic literature to support that view. Dkt. 224, 226 at 10; Dkt. 190 at 153:18-154:25, 155:2-10. The Petition does not address any of these deficiencies.

It was precisely because of these deficiencies that the District Court concluded Leitzinger failed to "provide sound reasoning" for the selection of his yardstick, rendering "his conclusion that [his] model estimates the effects of the challenged conduct . . . mere *ipse dixit*." Op. at 8 (citing *Mallinckrodt*, 2024 WL 1363544, at *10). This is a far cry from the "perfection" standard Plaintiffs attribute to the District Court.

Pet. at 13. The District Court's ruling is entirely consistent with the Court's admonition in *Manpower*: "The critical inquiry is whether there is a connection between the data employed and the opinion offered"; if the opinion is "connected to existing data only by the *ipse dixit* of the expert, that is properly excluded under Rule 702." *Manpower*, 732 F.3d at 806; *see also Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 157 (1999) ("[N]othing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert.").

Plaintiffs also mischaracterize the District Court's reasoning by reducing it to a finding of unreliability on the possibility that "five providers . . . in the yardstick might have also engaged in some the Challenged Conduct." Pet. at 12. The Opinion is not so limited. And neither the District Court nor Plaintiffs—and critically, not Leitzinger—have any idea how many providers in Leitzinger's yardstick engaged in the Challenged Conduct. It could be more than five providers. Leitzinger does not know and made no attempt to find out. Nor did he even seek to revisit his assumption after acknowledging that his yardstick was tainted.

The five providers referred to by the District Court are those identified by Anthem Blue Cross Blue Shield ("Anthem") as entities that engage in the Challenged Conduct, not an exhaustive list of the contamination in Leitzinger's yardstick. Op. at 9-10. In his rebuttal report, Leitzinger attempted to support his assumption that his yardstick is free of the Challenged Conduct by citing deposition testimony from Anthem that it was not common for Wisconsin providers to jointly contract with payors. Op. at 8-9. But the District Court found Leitzinger "misrepresented" Anthem's testimony because the witness also testified that at least five other providers in Wisconsin negotiate with Anthem in a similar manner to ANI. *Id*. at 9.

Leitzinger failed to consider or cite this testimony in his reports, and he did not analyze those five providers' payor contracting policies or investigate how many other providers contracted in a similar manner with other insurers.[5] *Id*. at 10; *see also* Dkt. 190 at 186:13-22. Comparing Leitzinger's explanations to the record, the District Court

[5] The Petition attempts to introduce new facts by claiming that the five providers make up "about 7% of the yardstick." Pet. at 12. Leitzinger does not offer this opinion and the Court should not consider this new calculation presented for the first time on appeal. *See Midwest Fence Corp. v. United States Dep't of Transp.*, 840 F.3d 932, 946 (7th Cir. 2016).

concluded that the deposition did not provide Leitzinger a "sound reason[] for assuming that yardstick providers did not engage in the challenged conduct." Op. at 9.

Contrary to Plaintiffs' argument, the District Court did *not* treat the presence of these five providers as the sole problem. The problem was that Leitzinger did not know which providers in his yardstick engaged in the Challenged Conduct and he had no methodology to determine that. As a result, he could not assess how the presence of the Challenged Conduct in his yardstick contaminated his findings.

For the same reason, the District Court properly rejected Plaintiffs' argument that the presence of the Challenged Conduct in the yardstick could theoretically bias Leitzinger's damages estimates in a conservative direction: there is no basis to assume that Leitzinger's opinions would always be biased toward being "conservative." *Compare* Op. at 11-13, *with* Pet. at 14-16. The Petition also fails to grapple with the District Court's "[c]rucial[]" finding that "Leitzinger never actually says in any of his reports that taint in the yardstick would necessarily make his model more conservative." Op. at 12.

Requiring that Leitzinger provide "a demonstrated foundation" for

his analysis does not mean that the District Court engaged "in its own weighing or assessment of the correctness of [Leitzinger's] opinion, nor did it accept one expert's analysis over another under the guise of questioning reliability as [Plaintiffs] argue[]." *In re Wholesale Grocery Prods. Antitrust Litig.*, 946 F.3d 995, 1002 (8th Cir. 2019) (excluding model); Pet. at 15-16. Instead, the District Court properly evaluated the reliability of Leitzinger's yardstick and found it to be fundamentally unsound. Op. at 8, 10; *see also Wholesale Grocery*, 946 F.3d at 1002; *Express Scripts*, 2024 WL 1834311, at *4 (excluding opinion because yardstick selection was "fundamentally unreasoned").

C. The District Court Did Not Abuse Its Discretion in Finding That Leitzinger Failed to Apply Control Variables Reliably.

The District Court also correctly found that Leitzinger's yardstick fails to control reliably for significant factors that he admitted could explain differences in price between what Defendants charged and the yardstick group. Op. at 13-17.

Contrary to Plaintiffs' argument, Pet. at 17-20, the District Court did not exclude Leitzinger's model based on a disagreement about which control variables he should have used. Rather, as the District Court

explained, the problem was "that Leitzinger himself fails to consistently explain what he controlled for and consequently, what his model measures." Op. at 14. In other words, the District Court could not find the "critical" and required "connection between the data employed and the opinion offered," *Manpower*, 732 F.3d at 806, i.e., that "his model isolates and measures antitrust impact," Op. at 17. Leitzinger's opinions were thus "properly excluded under Rule 702." *Manpower*, 732 F.3d at 806.

In addition, the District Court did not abuse its discretion in finding that Leitzinger's model failed to control for quality and market share—"'the two most important factors' affecting the price of healthcare services." Op. at 13, 17 (quoting *Marshfield Clinic*, 152 F.3d at 593); *Burns*, 78 F.4th at 373. To begin with, the Petition does not even attempt to argue that Leitzinger's model controls for market share.[6] Leitzinger confirmed at his deposition that market share could have a price effect but that it was not one of the variables included in his

[6] Plaintiffs urge the Court to ignore that Leitzinger's model fails to control for market share, Op. at 17—arguing the District Court "provided no analysis of this issue," Pet. at 11 n.4. But the District Court indisputably *did* analyze this issue, Op. at 13-14, 17, after Defendants fully briefed it, *e.g.*, Dkt. 224, 226 at 21. Regardless, it is *Plaintiffs'* burden to prove the reliability of their expert's model. Fed. R. Evid. 702.

model. Dkt. 224, 226 at 21.

As to quality, Leitzinger's own testimony confirms that his model cannot control for this "important factor," which he admits may also explain differences in healthcare prices not attributable to the Challenged Conduct. Op. at 14. In his rebuttal report, Leitzinger attempted to explain why certain providers in his yardstick, i.e., ThedaCare and Mayo Clinic, "showed significant overcharges when run through his model." *Id.* He opined that one reason for this may be these providers' "reputation for providing particularly high-quality care." *Id.* But, as the District Court found, this concession means that his model does not reliably control for quality, i.e., one of the "most important factors" that influence the price of health care. *Id.*

* * *

The "bottom line" is Leitzinger's model cannot reliably do what he claims it does—isolate the harm caused by the Challenged Conduct, Op. at 17, and the District Court therefore acted well within its discretion in excluding the model. *Manpower*, 732 F.3d at 806; *Mallinckrodt*, 2024 WL 1363544, at *7; *see also Wholesale Grocery*, 946 F.3d at 1002 (affirming exclusion of model that, *inter alia*, "fail[ed] to control for non-

conspiratorial factors").

III. Multiple Independent Grounds Compel Affirmance, Making Rule 23(f) Review Further Unwarranted.

There are several additional grounds on which the District Court could have excluded Leitzinger's opinions and denied class certification. Any one of those grounds warrants denial of the Petition.

First, Defendants moved to exclude under both Rule 702 and Rule 403, but Plaintiffs failed to respond to Defendants' Rule 403 arguments. Dkts. 224, 226 at 1. This provides an independent basis for exclusion, and any opposition has been waived. The *Daubert* briefing also identified various additional grounds—beyond those discussed by the District Court—why Leitzinger's opinions are inadmissible. Dkt. 214, 216 at 37-49 (discussing, for example, the unreliability of Leitzinger's two-step empirical method for assessing classwide impact and damages extrapolation). On any appeal, Leitzinger's exclusion should be upheld for these reasons as well.

Second, this case is an especially poor candidate for Rule 23(f) review because class certification could have been independently and appropriately denied on multiple other grounds, including Plaintiffs' failure to (1) provide support for their primary class definition, Dkts.

214, 216 at 23-24; (2) satisfy Rule 23(b)(3)'s predominance and typicality requirements by seeking to certify a class that includes a great many putative class members who lack standing, *id*. at 24-35; (3) prove that a class action is the superior mechanism to adjudicate this dispute rife with individualized issues, *id*. at 52-54; and (4) prove that joinder would be impracticable, as required under Rule 23(a)(1), *id*. at 54-56. The Petition addresses none of these independent and fatal defects.

CONCLUSION

Plaintiffs' Petition for interlocutory appeal should be denied.

Dated: January 12, 2026

Respectfully submitted,
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CERTIFICATE OF COMPLIANCE

1. This Opposition complies with the page limitation of Fed. R. App. P. 5(c)(1) because it contains 5,129 words, excluding the parts of the brief exempted by Fed. R. App. P. 5(b)(1)(E) and Fed. R. App. P. 32(f).

2. This Opposition also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) as modified by Circuit Rule 32(b) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it was prepared in a proportionally spaced, 14-point Century Schoolbook font.

Dated: January 12, 2026

/s/ Zachary M. Johns
Zachary M. Johns

CERTIFICATE OF SERVICE

The undersigned certifies that on this 12th day of January 2026, a true and accurate copy of the foregoing OPPOSITION TO PERMISSION FOR APPEAL PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 23(f) was served on the following counsel of record via electronic mail.

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