IN THE SUPREME COURT OF IOWA

NO. 22–0303

BRADLEY CHICOINE AND STEVEN MUELLER ET AL.,
Petitioners-Appellants,

V.

WELLMARK ET AL.,
Defendants-Appellees.

On appeal from the District Court for Polk County
The Honorable Sarah E. Crane

BRIEF OF APPELLEES WELLMARK, INC. AND WELLMARK HEALTH PLAN OF IOWA, INC.

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

Page(s)

Statutes

Rules

Other Authorities

STATEMENT OF THE ISSUES PRESENTED

I. DID THE DISTRICT COURT APPLY THE CORRECT LEGAL STANDARD FOR CLASS CERTIFICATION?

Cases

Butts v. Iowa Health Sys., 863 N.W.2d 36 (Iowa Ct. App. 2015)

Legg v. W. Bank, 873 N.W.2d 756 (Iowa 2016)

Freeman v. Grain Processing Corp., 895 N.W.2d 105 (Iowa 2017)

Roland v. Annett Holdings, Inc., 940 N.W.2d 752 (Iowa 2020)

Vos v. Farm Bureau Life Ins. Co., 667 N.W.2d 36 (Iowa 2003).

Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350 (2011)

Rules

Iowa R. Civ. P. 1.261

Iowa R. Civ. P. 1.262

Iowa R. Civ. P. 1.263

II. DID THE DISTRICT COURT CORRECTLY HOLD THAT PLAINTIFFS FAILED TO PRESENT EVIDENCE CAPABLE OF PROVING THEIR CLAIM ON A CLASS-WIDE BASIS?

Cases

Associated Gen. Contractors of Cal. v. Cal. State Council of Carpenters, 459 U.S. 519 (1983)

Blades v. Monsanto Co., 400 F.3d 562 (8th Cir. 2005)

Brookins v. Int'l Motor Contest Ass'n, 219 F.3d 849 (8th Cir. 2000)

Butts v. Iowa Health Sys., 863 N.W.2d 36 (Iowa Ct. App. 2015)

Comcast Corp. v. Behrend, 569 U.S. 27 (2013)

DeGuiseppe v. Vill. of Bellwood, 68 F.3d 187 (7th Cir. 1995)

Est. of Gottschalk by Gottschalk v. Pomeroy Dev., Inc., 893 N.W.2d 579, 586 (Iowa 2017)

Garnica v. HomeTeam Pest Def., Inc., 230 F. Supp. 3d 1155 (N.D. Cal. 2017)

Godfrey v. State, 962 N.W.2d 84 (Iowa 2021)

In re New Motor Vehicles Canadian Exp. Antitrust Litig., 522 F.3d 6 (1st Cir. 2008)

In re Principal U.S. Prop. Acct. ERISA Litig., 2013 WL 7218827 (S.D. Iowa Sept. 30, 2013)

In re Rail Freight Fuel Surcharge Antitrust Litig., 725 F.3d 244 (D.C. Cir. 2013)

Interstate Power Co. v. Ins. Co. of N. Am., 603 N.W.2d 751 (Iowa 1999)

IQ Dental Supply, Inc. v. Henry Schein, Inc., 924 F.3d 57 (2d Cir. 2019)

Kinseth v. Weil-McLain, 913 N.W.2d 55 (Iowa 2018)

Little Rock Cardiology Clinic PA v. Baptist Health, 591 F.3d 591 (8th Cir. 2009)

Mueller v. Wellmark, Inc., 818 N.W.2d 244 (Iowa 2012)

Mueller v. Wellmark, Inc., 861 N.W.2d 563 (Iowa 2015)

Ne. Cmty. Sch. Dist. v. Easton Valley Cmty. Sch. Dist., 857 N.W.2d 488 (Iowa 2014)

Next Generation Realty Co., Inc. v. Iowa Realty Co., 2003 WL 25280677 (Iowa Dist. Ct. Feb. 18, 2003)

Ohio v. Am. Express Co., 138 S. Ct. 2274 (2018)

Peters v. Aetna Inc., 2019 WL 1429607 (W.D.N.C. Mar. 29, 2019)

Roesch, Inc. v. Star Cooler Corp., 712 F.2d 1235 (8th Cir. 1983)

State v. Rutledge, 600 N.W.2d 324, 325 (Iowa 1999)

Sunbeam Television Corp. v. Nielsen Media Rsch., Inc., 711 F.3d 1264 (11th Cir. 2013)

Todd v. Exxon Corp., 275 F.3d 191 (2d Cir. 2001)

Valley Drug Co. v. Geneva Pharms., Inc., 350 F.3d 1181 (11th Cir. 2003)

Winnebago Indus., Inc. v. Haverly, 727 N.W.2d 567 (Iowa 2006)

Wright v. Brooke Grp. Ltd., 652 N.W.2d 159 (Iowa 2002)

Statutes

Iowa Code § 553.4

Iowa Code § 553.12

Other Authorities

Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* (4th ed. 2019)

Newberg on Class Actions (5th ed.)

III. ARE THE NAMED PLAINTIFFS INADEQUATE REPRESENTATIVES?

Cases

Comcast Corp. v. Behrend, 569 U.S. 27 (2013)

In re Milk Prods. Antitrust Litig., 195 F.3d 430 (8th Cir. 1999)

In re Principal U.S. Prop. Acct. ERISA Litig., 2013 WL 7218827 (S.D. Iowa Sept. 30, 2013)

Stender v. Blessum, 897 N.W2d 491 (Iowa 2017)

Other Authorities

Rest. (2d) of Judgments (Am. Law Inst. 1982)

ROUTING STATEMENT

Defendants Wellmark, Inc. and Wellmark Health Plan of Iowa, Inc. (collectively, "Wellmark") agree that the Supreme Court should retain this case. From an efficiency perspective, retention makes sense: this is the sixth appeal in a sequence of related litigation, and the Supreme Court retained all five prior appeals. *See Mueller v. Wellmark, Inc.*, 818 N.W.2d 244 (Iowa 2012) ("*Mueller I"*); *Mueller v. Wellmark, Inc.*, 861 N.W.2d 563 (Iowa 2015) ("*Mueller II"*); *Wellmark, Inc. v. Iowa Dist. Ct. for Polk Cnty.*, 890 N.W.2d 636 (Iowa 2017); *Abbas v. Iowa Ins. Div.*, 893 N.W.2d. 879 (2017); *Chicoine v. Wellmark*, 894 N.W.2d 454 (2017).

More importantly, this case presents a substantial question of enunciating legal principles. Iowa R. App. P. 6.1101(2)(f). Plaintiffs are, in essence, seeking to overturn this Court's decision in *Roland v. Annett Holdings Inc.*, 940 N.W.2d 752 (Iowa 2020). Retention is appropriate to address that challenge.

INTRODUCTION

After a full-day evidentiary hearing and supplemental hearing, the District Court issued a well-reasoned, fifteen-page opinion denying Plaintiffs' motion for class certification. The Court held that Plaintiffs' antitrust claim—which alleges that Wellmark entered into conspiracies with 466 self-funded employer health plan clients to underpay chiropractors—was not susceptible to class-wide proof. Instead, proving that each of the nearly 3,000 putative class members suffered "antitrust injury" would require highly individualized inquiries that would predominate over any common issues, and devolve into thousands of mini-trials. Moreover, broad swaths of the class suffered no injury at all. Given that evidentiary record, the District Court faithfully applied this Court's decision in *Roland v. Annett Holdings, Inc.*, 940 N.W.2d 752 (Iowa 2020), and other precedent to deny class certification.

Plaintiffs cannot identify any error in the District Court's decision, let alone an abuse of discretion. In fact, Plaintiffs do not contest the vast majority of the Court's findings. Nor could they. Despite conceding they had the burden to present "proof" of class-wide injury, liability, and damages, Plaintiffs took no depositions, called no witnesses, provided no expert testimony or model of damages, and chose not to cross-examine Wellmark's

expert. The only "evidence" they proffered was from a ***different*** case, brought under a ***different*** claim (which Plaintiffs lost).

Plaintiffs' main argument on appeal is that the District Court misunderstood their theory. But Plaintiffs ***concede*** that the Court analyzed the ***only*** theory they presented in their class motion and oral argument. Moreover, Plaintiffs' real problem is not that the District Court misunderstood their theory, but that they ***admitted*** that it ***precludes*** class certification: "I agree with you that if that was our theory that we have an individual situation that is not proveable class-wide." Vol. 1 Appellate App. 1511 at 48:18–20.

With minutes left in the final class certification hearing, Plaintiffs tried to switch to a liability theory that they had previously ***disavowed*** to survive Wellmark's motion to dismiss: that but for the conspiracy, the agreements between Wellmark and self-funded employers would still exist, but chiropractor pay "would be set at" 90% of medical doctors' pay. Vol. 1 Appellate App. 1512 at 49:1–6. The Court aptly rejected this bait-and-switch, holding that Plaintiffs were judicially estopped from changing their theory. On appeal, Plaintiffs do not challenge the Court's judicial estoppel ruling in any way. Moreover, they have failed to show that ***any*** element of their claim can be proven with class-wide evidence under ***any*** theory. Plaintiffs continue to point only to evidence from a different case asserting a different claim, and

do not contest factual findings demonstrating that broad swaths of the class were uninjured regardless of their theory.

The District Court did not misunderstand Plaintiffs' theory or argument. On the contrary, Judge Crane was right on the facts and the law: certification is not permitted under Iowa law where, as here, Plaintiffs failed to meet their evidentiary burden and the record evidence overwhelmingly shows that individual inquiries would predominate over common questions. This Court should affirm in full.

STATEMENT OF THE CASE

This case is the latest in a series of suits by certain Iowa chiropractors. Iowa courts and regulators have rejected every suit. The first lawsuit, *Mueller v. Wellmark, Inc.*, began in 2007 and later included claims nearly identical to those in the present suit. 818 N.W.2d 244, 247–49 (Iowa 2012). Specifically, the plaintiffs in that suit alleged that Wellmark engaged in *per se* illegal price-fixing by making its provider network available to Iowa self-funded employers. *Mueller v. Wellmark, Inc.*, 861 N.W.2d 563, 567 (Iowa 2015). After years of litigation, this Court affirmed judgment against all of those claims. *Mueller I*, 818 N.W.2d at 267; *Mueller II*, 861 N.W.2d at 575. The Court later held that the *Mueller* plaintiffs could not assert rule-of-reason

antitrust claims against Wellmark either. *Wellmark, Inc. v. Iowa Dist. Ct. for Polk Cnty.*, 890 N.W.2d 636, 645 (Iowa 2017).

Before *Mueller* had been resolved, the *Mueller* plaintiffs, joined by Plaintiffs here, brought a separate dispute before the Iowa Insurance Commissioner (*Abbas*). Non-Confidential Appendix to Pls.' 3/13/20 Mot. for Class Cert. ("Pls.' Non-Conf. App'x") at 9–10; Vol. 1 Appellate App. 278. In *Abbas*, the chiropractor plaintiffs argued that Wellmark discriminated against them by paying them less than medical doctors, in violation of Iowa Code § 514F.2. Pls.' Non-Conf. App'x at 14. Notably, *Abbas* did not include any antitrust claims—under the Iowa antitrust statute or otherwise. After an in-depth evidentiary hearing, the Commissioner rejected Plaintiffs' discrimination claim, and this Court affirmed. *Id.* at 493; *Abbas v. Iowa Ins. Div.*, 893 N.W.2d 879, 894 (Iowa 2017).

The same year the *Mueller* and *Abbas* decisions were affirmed, Plaintiffs filed this case. The original petition alleged that Wellmark conspired with the Blue Cross Blue Shield Association and the other Blue Plans to lower chiropractic reimbursement rates. Vol. 1 Appellate App. 31 ¶¶ 12, 15, 21. But after the Association moved to intervene, Plaintiffs

strategically abandoned any claim related to the Association or any other Blue Plan.[1] Vol. 1 Appellate App. 140 ¶¶ 4, 6(a)(i); Vol. 1 Appellate App. 169.

Thus, Plaintiffs strategically chose to narrow their case to a single claim under a single theory: that Wellmark and 466 self-funded employers conspired by entering into ordinary-course agreements under which Wellmark administers the employer's health plan benefits. Vol. 1 Appellate App. 168 ¶¶ 2(a) & (f), 3, 12. Plaintiffs allege that self-funded employers are "potential price competitors" with Wellmark. Vol. 1 Appellate App. 168 ¶¶ 2(a), 16(a), 59(a). Under this theory, but for the agreements between Wellmark and each self-funded employer, each of those 466 employers would have: (i) contracted directly with chiropractors across the state, and; (ii) uniformly paid higher rates and covered more services than they did in the real world. Vol. 1 Appellate App. 210, 215; Vol. 1 Appellate App. 168 ¶ 2.

Wellmark moved to dismiss, arguing that it acts as its self-funded clients' agent, and therefore no conspiracy claim can exist under the single-entity doctrine. Vol. 3 Appellate App. 36. Recognizing the threat of dismissal

[1] In response to Wellmark's Second Motion to Dismiss, Plaintiffs also voluntarily dismissed the *Mueller* plaintiffs as named plaintiffs in this case. Vol. 1 Appellate App. 198-200. Contrary to Plaintiffs' representations, Appellants' Br. at 18, 22, those individuals were not named plaintiffs in the District Court at the time of class certification and are not appellants here.

for any theory in which self-funded employers ***retained*** their contracts with Wellmark, Plaintiffs' opposition stressed that the alleged conspiracy or agreement they were challenging was Wellmark's and self-funded employers' entry into administrative services agreements in the first place. In their words, "[t]he initiating 'contract, combination, or conspiracy' is among the Wellmark Defendants and the Iowa self-fundeds who agree in their principal capacities to the Administrative Services Agreements." Vol. 1 Appellate App. 213. As they explained at the dismissal hearing, "[self-funded employers] [a]re potential competitors, but not for these contracts. John Deere, for example, would be out contracting with physicians, DOs, chiropractors on their own." Vol. 1 Appellate App. 246 at 23:12–15. Relying on that that argument, the District Court denied dismissal because Plaintiffs' theory is that "the Iowa self-funded employers would, absent their contractual relationship with Wellmark, be price competitors." Vol. 1 Appellate App. 270.

Plaintiffs moved for class certification on that theory (and *only* that theory), identifying "Iowa self-funded private and governmental employers" as "potential price competitors" and explaining that "[a]bsent the Administrative Services Agreements, the Iowa self-fundeds would have to negotiate such issues directly with the Plaintiff chiropractors." Vol. 1 Appellate App. 289-90. The ***only*** evidence Plaintiffs submitted in support of

class certification was the administrative record from *Abbas*, including their damages calculation based on Iowa Code 514F.2 (which bars limiting provider payments based solely on licensure), not the Iowa antitrust statute. Notably, that calculation was not created by any expert, but rather by Plaintiffs' ***counsel***. Wellmark opposed class certification because Plaintiffs cannot show either commonality or predominance for any of the elements of their claim—antitrust injury, liability, and damages—and because the class representatives are inadequate. Vol. 2 Appellate App. 960.

The District Court held a full-day evidentiary hearing on class certification, followed by a supplemental hearing. At the hearings, Plaintiffs called no witnesses, chose not to cross-examine Wellmark's expert economist, Dr. Kristin Terris, Ph.D., and chose not to controvert any of the evidentiary affidavits submitted by Wellmark in connection with its Resistance.

In a well-reasoned fifteen-page opinion, the District Court denied class certification. Judge Crane began by analyzing whether common or individual issues would predominate the antitrust injury analysis, and concluded that issue was "fatal to class certification." Vol. 1 Appellate App. 1761. The Court explained that, at the class certification stage, the antitrust injury element requires Plaintiffs to "demonstrate 'some means of determining that each

member of the class was in fact injured.'" *Id.* at 1762 (quoting *In re New Motor Vehicles Canadian Exp. Antitrust Litig.*, 522 F.3d 6, 28 (1st Cir. 2008)).

However, the Court found that "Plaintiffs have not identified any sort of modeling that would allow them to prove that each chiropractor suffered an injury." *Id.* at 1764. The Court further found that Plaintiffs' proposal to "simply compar[e] the Wellmark rate for Medical Doctors (MD) or Doctors of Osteopathic Medicine (DO) to the Wellmark rate for chiropractors … does not track the Plaintiffs' theory of the case. It is not correlated to the theory that self-funded employers would negotiate in the market." *Id.*

The Court also found that many putative class members were not injured at all, including those who had no self-funded patients and those whose billed charges were already paid in full. *Id.* at 1762, 1764. Indeed, "63.5% of chiropractic charges from 2010–2019 were billed ***below the MD/DO fee schedule***, so over half of the claims at issue would not have caused injury in the way the Plaintiffs' damage model would compensate." *Id.* at 1764-65 (emphasis added). Further, "Named Plaintiffs acknowledge that what constitutes a reasonable rate would differ based on the chiropractor and that Wellmark's reimbursement rates might be reasonable for some chiropractors." *Id.* at 1765 (internal citations omitted).

Based on the entirety of the record evidence, the Court found that identifying which, if any, chiropractors were injured would require "analysis … on a chiropractor by chiropractor and employer by employer basis to determine whether a higher rate would have been negotiated absent the allegedly unlawful agreements." *Id.* at 1767. Because "Plaintiffs have not identified any way to sort through this issue that would not require an assessment of individualized claims by chiropractor" identifying which putative class members suffered any injury at all would "devolve into mini-trials." *Id.* at 1762, 1766-67. The Court emphasized that "the issue is not the calculation of damages but whether or not class members have any claims at all." *Id.* at 1767 (quotation omitted).

Even Plaintiffs admitted at the second hearing that class certification would ***not*** be appropriate on the only theory they had pursued and briefed, because under that theory: "we're not saying that we're – that we would – we would contract with individual self-fundeds … if that was our theory [] we have an individual situation that is not proveable class-wide." Vol. 1 Appellate App. 1511 at 48:3–20.

Given that fatal concession, with just minutes remaining in the final class certification hearing, Plaintiffs tried to change their theory. They argued that, in the but-for world, "self-funded employers would still have agreements

with Wellmark," but "Wellmark would instead apply the MD/DO rate in the implementation of those agreements." Vol. 1 Appellate App. 1768. As the District Court held, "[t]he problem with this argument is that ***Plaintiffs disavowed it earlier to survive a motion to dismiss***." *Id.* (emphasis added). Because Plaintiffs successfully "framed their case in a particular way to survive a motion to dismiss," they "are judicially estopped from this late change of theory." *Id*.

STATEMENT OF THE FACTS

I. PLAINTIFFS ALLEGE THAT WELLMARK CONSPIRES WITH 466 HIGHLY DIVERSE ENTITIES.

Employers can fund health care benefits for their employees in one of two ways: through a fully insured plan or a self-insured plan. Fully insured employers pay a monthly premium to the insurer. The insurer pays for the employees' health care expenses and bears the risk of expenses being higher than premiums. Vol. 2 Appellate App. 1003[2] ¶ 28.[3] Self-insured employers, by contrast, bear that risk themselves. *Id.*; *see also* Vol. 1 Appellate App.

[2] Exhibits identified by letter are the attachments to Defendants' 10/23/20 Resistance to Plaintiffs' Motion for Class Certification. Vol. 2 Appellate App. 941.

[3] Plaintiffs chose not to cross-examine Dr. Terris, and the District Court credited her report and testimony, citing it multiple times throughout the class opinion. *E.g.*, Vol. 1 Appellate App. 1763, 1765.

1755. Because most self-insured employers are not in the health insurance industry, they pay a carrier to do the administrative work of running a health plan. *See, e.g.*, Vol. 1 Appellate App. 1755 (describing such an arrangement between Wellmark and Iowa self-funded employers). That work includes: contracting with "in-network" providers; evaluating scientific literature to decide which treatments are medically necessary and not experimental; adjudicating claims, which in turn requires evaluating coverage, investigating fraud, and coordinating benefits with other insurers; tracking deductibles, co-pays, and out-of-pocket maximums; and complying with prompt-pay laws and other regulations. *See, e.g.*, Iowa Admin. Code r. 191-15.32(507B); Vol. 2 Appellate App. 1134-35 ¶¶ 7–8.

Self-insured employers pay an administrative fee and enter into administrative services agreements with a carrier, like Wellmark, to do that work. Vol. 2 Appellate App. 1003-04 ¶¶ 29–30. These contracts between Wellmark and self-insured employers are the agreements that Plaintiffs challenge here. Vol. 1 Appellate App. 188, 190 ¶¶ 43–46, 53; *see also*, Vol. 1 Appellate App. 1756 ("Plaintiffs allege Defendants entered into Administrative Services Agreements with … self-funded Iowa employers[] to artificially fix a lower price for chiropractic services … ."). During the alleged class period, patients from 466 self-funded Wellmark clients in Iowa received

chiropractic services. *Id.* at 1762; Vol. 2 Appellate App. 1041 ¶ 84, n.98. Thus, Plaintiffs' claim is based on 466 different alleged conspiracies, each based on the unique agreement between an individual employer and Wellmark. *See* Vol. 1 Appellate App. 1760 (noting Plaintiffs' claim is that Wellmark "conspir[ed] with Iowa's self-funded employers").

Plaintiffs wrongly state (without citation to any record evidence) that all self-funded employers "sign the same forms." Appellants' Br. at 54. The actual record evidence shows that each self-funded employer tailors its benefits—including chiropractic coverage—based on its employee base. Vol. 2 Appellate App. 1175 at 116:10–117:2; *see also* Vol. 2 Appellate App. 1144 ¶ 10; Vol. 2 Appellate App. 254-55. Because most self-funded plans are regulated by ERISA, not state law, employers can choose not to cover chiropractic care ***at all***. Pls.' Non-Conf. App'x at 490–91. Some employers limit the number of covered visits. Vol. 2 Appellate App. 1397; Vol. 2 Appellate App. 1511; Vol. 2 Appellate App. 118-21, 253-54. Some require a treatment plan, referral, or medical-necessity review after a certain number of visits. Vol. 2 Appellate App. 1599; Vol. 2 Appellate App. 1686; Vol. 2 Appellate App. 1783; Vol. 2 Appellate App. 1870. Still others set a limit on spending. Vol. 2 Appellate App. 1978; Vol. 2 Appellate App. 2068; Vol. 2 Appellate App. 114-17, 252-53.

Employers can also move between fully insured and self-funded products. Vol. 2 Appellate App. 1019 ¶ 60. In fact, 148 of the 466 employers at issue (32%) switched from a fully insured to a self-insured plan, or vice versa, during the proposed class period. *Id.* As the District Court recognized, these employers vary in their size and resources. Vol. 1 Appellate App. 1763. Some have thousands of employees and significant resources (*e.g.*, Casey's General Store); others have fewer employees and capabilities (*e.g.*, Schoitz Engineering, a small tool design firm in Waterloo). Vol. 2 Appellate App. 952; *see also* Vol. 2 Appellate App. 1022-23 ¶ 66.

In addition, some self-fundeds utilize a broad PPO network of providers, while others offer an HMO or narrow network. Vol. 2 Appellate App. 1004 ¶ 31. Wellmark's PPO network is a broad network of hospitals, doctors, and other providers across the entire state that took decades and millions of dollars to develop. Vol. 2 Appellate App. 1134 ¶ 4; Vol. 2 Appellate App. 126, 175. By contrast, narrow networks are a common cost-saving strategy; they include only a subset of providers who are willing to offer discounts to be included in the narrow network, in exchange for a potentially greater patient volume. Vol. 2 Appellate App. 1027 ¶ 72; Emily Gillen *et al.*, *The Effect of Narrow Network Plans on Out-of-Pocket Cost*, 23 Am. J. Managed Care 540 (2017); Kate Ho & Robin Lee, *Equilibrium*

Provider Networks: Bargaining and Exclusion in Health Care Markets, 109 Am. Econ. Rev. 473 (2019).

HMOs are a common example of narrow networks. Vol. 2 Appellate App. 1001-02 ¶¶ 22–23. Wellmark did not build its own HMO chiropractic network, but instead pays for access to a network built by the Iowa Chiropractic Physicians Clinic ("ICPC"). *See* Vol. 1 Appellate App. 1763 (noting that Wellmark's HMO products utilize the ICPC network). ICPC chiropractors' rates are set by their contract with ICPC, not Wellmark. Vol. 2 Appellate App. 1002-03 ¶ 26.[4] The ICPC network that Wellmark's HMO product uses includes fewer than 20% of the Iowa chiropractors in Wellmark's PPO, but meets Wellmark's network adequacy guidelines for all geographies statewide. Vol. 2 Appellate App. 1140 ¶¶ 7–9; Appellants' Br. at 74 (admitting that only 248 of 1,300–1,500 chiropractors are part of the ICPC network).

[4] Wellmark is not unusual in renting part of its network from another entity; multiple rental networks are available in Iowa. Vol. 2, Conf. App. 235-37. In fact, all of the named Plaintiffs are members of at least one rental network. Vol. 2, Conf. App. 1297-98; Vol. 2, Conf. App. 1202 at 225:13-17. Because setting up a network is costly, it is typically more affordable for small or new carriers to rent networks. Vol. 2, Conf. App. 237; Vol. 2, Conf. App. 1021 ¶ 63.

II. PLAINTIFFS SEEK TO REPRESENT A HIGHLY DIVERSE CLASS.

Plaintiffs seek to represent a class of chiropractors who were Iowa citizens as of October 2015, or who have been Iowa citizens since 2004.[5] Vol. 1 Appellate App. 1756; Vol. 1 Appellate App. 275. It is unclear how many chiropractors fit these arbitrary conditions, but 2,717 chiropractors submitted claims to Wellmark from 2004 to 2019. Vol. 2 Appellate App. 995 ¶ 13(d) n.2. These 2,700-plus chiropractors are incredibly diverse, and would each be affected differently by changes in the marketplace. *Id*. at ¶ 66.

A. Class Members Face Highly Variable Competitive Conditions.

Putative class members face very different levels of competition, which Plaintiffs recognize would impact the rates they could obtain. Vol. 1 Appellate App. 290 (alleging that the number of competitors impacts the price each competitor can command); *see also* Vol. 1 Appellate App. 1766 ("[T]he competitive price that would have prevailed absent the Administrative Services Agreement would … vary by … competition among chiropractors."). For example, there are only four chiropractors within a ten-mile radius of Dr.

[5] Although the alleged class period starts in 2004 at the earliest, Appellants' Br. at 24, much of Plaintiffs' Statement of the Facts discusses their view of decades-old legislative activities, an alleged "boycott" by the American Medical Association in the 1960s, proposals that were never adopted, and other issues that have no relevance to the issues presently before the Court.

Niles, but there are 39 within the same radius of Dr. Chicoine. Vol. 2 Appellate App. 1056-60 ¶ 98 & Ex. 30-33. Similarly, each chiropractor's potential patient base has a different ability to pay and a different need for chiropractic care. *See, e.g.*, Vol. 1 Appellate App. 1766 (noting the effect that locality and demographics would have upon competitive price). Population density (*i.e.*, the number of potential patients) can vary tenfold from county to county. Vol. 2 Appellate App. 1053 Ex. 27. Median household income in Dallas County is more than twice as high as in Decatur County. *Id.* at 1049 Ex. 23. Some counties have an uninsured rate 50% greater than other counties. *Id.* at 1050 Ex. 24.

B. Class Members Have Varying Abilities To Win Self-Fundeds' Business.

Plaintiffs assume that any chiropractor who wants a contract with a self-funded employer would get one. Vol. 2 Appellate App. 1016-17 ¶ 55. In fact, as the District Court recognized, self-funded employers have strong economic incentives to use narrow networks, which are less costly and typically lead to lower reimbursement rates for providers in the network. *See, e.g.*, Vol. 1 Appellate App. 1763-64 (observing the incentives that self-funded employers would have to utilize narrow networks if unable to utilize Wellmark's PPO network). The ability to win contracts with self-funded employers would vary from chiropractor to chiropractor. *Id.* at 1763-64, 1766 ("Here, the

competitive price that would have prevailed absent the Administrative Services Agreement would also vary by locality, demographics, the size of the self-funded employer, and competition among chiropractors."). Some have decades of experience; others just graduated from college. *See, e.g.*, Vol. 2 Appellate App. 1038 ¶ 79. Some have a strong reputation built over years of exceptional service; others have had service issues. *Id.*

Given these differences, it is no surprise that chiropractors' ability to attract patients from self-funded employers varies; in fact, 328 of the 2,717 chiropractors (12.1%) did not have a ***single*** claim from ***any*** self-funded employer during the class period. Vol. 1 Appellate App. 1762; Vol. 2 Appellate App. 1023, 1025 ¶ 67, Ex. 9. For another 31.6% (859 chiropractors), less than 25% of their Wellmark claims were self-funded. *Id.* ¶ 67.

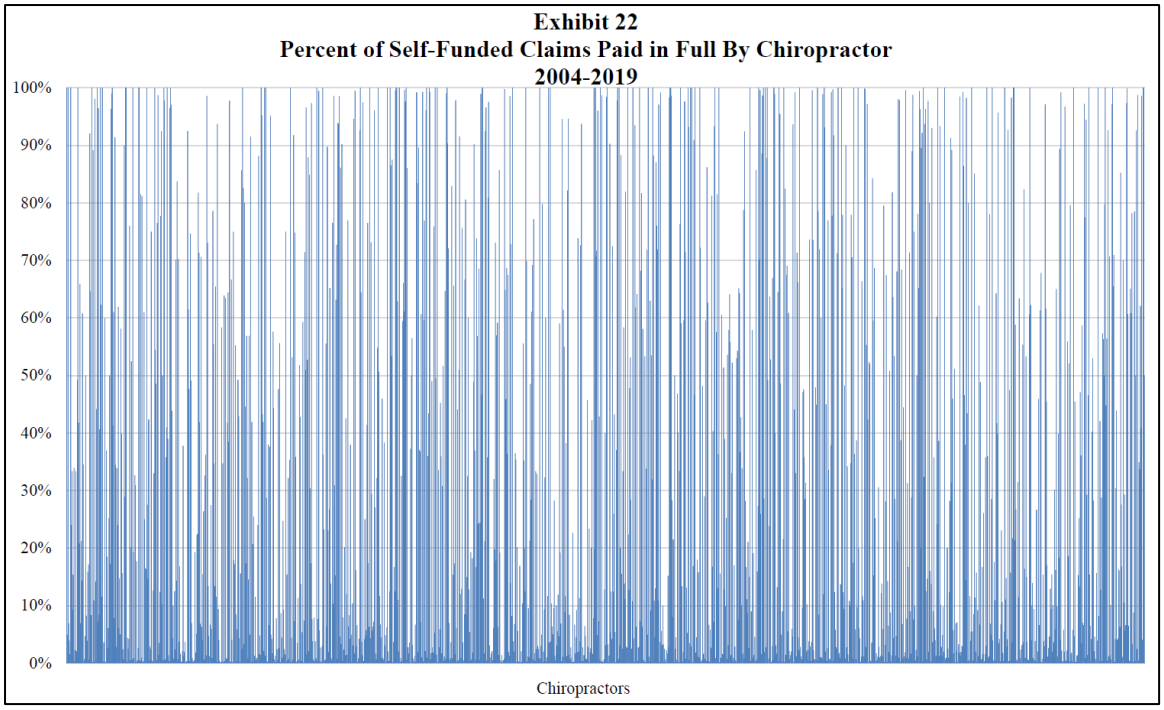
C. Each Chiropractor Charges, And Is Paid, Rates Tailored To That Chiropractor.

Each chiropractor charges unique rates. Order at 11. For example, in 2019, the three Named Plaintiffs charged rates for CPT code 72100 (a lower spine x-ray (2 or 3 views)) that varied by up to ***70%***. Vol. 2 Appellate App. 2169; Vol. 2 Appellate App. 2219; Vol. 2 Appellate App. 2245. Variations throughout the putative class are extreme: charges for the same CPT code can vary by 1,000% or more. Vol. 2 Appellate App. 1075-77 Ex. 38(a)–(c). As

the "Named Plaintiffs acknowledge," "what constitutes a reasonable rate" differs "based on the chiropractor." Vol. 1 Appellate App. 1765; Vol. 2 Appellate App. 982.[6]

As a result, contrary to Plaintiffs' unsupported assertion, Iowa chiropractors do not "generally receive identical compensation for each performance of a service represented by the CPT codes." Appellants' Br. 39. Many are paid the full amount they request. *See* Vol. 1 Appellate App. 1765-66. Indeed, nearly 20% of Wellmark chiropractic claims during the class period were paid the full amount requested. Vol. 2 Appellate App. 1068 ¶ 114. At least 99 chiropractors were paid full billed charges for every single self-funded claim during the class period. *Id.* at 1045-46, 1048 ¶ 92, Ex. 22; Vol. 1 Appellate App. 1765 ("3.6% of chiropractors were paid the full billed rate on every charge during the 2004–2019 class period."). And 745 chiropractors had a "gap" (between the amount requested and the amount paid) of less than $1,000 ***total*** over the ***entire class period***. Vol. 2 Appellate App. 1045-46, 1048 ¶ 92, Ex. 22. As Exhibit 22 shows, the percentage of self-funded claims paid in full varies significantly from chiropractor to chiropractor.

[6] Exhibit A contains full quotations of key deposition testimony from two of the named Plaintiffs who were deposed on these and other topics.



Even when chiropractors are reimbursed based on Wellmark's fee schedule, they are not paid a fixed amount per CPT code. As Dr. Terris explains, CPT codes often cover overlapping services, so Wellmark uses an "edit process" to avoid duplicative payment. As a result, reimbursement for a single CPT code can vary by 500% or more. *Id.* at 1007-11 ¶ 40–42, Ex. 3–4. Plaintiffs presented no contrary evidence and did not attempt to cross-examine Dr. Terris on this or any other point at the class certification hearing.

In short, as the District Court found, the 466 self-funded employers and the 2,700-plus chiropractors that would comprise Plaintiffs' proposed class represent wide-ranging, diverse populations that vary significantly in meaningful ways.

ARGUMENT

I. THE DISTRICT COURT APPLIED THE CORRECT LEGAL STANDARD FOR CLASS CERTIFICATION.

Error Preservation.

Wellmark does not dispute Plaintiffs' statement on error preservation as applied to this issue.

Scope and Standard of Review.

Wellmark agrees with Plaintiffs' statement, and would add that this Court's review of the District Court's class certification decision "is limited because the district court enjoys broad discretion in the certification of class action lawsuits." *Legg v. W. Bank*, 873 N.W.2d 756, 758 (Iowa 2016) (internal quotation omitted). Review is for abuse of discretion, which is found "only where the district court's grounds were clearly unreasonable." *Vos v. Farm Bureau Life Ins. Co*., 667 N.W.2d 36, 44 (Iowa 2003).

* * * * *

As a preliminary matter, the District Court applied the correct legal standard to analyze (and deny) Plaintiffs' motion for class certification. A court may certify a class only if it determines that (1) the class is so numerous that joinder of all members is impracticable; (2) there is a question of law or fact common to the class; (3) a class action should be permitted for the fair and efficient adjudication of the controversy, and (4) the representative parties

will fairly and adequately protect the interests of the class. *See* Vol. 1 Appellate App. 1757-59 (describing Iowa R. Civ. P. 1.261–1.262, 1.263).

With regard to the third element—whether a class action should be permitted for the "fair and efficient adjudication of the controversy"—the Iowa Rules identify thirteen factors to consider, including whether "common questions of law or fact predominate over any questions affecting only individual members." Iowa R. Civ. P. 1.263.(1)(e). As the District Court correctly noted, (1) it has "considerable discretion" in weighing these factors; and (2) this Court has "emphasized that … whether common questions of law or fact predominate is a 'key factor' and a '***fundamental requirement for class certification***.'" Vol. 1 Appellate App. 1759 (quoting *Freeman v. Grain Processing Corp.*, 895 N.W.2d 105, 109, 115 (Iowa 2017) (emphasis added)). Indeed, "[g]roup or class adjudication makes little sense if individual issues predominate." *Roland v. Annett Holdings, Inc.*, 940 N.W.2d 752, 759 (Iowa 2020).

The District Court further properly recognized that "[i]t is the plaintiffs' burden to prove certification of the putative class is both permissible and proper." Vol. 1 Appellate App. 1759 (citing *Butts v. Iowa Health Sys.*, 863 N.W.2d 36 (Iowa Ct. App. 2015)). Plaintiffs do not deny that they need

"common class-wide *proof* of liability, proximate cause, injury and common measureable damages." Appellants' Br. 53 (emphasis added).

To analyze whether Plaintiffs carried their burden, the District Court correctly focused on the standard that has been reiterated repeatedly by recent binding case law: "the appropriate method to consider class certification is to identify the elements of the plaintiff's claim and consider whether the elements are capable of being proven on a class wide basis." Vol. 1 Appellate App. 1759 (citing, *e.g.*, *Freeman*, 895 N.W.2d at 121–122 and *Roland*, 940 N.W.2d at 752). While "[c]ertification of a class action does not depend on a determination of whether plaintiffs will ultimately prevail on the merits," the class inquiry does require "delving into the elements of the legal claims and considering how the plaintiffs will establish those elements as to the class as a whole." Vol. 1 Appellate App. 1759-60 (citing, *e.g.*, *Freeman*, 895 N.W.2d at 120).

This Court's recent decision in *Roland* is particularly instructive. In *Roland*, an out-of-state, long-distance truck driver sought to certify a class of "similarly situated" drivers who had been required by their company to sign a Memorandum of Understanding ("MOU") related to care after a workplace injury. 940 N.W.2d at 753. Roland alleged deprivation of statutory rights and bad faith, among other things. *Id.* at 755–56. The district court granted class

certification, but this Court reversed, holding that certifying any class was an abuse of discretion. *Id.* at 753. Although all putative class members brought the same claim and raised the same question (the validity of the MOU), the evidence required to ***answer*** to that question would differ widely by class member. *Id.* at 760 (question "cannot be resolved for all [class members] in a single adjudication"). For example, each putative class member's claim required individualized evidence regarding the distance traveled, types of injury, and care received; "proof on these issues cannot be established without individualized evidence." *Id.* These "inquiries would create mini trials within the larger class action, which is unsuitable." *Id.*

Plaintiffs argue that *Roland* has "limited application" and that the "district court misapplied" it. Appellants' Br. at 16. Specifically, Plaintiffs contend that *Roland* denied class certification because the Court had previously found that a "peculiar" issue in that case "depended upon factual findings by the [Iowa Workers' Compensation] Commissioner" and thus the issue "was subject to individual proof and agency determination which could vary from individual to individual." Appellants' Br. at 51–52.

Plaintiffs are wrong. *Roland* recognized class members' "[f]ailure to [e]xhaust [a]dministrative [r]emedies" as "**[*a*]*nother*** reason" class treatment was inappropriate. 940 N.W. 2d at 761 (emphasis added). However,

Plaintiffs ignore this Court's central holding: that "class certification is inappropriate … when the theory of liability cannot be established with generalized evidence by the representative on behalf of the entire class." 940 N.W.2d at 760. That holding is not remotely limited to failure to exhaust administrative remedies or to "peculiar" "factual determination[s] initially made by the Workers' Comp Commissioner" (Appellants' Br. at 51). Rather, the core holding of *Roland*, like the United States Supreme Court's holding in *Wal-Mart Stores, Inc. v. Dukes*, bars class certification when answering the questions raised by class members' claims requires individualized rather than class-wide evidence. 940 N.W.2d at 760; *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011) ("What matters to class certification is not the raising of common 'questions'—even in droves—but rather, the capacity of a class-wide proceeding to generate common *answers* apt to drive the resolution of the litigation.") (internal quotation omitted). The District Court's analysis precisely tracks *Roland* and other binding Iowa law.

II. THE DISTRICT COURT CORRECTLY HELD THAT PLAINTIFFS FAILED TO PRESENT EVIDENCE CAPABLE OF PROVING THEIR CLAIM ON A CLASS-WIDE BASIS.

Error Preservation.

To the extent Plaintiffs assert that the District Court failed to consider a theory that Plaintiffs presented to the District Court in connection with class

certification, Wellmark does not dispute Plaintiffs' statement on error preservation. However, to the extent Plaintiffs are attempting to assert any error based on theories that were not so presented, such arguments cannot be raised on appeal. *Est. of Gottschalk by Gottschalk v. Pomeroy Dev., Inc.*, 893 N.W.2d 579, 586 (Iowa 2017) ("We do not consider issues for the first time on appeal."); *State v. Rutledge*, 600 N.W.2d 324, 325 (Iowa 1999) ("Nothing is more basic in the law of appeal and error than the axiom that a party cannot sing a song to us that was not first sung in trial court.").

Scope and Standard of Review.

Review of a class certification decision is for abuse of discretion. *See* Part I, *supra.* The same standard of review applies to the judicial estoppel decision. *Kinseth v. Weil-McLain*, 913 N.W.2d 55, 66 (Iowa 2018) ("[W]e therefore review questions of judicial estoppel for an abuse of discretion.").

* * * * *

As described above, class certification is improper under Iowa law unless Plaintiffs present evidence showing that ***each*** element of their claim is capable of being proven on a class-wide basis. Vol. 1 Appellate App. 1759. If proving any one of those elements requires individualized evidence, class certification must be denied. *Id.*

Plaintiffs allege an antitrust conspiracy under Iowa Code § 553.4. Vol. 1 Appellate App. 195 ¶ 63.[7] As the District Court correctly held, antitrust claims have three elements: (1) "antitrust injury" (*i.e.*, antitrust standing), (2) liability, and (3) damages. Vol. 1 Appellate App. 1760; *see also Next Generation Realty Co., Inc. v. Iowa Realty Co.*, 2003 WL 25280677, at 23 (Iowa Dist. Ct. Feb. 18, 2003)*, aff'd* 686 N.W.2d 206 (Iowa 2004) ("Plaintiffs must establish [] (1) that they have standing … and (2) Defendants have violated the requisite antitrust laws …"); Iowa Code § 553.12(2) (authorizing "actual damages").

First, Plaintiffs must show they suffered an "actual, cognizable injury that was proximately caused by the claimed violation." *Next Generation*, 2003 WL 25280677, at 25. Plaintiffs concede that "[t]he Supreme Court sets a ***relatively high standard for proof*** of the fact of an antitrust violation ***and resulting injury***." Appellants' Br. at 62 (emphases added). This requires proving "a causal 'injury-in-fact'"—*i.e.*, showing that Plaintiffs are "in a 'worse position' as a consequence of the defendant's conduct." Vol. 1

[7] Section 553.4 parallels Section 1 of the Sherman Act, and is contemplated to be construed in harmony with federal law. *Mueller*, 861 N.W. 2d at 565-68 (describing § 553.4 as "the counterpart to section 1 of the Federal Sherman Antitrust Act"); Iowa Code § 553.2 (Iowa's Competition Law is to "be construed to complement and be harmonized with the applied laws of the United States which have the same or similar purpose.")

Appellate App. 1761 (citing *Associated Gen. Contractors of Cal. v. Cal. State Council of Carpenters*, 459 U.S. 519, 537–40 (1983); *IQ Dental Supply, Inc. v. Henry Schein, Inc.*, 924 F.3d 57, 62–63 (2d Cir. 2019)). In other words, Plaintiffs must show that "class members would be better off in [their proposed] 'but for' world" than they were in the real world. Vol. 1 Appellate App. 1763; *see also IQ Dental Supply*, 924 F.3d at 64 (holding that plaintiffs must show they were "worse off than [they] would be if the market were free" of the challenged conduct).

Where, as here, the challenged conduct allegedly excluded competitors from the market, Plaintiffs must prove "the existence of a competitor willing and able to enter the relevant market, but for the exclusionary conduct." *Sunbeam Television Corp. v. Nielsen Media Rsch., Inc.*, 711 F.3d 1264, 1273 (11th Cir. 2013); *In re New Motor Vehicles*, 522 F.3d at 27 (denying class certification in case alleging conspiracy to limit car imports because plaintiffs did not present evidence of a "very large number of cars poised to cross the border," meaning the "impact on the automobile market of the sort required by plaintiffs' theory is implausible.")

Second, to establish liability, Plaintiffs must show that Wellmark has "violated the requisite antitrust laws" through the alleged conspiracy. *Next Generation*, 2003 WL 25280677, at 23. This requires proving (1) a

conspiracy, (2) a relevant antitrust market, and (3) that the conspiracy "has a substantial anticompetitive effect … in the relevant market." *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2284 (2018); *see also* Iowa Code § 553.4 (requiring a restraint of trade "in a relevant market").

To prove a conspiracy, Plaintiffs must show that ***each*** self-funded employer had a "conscious commitment" to an unlawful objective. *Wright v. Brooke Grp. Ltd.*, 652 N.W.2d 159, 171 (Iowa 2002) ("Under Iowa law, [a] conspiracy is a combination of two or more persons by concerted action to accomplish an unlawful purpose … .") (internal quotations and citation omitted); *Roesch, Inc. v. Star Cooler Corp.*, 712 F.2d 1235, 1237 (8th Cir. 1983).

To show anticompetitive effects, Plaintiffs must first establish the relevant market: "Without a well-defined relevant market, a court cannot determine the effect that an allegedly illegal act has on competition." *Little Rock Cardiology Clinic PA v. Baptist Health*, 591 F.3d 591, 596 (8th Cir. 2009). As Plaintiffs are sellers of goods or services, the relevant market comprises "buyers who are seen by sellers as being reasonably good substitutes." *Todd v. Exxon Corp.*, 275 F.3d 191, 202 (2d Cir. 2001). The relevant market excludes buyers who are "too far away" or whose purchases are "too different" to be suitable alternative buyers. Phillip E. Areeda &

Herbert Hovenkamp, *Antitrust Law* ¶ 530a (4th ed. 2019). If Plaintiffs establish the relevant market, they then must show substantial anticompetitive effects in that market. *Am. Express*, 138 S. Ct. at 2284.

Third, Plaintiffs must prove their actual damages. Iowa Code § 553.12(2). Plaintiffs are entitled "only to damages resulting from" their antitrust theory of injury. *Comcast Corp. v. Behrend*, 569 U.S. 27, 35–36 (2013). Plaintiffs' damages methodology must calculate damages resulting ***solely*** from the alleged anticompetitive conduct; if the methodology includes damages potentially resulting from other conduct or legal theories, class certification must be denied. *Id.*

A. The District Court Correctly Held That Plaintiffs Failed To Present Class-Wide Evidence Of Antitrust Injury.

As the District Court recognized, Plaintiffs' theory of antitrust injury is as follows: Wellmark and self-funded employers' entry into administrative services agreements violates the Iowa antitrust statute, and "but for" those agreements, (1) self-funded employers would have contracted directly with chiropractors; (2) the employers would have paid higher rates than chiropractors received in the real world; and (3) all Iowa chiropractors would be better off as a result. Vol. 1 Appellate App. 1761; *see also* Vol. 1 Appellate App. 290; Vol. 2 Appellate App. 1345 at 23:12–22. As the District Court explained, "This is the theory of the case identified in the petition, set forth in

the Plaintiff's briefing on the motion to dismiss, and argued in the Plaintiff's application to certify a class." Vol. 1 Appellate App. 1769 (internal citations omitted). Plaintiffs have repeatedly asserted this theory of injury throughout this litigation:

- **In the operative complaint,** which repeatedly describes Wellmark's self-funded clients as "potential price competitors." Vol. 1 Appellate App. 170, 179, 191 ¶¶ 2(a), 16(a), 59(a);
- **At the motion to dismiss hearing**, during which Plaintiffs' counsel explained that self-funded employers are "potential competitors, ***but not for these contracts. John Deere***, for example, ***would be out contracting with physicians, DOs, chiropractors on their own***." Vol. 2 Appellate App. 1345 at 23:12–15 (emphases added);
- **In their motion for class certification,** arguing that "***[a]bsent the Administrative Services Agreements***, the Iowa self-fundeds would have to ***negotiate*** such issues ***directly*** with the Plaintiff chiropractors. … Given that each of the Iowa self-fundeds on its own does not control a substantial amount of the health insurance market in Iowa, Plaintiff chiropractors would be able to ***negotiate*** more favorable rates and coverage." Vol. 1 Appellate App. 290 (emphases added); and
- **In pleadings filed *after* the class certification hearing and *after* Plaintiffs attempted to change their theory**, in which Plaintiffs reverted to arguing "that the Iowa self-funded employers would, absent their contractual relationship with Wellmark, be price competitors." Vol. 1 Appellate App. 1535.

Plaintiffs concede this is the sole theory they presented "in the class certification motion and oral presentations of plaintiffs' counsel at the hearings." Appellants' Br. at 59; *see also infra* Part II.A.3 (addressing Plaintiffs' argument that the District Court somehow misunderstood their theory).

As the District Court explained, this theory of injury "would require individualized consideration of how particular self-funded employers, whose employees are patients of particular chiropractors, would act in the absence of the challenged Administrative Services Agreements." Vol. 1 Appellate App. 1762. Among other things, each putative class member would have to show that self-funded employers are "willing and able" to directly contract with chiropractors. *Sunbeam Television*, 711 F.3d at 1273. Plaintiffs also must show that "class members would be better off in this 'but for' world and, therefore, have suffered antitrust injury." Vol. 1 Appellate App. 1763; *IQ Dental Supply*, 924 F.3d at 64.

Contrary to Plaintiffs' assertion, this issue is not "an interpretation of computation of individual amounts of damages, something that has never before been found to be a reason to deny class certification." Appellants' Br. at 16. As the District Court correctly explained, with respect to antitrust injury "the issue is not the calculation of damages but whether or not class members have any claims at all." Vol. 1 Appellate App. 1767 (quotation omitted). The Court's ruling is grounded in Plaintiffs' failure to present evidence capable of proving that all class members suffered ***any*** injury, not the "computation of individual amounts of damages."

1. Plaintiffs failed to show that any employer—let alone all 466—is "willing and able" to contract directly with chiropractors.

Plaintiffs allege that self-funded employers are "potential price competitors" that would compete in the market for chiropractors' services, absent the challenged agreements. Vol. 1 Appellate App. 289. To prove this theory, they must show that these would-be "competitor[s]" are "willing and able" to contract with chiropractors "but for the exclusionary conduct." *Sunbeam Television*, 711 F.3d at 1273.

Plaintiffs proffered zero evidence indicating that ***any*** self-funded employer has ***ever*** had any desire to contract directly with ***any*** chiropractor. In fact, they concede that "none of the self-fundeds have any record of performance in establishing a price for purchase of health care services for its employees." Appellants' Br. at 59. The evidence confirms this, as no employer has ever directly contracted with Plaintiffs or even reached out to discuss directly contracting. *See* Vol. 2 Appellate App. 1174 at 111:25–112:3; Vol. 2 Appellate App. 1261 at 182:18–23; Vol. 2 Appellate App. 1144 ¶ 12 ("To the best of my knowledge and based on 31 years of experience, no self-funded employer has ever directly contracted with any chiropractor in the state of Iowa. Nor has any self-funded employer ever expressed interest in doing so.").

This Court has also previously recognized that "Wellmark does not really compete with its self-insured clients." *Mueller*, 861 N.W.2d at 571. Plaintiffs further admit that self-funded employers "likely would have no contractual relationship with providers whatsoever." Vol. 2 Appellate App. 1286. The total lack of evidence showing that employers are ready and willing to contract directly with chiropractors forecloses certification. *See, e.g.*, *New Motor Vehicles*, 522 F.3d at 27 (reversing certification because plaintiffs did not present evidence of a "large number of cars poised to cross the border").

2. Proving injury requires a highly individualized, six-step analysis.

In addition, Plaintiffs failed to demonstrate how they would show each class member was injured with ***common*** rather than individualized evidence. The District Court thus correctly held that "whether each of the putative class members was in fact injured" would "devolve into mini-trials" requiring individualized inquiries and evidence. Vol. 1 Appellate App. 1762.

Examining just one putative class member's claim makes clear that individualized inquiries are required, dooming class certification. Over the class period, Dr. Rebarcak treated patients from 117 self-funded employers. Vol. 2 Appellate App. 1039-40 ¶ 81. Showing injury to him—*i.e.*, that he would be "better off" in the "but for" world—requires a six-step analysis:

Step	Analysis
1	Employers would not purchase fully insured product
2	Employers would not rent network
3	Employers would contract with Dr. Rebarcak over competitors
4	Employers would pay higher prices
5	Increased revenue more than offsets lost revenue from lost contracts
6	Net increased revenue more than offsets increased costs

***First*,** Dr. Rebarcak must show that these 117 self-funded employers would not choose to buy a fully insured Wellmark product instead of negotiating directly with chiropractors. That is because Wellmark's fully insured and self-funded reimbursement rates are the same (*id.* at 1015 ¶ 53(c); Vol. 1 Appellate App. 284-85), and Plaintiffs do not allege that buying a fully insured product would be anticompetitive. Therefore, if a self-funded employer simply decided to switch to a fully insured product in the but-for world, that would "mean there was no injury" to Plaintiffs. Vol. 1 Appellate App. 1763.

Making this showing for each of the 117 self-funded employers requires highly individualized evidence. As just two examples, Schoitz Engineering, a small tool design firm in Waterloo, likely has no experience in provider contracting and insufficient staffing to take on the additional work of administering a network. Vol. 2 Appellate App. 952; *see also* Vol. 2

Appellate App. 1022-23 ¶ 66. Casey's General Stores, on the other hand, has more resources, but it also has stores spread across Iowa, increasing the cost and complexity of building a network to meet its employees' health care needs. *Id.* Both employers are likely to purchase a fully insured product rather than take on the work of building their own chiropractic networks, but for different reasons.

As the District Court explained, Plaintiffs have failed at step one, as they failed to present ***any*** common proof that "all practices would receive the benefit of the self-funded employers' participation in the market as price competitors." Vol. 1 Appellate App. 1763. Rather, the evidence shows that "[s]elf-funded employers of different sizes may or may not have the resources to administer a network and negotiate lower prices," and thus "[s]ome would likely sign up for a fully-funded Wellmark insurance to avoid the cost of administering a health insurance program, which would mean there was no injury." Vol. 1 Appellate App. 1763. Plaintiffs have not challenged these factual findings in any way.

Second, even assuming he could get past step one, Dr. Rebarcak must show that these employers would also choose to incur the significant costs of building their own chiropractic network rather than simply renting an existing network. Dr. Rebarcak is a member of two rental networks: ICPC and

Advantage Chiropractic Network. Vol. 2 Appellate App. 1297. The District Court found that Plaintiffs cannot clear this hurdle, as the evidence demonstrates that some self-funded employers "might contract with a different chiropractic network that offers reduced pricing and/or a narrow network, such as the Iowa Chiropractic Physicians Clinic (ICPC)." Vol. 1 Appellate App. 1763 (citing Vol. 2 Appellate App. 1021 at ¶ 63). Plaintiffs do not challenge that finding.

And if ***any*** employers whose patients see Dr. Rebarcak decided to contract with one of those networks in the but-for world, Dr. Rebarcak's reimbursement from those employers would ***decrease***. Plaintiffs admit that these networks' rates are or may be lower than Wellmark's PPO fee schedule. Vol. 1 Appellate App. 286 (asserting ICPC rates are 50% lower than Wellmark's PPO rates). Thus, the Court found that if any of the self-funded employers relevant to Dr. Rebarcak chose to rent a network, "there would be no injury in that scenario." Vol. 1 Appellate App. 1763-64. Plaintiffs do not challenge that finding either.

Third, Dr. Rebarcak must then show which, if any, of the self-funded employers would choose to contract with ***him*** rather than competing chiropractors. In the real world, a chiropractor can obtain instant access to hundreds of self-funded employers simply by joining Wellmark's network.

Plaintiffs' but-for world eliminates that option for chiropractors and replaces it with individualized negotiations between chiropractors and employers such as John Deere. Plaintiffs assume that hundreds of thousands of direct contracts would be negotiated between chiropractors and employers, but presented zero evidence supporting this wildly unrealistic assumption.

In fact, most employers would choose ***not*** to contract with most chiropractors:

- ***Narrow contracting would minimize administrative costs***. As the District Court recognized, self-funded employers "would have the incentive to reduce administrative costs by contracting with as few chiropractors as possible." Vol. 1 Appellate App. 1763 (quoting Vol. 2 Appellate App. 1031 ¶ 75). Each extra contract with a chiropractor increases an employer's administrative costs. Vol. 2 Appellate App. 1016-17, 1019 ¶¶ 55, 59; Vol. 2 Appellate App. 237. Employers without a statewide employee base do not need a statewide network. Most employers could meet Wellmark's network adequacy standards with five or fewer chiropractors. Vol. 2 Appellate App. 1034-35 ¶ 76.

- ***Narrow contracting would minimize healthcare costs.*** Employers would likely prefer narrow networks, which often yield ***lower*** provider rates and ***lower*** healthcare costs. Vol. 2 Appellate App. 1200 at 215:13–18 (agreeing that some chiropractors may be willing to accept lower prices in exchange for more patients). Many self-funded employers (43.8% in the past five years) already use Wellmark's narrower chiropractic network option. Vol. 2 Appellate App. 1030 ¶ 74.

For these reasons, the District Court concluded that "[i]f forced to negotiate individually, self-funded employers would likely contract with a limited number of chiropractors, meaning some chiropractors would be left

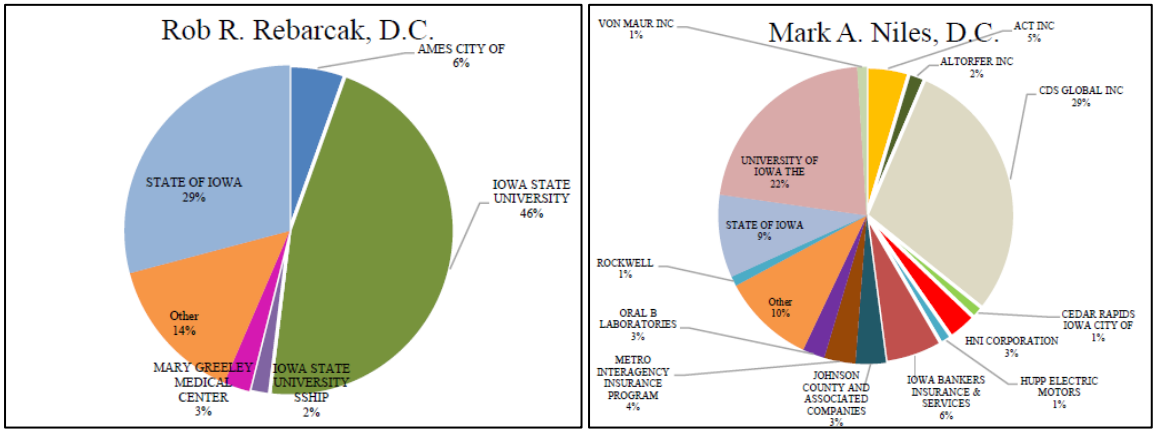
without any self-funded employer patients." Vol. 1 Appellate App. 1763. Plaintiffs do not contest that finding.

Piecing together the puzzle of which employers would contract with which chiropractors is highly individualized. To prove injury, Dr. Rebarcak must show that he would beat his competitors to win employers' business in the but-for world. To do that, he would point to his practice's unique features, such as its reputation, quality of service, and 40-year history. Vol. 2 Appellate App. 1205 at 235:3–10.

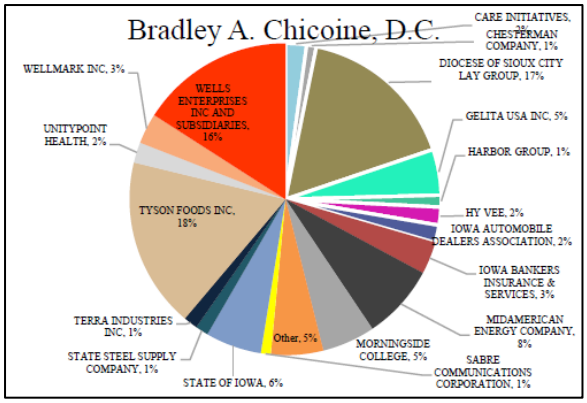
But as in *Roland*, even if Dr. Rebarcak succeeds, his evidence would not prove any other class member's injury; rather, injury "must be determined [chiropractor-by-chiropractor] based on their individual factual circumstances." *See* 940 N.W.2d at 758. As the Court here recognized, "[e]ach class member has a different percentage of patients who are employed by different self-funded employers." Vol. 1 Appellate App. 1762. For instance, Iowa State University is Dr. Rebarcak's largest source of self-funded patients; proof that ISU would contract with him is essential to him, but irrelevant to Dr. Niles, who does not treat any ISU members. Vol. 2 Appellate App. 1205 at 234:2–6; Vol. 2 Appellate App. 1263 at 190:11–16. Dr. Niles must show that he would win contracts with employers in Tipton by outcompeting chiropractors there. And Dr. Chicoine's main sources of self-

funded patients are Tyson Foods, Wells Enterprises, and the Diocese of Sioux City.

Each class member's claim thus requires evidence specific to his or her unique self-funded client base. Even among the named Plaintiffs, no two chiropractors' patient bases are similar. Vol. 2 Appellate App. 1040 Ex. 18.[8] And these are only the ***named Plaintiffs***; their proof says nothing about the 2,713 other chiropractors in the putative class—which include chiropractors who recently graduated from college, have had service issues, or are otherwise less competitive than Dr. Rebarcak.



[8] Dr. Winecoff, who is a member of Dr. Rebarcak's practice, is no longer a named plaintiff. Vol. 1 Appellate App. 1388.



Fourth, Dr. Rebarcak would have to show that the employers who contract with him would pay higher rates than he received in the real world. He must also show that the employer would not cut or reduce coverage for chiropractic care, which would also decrease his reimbursement. Plaintiffs assume, without evidence, that this would be true not only for Dr. Rebarcak, but for all Iowa chiropractors.

But as Dr. Rebarcak and Dr. Niles admit, "what constitutes a reasonable rate would differ based on the chiropractor." Vol. 1 Appellate App. 1765 (citing Vol. 2 Appellate App. 1192 at 182:21–183:5 and Vol. 2 Appellate App. 1230 at 58:5–9). Perhaps for this reason, Plaintiffs ***concede*** they cannot prove on a class-wide basis that all chiropractors would receive higher rates in the but-for world. Vol. 1 Appellate App. 1511.

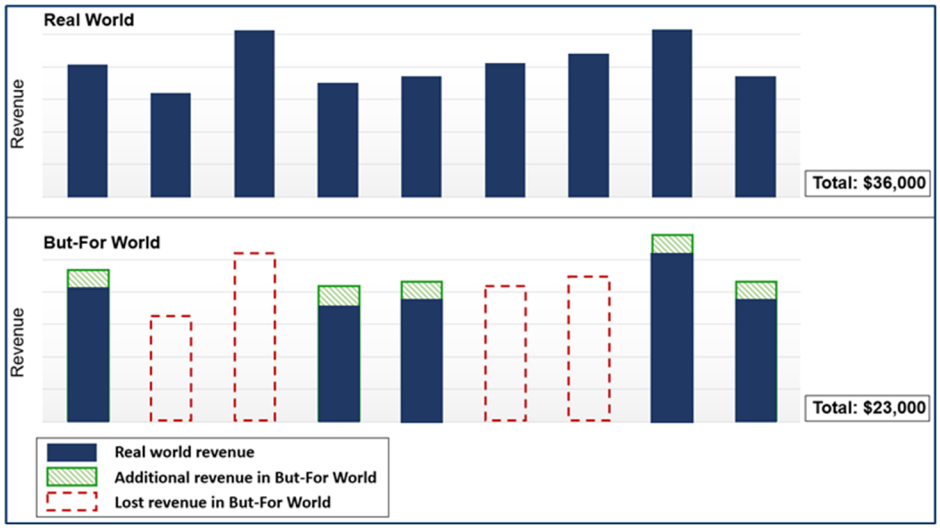
Moreover, there are many reasons an employer would pay ***less*** than Wellmark. In the real world, Wellmark does not have different rates for chiropractors who just graduated, offer fewer services, have customer service

issues, or have lower overhead (*e.g.*, from operating in a rural area). Yet in the but-for world, employers may well choose to negotiate lower rates based on these factors. As the District Court found, "[d]ifferences in demographics, geographic distribution of self-funded employers, and the level of competition amongst chiropractors in any community would impact negotiations," including whether negotiations "would result in rates higher than those currently set by Wellmark." Vol. 1 Appellate App. 1763. Plaintiffs do not contest these findings, but rather admit that the lower a party's market share, the lower that party's ability to negotiate prices. Vol. 1 Appellate App. 275.

Plaintiffs' admissions place them squarely within the holding of *Butts v. Iowa Health System*, which denied class certification because "determination of the reasonableness of [health care provider rates] will necessarily depend on the individual facts and circumstances." 863 N.W.2d at *5. In *Butts*, uninsured patients argued that a hospital charged them "unreasonable rates" compared to insured patients. *Id.* at *1. Like Plaintiffs here, Butts argued that class treatment was appropriate because the court could simply compare two rates—rates for insured patients versus rates for uninsured patients—across the class. *Id.* at *5. The court rejected that argument; what constituted a "reasonable price" depended on a "host" of "individualized considerations," including "the hospital's … internal costs,

the availability of medical care providers for the type of service, … and the rates of competitor's services." *Id.* at *5. As "[n]o generalized evidence" could "prove or disprove the reasonableness of the charges," class certification was "not permissible." *Id.* at *6. The same is true here in added measure. Plaintiffs fail to cite, let alone distinguish, *Butts* despite its striking similarity to their class arguments.

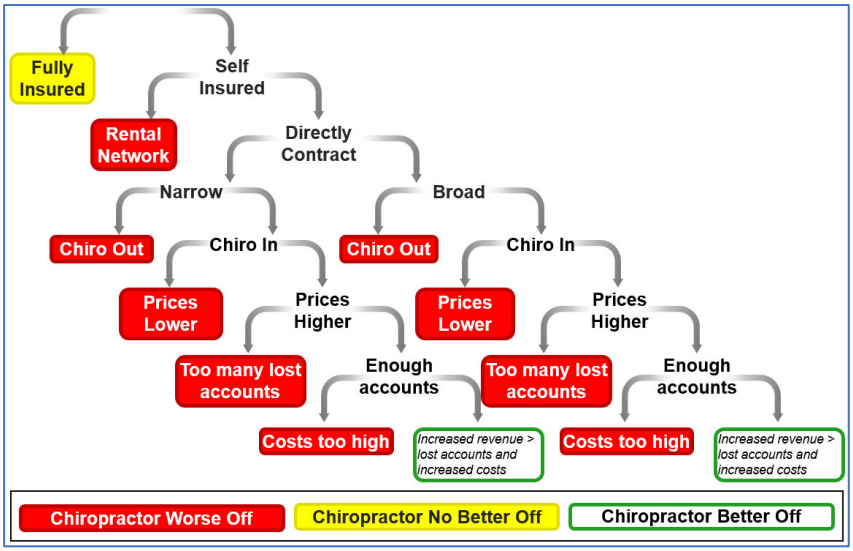
Fifth, Dr. Rebarcak must show that the increased revenue from contracts he wins will offset the 100% loss of revenue from lost contracts. For example, even if Dr. Rebarcak won contracts with five of nine employers ***and*** obtained a material price increase from them, he will lose ***100%*** of the revenue from the other four employers. This ***total loss of revenue*** could dwarf any increase from the retained employers, as shown below.



Sixth, Dr. Rebarcak must show that the increased costs of negotiating and servicing up to 117 different contracts do not offset the increased revenue,

such that his ***profits*** are lower. Vol. 2 Appellate App. 1204 at 230:4–11 (noting that contracting with more insurance companies increases the amount of administrative work for his practice). Many chiropractors cannot make that showing. As noted above, there were 745 chiropractors (27.4% of the putative class) who had a total "gap" between the amount requested and the amount paid of less than $1,000 for the entire class period (*i.e.*, $62.50 per year). Vol. 2 Appellate App. 1045-46 ¶ 92. These chiropractors will have a near-impossible time proving injury, because the added costs of servicing numerous individual employers likely exceed $1,000 every year, let alone over sixteen years.

In sum, the evidence demonstrates that each chiropractor's individual circumstances drive the rates and patient volume she would receive in the but-for world, and therefore an individualized multi-step analysis, illustrated by the diagram below, must be repeated for each putative class member to show injury. (Vol. 2 Appellate App. 1016 Ex. 5)



As the diagram shows, many chiropractors will be ***no better off***—or even ***worse off***—in the but-for world. These include the 12.1% of chiropractors who saw no patients from self-funded employers, the 3.6% who were paid full billed charges, and the unknown number whose patients' employers would purchase fully insured products from Wellmark or choose rental networks. That precludes class certification. *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244, 252 (D.C. Cir. 2013) (reversing certification where "common evidence" failed to show "all class members suffered some injury"); *Valley Drug Co. v. Geneva Pharms., Inc.*, 350 F.3d 1181, 1191 (11th Cir. 2003) ("[T]hese class members appear to benefit from the effects of the conduct alleged to be wrongful … . Class certification under these circumstances would be inappropriate."); *Peters v. Aetna Inc.*, 2019 WL 1429607, at *9 (W.D.N.C. Mar. 29, 2019) ("A proposed class challenging

conduct that did not harm—and in fact benefitted—some proposed class members fails to establish the commonality required for certification.").

And even assuming some chiropractors are better off in Plaintiffs' but-for world, the evidence required to evaluate that issue would be different for each chiropractor. As the District Court explained, "Plaintiffs' antitrust claim will require analysis on a charge by charge basis … and then on a chiropractor by chiropractor and employer by employer basis to determine whether a higher rate would have been negotiated absent the allegedly unlawful agreements." Vol. 1 Appellate App. 1767.

Given this evidentiary record, the District Court properly concluded that "[t]his case is, therefore, governed by the analysis of *Roland* as opposed to *Freeman*, because individualized mini-trials will be required to demonstrate antitrust injury." Vol. 1 Appellate App. 1766; *see also Blades v. Monsanto Co.*, 400 F.3d 562, 572 (8th Cir. 2005) (cited by Vol. 1 Appellate App. 1766) (affirming denial of class certification where the competitive price that would have prevailed but for the challenged conduct varied by the locality of individual plaintiffs, some plaintiffs paid negligible or no premiums for

defendants' product, and plaintiffs' expert did not present common evidence capable of showing injury for the class as a whole).[9]

3. Plaintiffs fail to show any error in the District Court's analysis, let alone an abuse of discretion.

On appeal, Plaintiffs do not respond to, much less refute, ***any*** of the evidence showing that evaluation of antitrust injury will be individualized. Instead, they contend the District Court erred in two ways.

First, they argue that this Court already "concluded that plaintiffs have stated an antitrust injury" in *Mueller I.* Appellants' Br. at 57–58 (citing 818 N.W.2d at 265). But as *Next Generation Realty* explains, antitrust injury has two components: First, did the plaintiff suffer "actual, cognizable injury that was proximately caused by the claimed violation"? Second, is the alleged

[9] *Freeman* likewise supports denial of class certification. *Freeman* was a nuisance case based on a "normal person" standard that renders immaterial all "idiosyncratic" factors. 895 N.W.2d at 121. Such standards "more readily present common questions." *Id.* In contrast, Plaintiffs' antitrust claim cannot be proven by reference to a "normal person"; each chiropractor must prove that she—not a "normal person"— would be better off in the but-for world (among many other things). In addition, the *Freeman* plaintiffs offered expert testimony and a complex model that showed harm to all class members ***while accounting for*** the individualized factors that could impact whether someone was harmed, such as wind speed and direction, temperature, humidity, precipitation, and obstructions. *Id.* at 110–111, 127 n.5. Plaintiffs here did not attempt to present ***any*** such testimony or model, let alone a model that reliably accounts for the myriad individualized factors that could impact whether a chiropractor would be better off in the but-for world.

injury "the kind of injury that antitrust law is designed to prevent"? 2003 WL 25280677, at 25. *Mueller I* addressed only the second question. In that case, Wellmark argued that "because the plaintiffs are suing as disadvantaged sellers rather than disadvantaged buyers, they have not suffered an injury of the type sought to be compensated by antitrust laws." 818 N.W.2d at 265 (internal quotation omitted). The Court held that antitrust law is also "concerned about abuse of monopsony power." *Id.* The Court did not address whether Plaintiffs have suffered "actual, cognizable injury proximately caused by the claimed violation," which is the key question for class certification (and the question the District Court properly examined).

Moreover, the *Mueller I* decision only addressed—at the motion to dismiss stage—whether Plaintiffs adequately *pled* an antitrust injury. 818 N.W.2d at 250, 265. The question at the class certification stage is whether they can *prove* that injury using class-wide evidence. The District Court correctly held that Plaintiffs have not remotely carried that burden of proof.

Second, Plaintiffs argue that the District Court misunderstood their theory of the case. Appellants' Br. at 58–59. Plaintiffs are wrong, and fail to demonstrate any error in the District Court's ruling for numerous reasons, as discussed below.

The District Court correctly understood Plaintiffs' theory. Plaintiffs take issue with the District Court's description of their theory of antitrust injury as: "absent the unlawful Administrative Services Agreements between Wellmark and the self-funded employers, those employers would operate as competitors in the insurance market and, therefore, negotiate and pay the chiropractors directly, resulting in higher rates than those set by Wellmark." Appellants' Br. at 58–59. But in the next breath, Plaintiffs ***concede*** this is the very theory they presented "in the class certification motion and oral presentations of plaintiffs' counsel at the hearings." *Id.* at 59. The District Court rightly focused on this theory, as it is the sole theory Plaintiffs have repeatedly briefed and argued for years.

Plaintiffs are judicially estopped from changing their theory. As discussed above, with just minutes remaining in the final class certification hearing, Plaintiffs tried to fundamentally change their theory of antitrust injury. After conceding that they had no class-wide proof of antitrust injury under the theory they had presented in their class certification motion and nearly two days of argument, Plaintiffs argued that in the but-for world, self-funded employers would still have administrative services agreements with Wellmark, but Wellmark would pay chiropractors 90% of what it pays medical and osteopathic doctors. Appellants' Br. at 67.

That view of the but-for world is not based on any record evidence. But even more fundamentally, "[t]he problem," as the District Court explained, "is that Plaintiffs disavowed [that theory] earlier to survive a motion to dismiss." Vol. 1 Appellate App. 1768. Wellmark's motion to dismiss argued, in part, that no antitrust conspiracy could exist because Wellmark acted as the self-funded employers' agent when implementing the administrative services agreements. Vol. 3 Appellate App. 36-38. In their opposition, Plaintiffs successfully avoided dismissal by urging that their theory was that the illegal conspiracy was the decision to enter into the Administrative Services Agreements between Wellmark and self-funded employers ***at all***. In their words, "[t]he initiating 'contract, combination, or conspiracy' is among the Wellmark Defendants and the Iowa self-fundeds who agree in their principal capacities to the Administrative Services Agreements." Vol. 1 Appellate App. 213. Plaintiffs could not have been clearer at the dismissal hearing that, ***in their proposed but-for world, no contract would exist between Wellmark and self-funded employers***: "[Self-funded employers] [a]re potential competitors, but not for these contracts. John Deere, for example, would be out contracting with physicians, DOs, chiropractors on their own." Vol. 1 Appellate App. 246 at 23:12–15.

The District Court relied on that theory and argument in denying dismissal, stressing that "[i]t is when the self-funded employers contract with Wellmark to gain access to Wellmark's provider network and to have Wellmark administer their self-funded plans that plaintiffs allege the horizontal price-fixing occurs." Vol. 1 Appellate App. 270. The Court noted, "It appears the plaintiffs agree" that when Wellmark "administer[s] the self-funded employers' plans" it is "acting as their agent[]." *Id.* Thus, the Court explained, if Plaintiffs had posited a but-for world in which self-fundeds ***retained*** a contract with Wellmark—*i.e.*, a principal-agent relationship—"the court might agree dismissal under the single-entity doctrine would be appropriate." *Id.* However, because "plaintiffs assert that the Iowa self-funded employers would, absent their contractual relationship with Wellmark, be price competitors"—*i.e.*, in the but-for world, employers would not have any contract with Wellmark—the Court denied Wellmark's motion. *Id.*

Judicial estoppel "prevents a party from changing its position after it has successfully urged a different position to obtain a certain litigation outcome." *Godfrey v. State*, 962 N.W.2d 84, 100 (Iowa 2021). Courts are "under no compulsion to heed the shifting theories of 'chameleonic litigants.'" *Winnebago Indus., Inc. v. Haverly*, 727 N.W.2d 567, 575 (Iowa 2006) (quoting *DeGuiseppe v. Vill. of Bellwood,* 68 F.3d 187, 191 (7th Cir. 1995));

see also Matter of K.D., 2021 WL 5105900, at *1 (Iowa Ct. App. Nov. 3, 2021) (applying the doctrine of judicial estoppel to positions taken at different stages of the same case). The District Court correctly held that judicial estoppel barred Plaintiffs' last-ditch effort to shift theories.

On appeal, Plaintiffs do not contest in any way the District Court's application of judicial estoppel. Their brief does not even contain the word "estoppel." Accordingly, they have forfeited any challenge to that ruling, and are bound to the sole theory they presented to the District Court in the class motion and argument.

Plaintiffs may not raise any new theory on appeal. Plaintiffs' appellate brief does not clearly identify the theory of antitrust injury they believe the District Court failed to consider. If the theory is that, in the but-for world, there would be ***no*** administrative services agreements between Wellmark and self-funded employers, then the District Court's ruling should be affirmed for the numerous (unchallenged) reasons discussed in Section II(A)(1)–(2) above. If the theory is that, in the but-for world, there would ***still*** be administrative services agreements between Wellmark and self-funded employers, then the District Court's ruling should be affirmed on

(unchallenged) judicial estoppel grounds.[10] It is unclear what other option could exist. In any event, to the extent Plaintiffs attempt to identify a third theory, such a theory (1) is barred by judicial estoppel, as Plaintiffs espoused a single, specific theory to survive Wellmark's motion to dismiss and are bound to that theory going forward, and (2) was not presented to the District Court, and thus any appellate argument regarding such a theory has been forfeited. *Gottschalk*, 893 N.W.2d at 586; *Rutledge*, 600 N.W.2d at 325.

Plaintiffs failed to present proof of class-wide antitrust injury under any theory. Regardless which theory Plaintiffs pursue, they have failed to present class-wide evidence of antitrust injury. At the threshold, Plaintiffs cannot prove class-wide antitrust injury merely by asserting that "the Wellmark pricing structure *discriminates* against Iowa chiropractors" relative to "other providers." *E.g.*, Appellants' Br. at 47. As the District Court correctly held, antitrust injury requires proof that each putative class member "is in a worse position due to the allegedly unlawful behavior." Vol. 1 Appellate App. 1764-65. This determination necessarily compares the

[10] Or Plaintiffs' claim should be dismissed under the single entity doctrine for the reasons articulated in Wellmark's motion to dismiss. As the District Court noted, if Plaintiffs' posited that in the but-for world self-funded employers would still have a contract with Wellmark, "the court might agree dismissal under the single-entity doctrine would be appropriate." Vol. 1 Appellate App. 270.

chiropractor's position in the real world to her position in a world without the challenged agreements. Plaintiffs cannot evade their evidentiary burden by simplistically ***assuming*** that all chiropractors would receive uniform rates that are similar to board-certified medical doctors; they need actual evidence that this (incredibly specific) result would occur under ***whichever*** theory of the but-for world they try to pursue.

Moreover, the District Court's factual findings—which Plaintiffs do not contest—preclude Plaintiffs from showing class-wide antitrust injury regardless of theory. For example, Plaintiffs admit that the damages model that they presented to the District Court is the same model they would use to prove class-wide injury and damages under any theory. Appellants' Br. at 63, 65–68. The Court found this model "would compensate even claims that were not the result of any antitrust injury," including "chiropractors [who] have set their billed rates below Wellmark's fee schedule" (and so were already paid the full amount requested). Vol. 1 Appellate App. 1765. Plaintiffs ***conceded*** that such class members did not suffer ***any*** injury, yet they are still included in Plaintiffs' model. *Id.*

In addition, the District Court found that 63.5% of chiropractic charges from 2010–2019 were billed below the fee schedule for MDs and DOs. Vol. 1 Appellate App. 1764-65. In other words, for the majority of claims at issue,

putative class members did not even ***request*** the amount that Plaintiffs' damages calculation assumes they would get. Accordingly, the Court found that "over half of the claims at issue would not have caused injury in the way the Plaintiffs' damages model would compensate." *Id.* These unchallenged factual findings preclude class certification under any theory.

Finally, Plaintiffs have already litigated—and lost—a claim that Wellmark's pricing structure unlawfully discriminates against chiropractors relative to other providers (*In re Abbas*), which this Court affirmed. Pls.' Non-Conf. App'x at 480, 523; *Abbas*, 893 N.W.2d at 893. Their damages calculation here is copied directly from that case with a 10% discount. *Compare* Vol. 2 Appellate App. 937-40 *with* Vol. 2 Appellate App. 2301.[11]

[11] Plaintiffs assert that their proposed prices for chiropractors are derived from Medicare's practices, and characterize Medicare as a "market that is as similar as possible to the cartelized market, but for the conspiracy." Appellants' Br. at 63. That is incorrect. The Center for Medicare & Medicaid Services has not defined what chiropractors should be paid as a set percentage of doctors' rates; Plaintiffs are creating that ratio on their own. Appellants' Br. at 66–67. And Medicare pays chiropractors ***only*** for spinal manipulation. *See* "Chiropractic Services," *Medicare*, available at https://www.medicare.gov/coverage/chiropractic-services, accessed on November 14, 2022; Vol. 2 Appellate App. 3085 at 30:10–19. Thus, if Medicare's approach defines what chiropractors would receive in the but-for world, most of the class has not suffered antitrust injury: they would not be paid ***at all*** for 74% of the CPT codes at issue and thus would be far worse off than they were in the real world. Vol. 2 Appellate App. 78-79 (listing 34 CPT codes for damages, only nine of which are for spinal manipulation).

B. Plaintiffs Cannot Prove Liability On A Class-Wide Basis.

Although the District Court primarily focused on antitrust injury, its denial of class certification should be affirmed for the independent reason that Plaintiffs cannot prove liability on a class-wide basis. This Court can affirm on any "grounds urged in the district court." *Interstate Power Co. v. Ins. Co. of N. Am.*, 603 N.W.2d 751, 756 (Iowa 1999); *Ne. Cmty. Sch. Dist. v. Easton Valley Cmty. Sch. Dist.*, 857 N.W.2d 488, 491 (Iowa 2014).[12]

As explained above, the second element of Plaintiffs' antitrust claim requires showing, with common, class-wide proof, that a conspiracy between Wellmark and the alleged "unnamed co-conspirators"—*i.e.*, "Iowa governmental and private employers who self-fund the purchase of health care services for employees and their families," Appellants' Br. at 19—caused anticompetitive effects in the relevant market. Iowa Code § 553.4; *Brookins v. Int'l Motor Contest Ass'n*, 219 F.3d 849, 852 (8th Cir. 2000); *Am. Express*, 138 S. Ct. at 2284. Plaintiffs' brief addresses liability in passing, asserting that liability is "inherent in the restraint of trade alleged." Appellants' Br. at 64. That does not remotely demonstrate that Plaintiffs carried their burden to present evidence capable of proving liability for all putative class members.

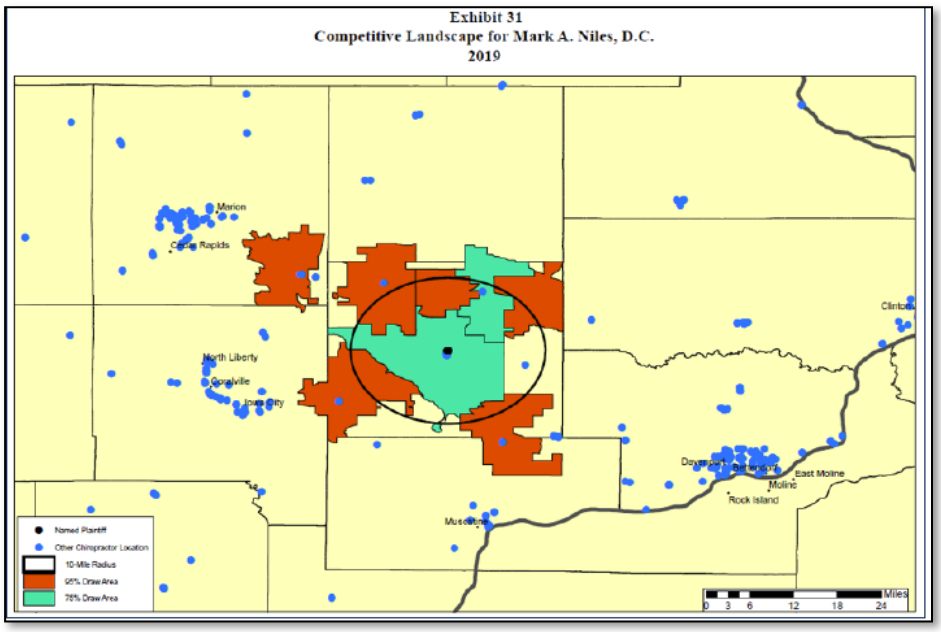
[12] Wellmark raised the alternative grounds for affirmance covered in this brief in its Resistance at Vol. 2 Appellate App. 948-49, 955-58, 960-76.

First, Plaintiffs cannot prove a conspiracy with common evidence. To prove a conspiracy between Wellmark and any given governmental or private self-funded employer, Plaintiffs must show that the employer had a "conscious commitment" to an unlawful objective. *Wright*, 652 N.W. 2d at 171 ("Under Iowa law, [a] conspiracy is a combination of two or more persons by concerted action to accomplish an unlawful purpose … ."); *Roesch*, 712 F.2d at 1237. Evidence of one employer's "conscious commitment" cannot demonstrate that any other employer had the same "conscious commitment." As each chiropractor serves patients from different employers, each chiropractor must prove different conspiracies. Such individualized inquiries would predominate, barring class certification. *Roland*, 940 N.W.2d at 760.

Second, Plaintiffs cannot prove anticompetitive effects in a relevant market on a class-wide basis. In cases alleging that buyer-side market power suppresses prices, the relevant market includes only "buyers who are seen by sellers as being reasonably good substitutes," excluding buyers who are "too far away." *Todd*, 275 F.3d at 202; Areeda and Hovenkamp ¶ 530a.

Plaintiffs conclusorily assert that the relevant market is the entire state of Iowa, but presented no evidence in support besides noting that Wellmark operates statewide. Vol. 1 Appellate App. 170-71 ¶ 2(c). For good reason. The appropriate market in this case must focus on where a given chiropractor,

not Wellmark, does business. And there is no evidence that any chiropractor—much less all of them—could draw patients from the entire state. In fact, the record shows the opposite. Dr. Niles, for example, draws nearly 95% of his patients from Cedar County alone, as shown below. Vol. 2 Appellate App. 1058 Ex. 31 (95% catchment area represented by green and brown shaded areas).



As the map illustrates, there are ***dozens*** of relevant markets throughout the state. Accordingly, Plaintiffs cannot prove anticompetitive effects on a class-wide (*i.e.*, across the entire state) basis; any effects must be evaluated in each market separately, thereby precluding class certification. *Garnica v. HomeTeam Pest Def., Inc.*, 230 F. Supp. 3d 1155, 1157–58 (N.D. Cal. 2017) (denying class certification in case involving 32 separate geographic markets);

Blades, 400 F.3d at 570 (affirming denial of class certification where relevant market was "highly individualized.")

C. Plaintiffs Cannot Prove Damages On A Class-Wide Basis.

Plaintiffs also failed to establish that the third element of their antitrust claim, damages, is "capable of measurement on a classwide basis." *Comcast*, 569 U.S. at 34; *In re Principal U.S. Prop. Acct. ERISA Litig.*, 2013 WL 7218827, at *31 (S.D. Iowa Sept. 30, 2013) ("If the damages determination for each putative class member requires individualized analysis, Plaintiffs' motion cannot survive the commonality inquiry."). Plaintiffs must show that each class member's "individual damages can be proven according to one method across the whole class." Newberg on Class Actions § 20.62 (5th ed.). And that method must be tailored to "measure only those damages attributable" to Plaintiffs' theory of injury; otherwise, certification must be denied. *Comcast*, 569 U.S. at 35–36. As with the first two elements of their claim, Plaintiffs have failed to establish that they can prove damages on a class-wide basis.

First, Plaintiffs now concede that they have no class-wide measure of damages for the vast majority of class members. Plaintiffs admit that only 248 of 1,300–1,500 chiropractors (*i.e.*, 16.5%–19%) are part of the ICPC network. Appellants' Br. at 74. They further admit that "[t]he measure of

damages for the subclass of ***non***-members of ICPC for [Wellmark Health Plan of Iowa, Inc. ("WHPI")] discrimination ***would have to be lost profits***." *Id.* (emphasis added). Elsewhere, Plaintiffs concede that proving lost profits is impossible on a class-wide basis because it is "too speculative to be recoverable" and "violates the new business rule." *Id.* at 47, 59. Thus, Plaintiffs concede that they have no class-wide measure of all alleged damages for 81–83.5% of chiropractors.

Second, as the District Court properly held, Plaintiffs' proposed damages calculation does not measure damages that are actually attributable to their theory of injury. Vol. 1 Appellate App. 1764. Plaintiffs' damages calculation is the difference between Wellmark's fee schedule for chiropractors and its fee schedule for medical doctors, minus a 10% discount. Appellants' Br. at 65–68. But, as the Court recognized, assuming damages equal to the difference between chiropractor and medical-doctor fee schedules "does not track the Plaintiffs' theory of the case." Vol. 1 Appellate App. 1764. It is "not correlated to the theory that self-funded employers would negotiate in the market." *Id*. In fact, it is a regurgitation of the same damages calculation Plaintiffs' counsel created in *Abbas*—which was brought under a different legal theory sounding in insurance regulation rather than antitrust. *See* Vol. 2 Appellate App. 1317-20 (citing *Abbas* exhibits). Plaintiffs admit

that damages may only "restore [a plaintiff] to the position in which he would have been ***but for the violation***." Appellants' Br. at 62 (emphasis added). But their damages calculation "does not even attempt" to measure "only those damages attributable" to their antitrust theory and thus "cannot possibly establish that damages are susceptible of measurement across the entire class." *Comcast*, 569, U.S. at 35; *see also Principal*, 2013 WL 7218827, at *29, *31.

Third, Plaintiffs' proposed class includes hundreds of chiropractors who have not suffered any damages (or antitrust injury). To "justify [a] class action," "damages to all class members must be shown." *Blades*, 400 F.3d at 571 (cited by Vol. 1 Appellate App. 1766); Areeda and Hovenkamp ¶ 331d1. But Plaintiffs' calculation would award damages to broad swaths of putative class members who certainly or very likely suffered no damages (Vol. 2 Appellate App. 1067 Ex. 37):

- An unknown number of chiropractors did not contract with Wellmark at all;
- At least 328 chiropractors (or 12.1%) did not treat any self-funded patients;
- At least 99 chiropractors (or 3.6%) were already paid full billed charges for all claims;
- An unknown number of chiropractors contract with employers who would not contract directly in the but-for world;

- At least 745 chiropractors (27.4%) have a gap between the amount requested and amount paid totaling less than $1,000 for the entire class period;
- At least 322 chiropractors (11.9%) obtain less than 25% of patients from self-funded employers; and
- An unknown number of chiropractors would lose more revenue from self-funded clients than they would gain in the but-for world.

Finally and crucially, proving damages would require individualized evidence. As Dr. Rebarcak admitted, the calculation of what a chiropractor is owed depends on each chiropractor's specific circumstances. Vol. 2 Appellate App. 1211 at 259:24–260:15. Similarly, each chiropractor would need to negotiate their reimbursement rates directly with each self-funded employer—and Plaintiffs' blanket assumption that every chiropractor would negotiate (i) better rates than they currently receive and (ii) the exact same rate (*i.e.*, 10% less than Wellmark currently pays MDs) defies basic common sense. As the District Court succinctly found, "[w]hether individual chiropractors would arrive at the MD/DO fee schedule in negotiations with individual self-funded employers is not susceptible to common proof." Vol. 1 Appellate App. 1765. Likewise, chiropractors are not interchangeable; as the Court found, different competitive conditions and skillsets would drive differences in their rates in the but-for world. *Id.* at 1763 (noting that "local

market realities," for example "would impact whether negotiations would result in rates higher than those currently set by Wellmark or not.").

To make matters worse for Plaintiffs, the assumptions in their damages theory are contradicted by actual record evidence. For example, on average, U.S. chiropractors receive lower rates than medical doctors. Vol. 2 Appellate App. 1011-12 ¶ 44. As this Court has previously held, chiropractors merit lower rates based on ***every*** factor used to determine Medicare and Medicaid rates. *Abbas*, 893 N.W. 3d at 891–92 (listing factors). There is simply no reason to expect that any employer in Iowa (let alone ***all*** of them) would pay chiropractors the same rates as (or even 10% less than) board-certified radiologists and osteopaths.

In fact, class members themselves did not value their services as equivalent to medical doctors' services. Named Plaintiffs testified that they believe their billed charges are fair or ***already*** reflect the ***reasonable value*** of their services. Vol. 2 Appellate App. 1190 at 177:7–10. Yet from 2010–2019, ***63.5%*** of chiropractor charges were below the MD fee schedule. Vol. 1 Appellate App. 1764-65 (citing Vol. 2 Appellate App. 1070 ¶ 119). As before, Plaintiffs do not contest any of these factual findings.

* * * * *

In sum, Plaintiffs have failed to present class-wide proof of ***any*** element of their antitrust claim, and the undisputed record evidence demonstrates that every element of each chiropractor's claim will require individualized evidence and evaluation. Thus, the District Court properly denied class certification.[13]

III. THE NAMED PLAINTIFFS ARE NOT ADEQUATE REPRESENTATIVES.

Error Preservation.

Wellmark agrees that Plaintiffs preserved error on this issue in the District Court. *See* Vol. 2 Appellate App. 2278-80.

Scope and Standard of Review.

Review of a class certification decision is for abuse of discretion. *See* Part I, *supra.*

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[13] Contrary to Plaintiffs' argument that the District Court "abused its discretion" by "not stating or accepting Plaintiffs' proof of theory … with respect to the conspiracy to price fix and partial boycott led by WHPI HMO," *see* Appellants' Br. at 69–75, the Court properly rejected class certification as to Plaintiffs' case ***as a whole***. The elements of Plaintiffs' antitrust claim are the same for the alleged WHPI and non-WHPI chiropractor sub-classes and the class as a whole. *Id.* at 75 (admitting that the "common questions of law" for the sub-classes and the class as a whole "are essentially the same"). And the Court's findings and rationale (and additional reasons for affirmance discussed herein) apply equally to these sub-classes. In addition, Plaintiffs concede that the "measure of damages for the subclass of non-members of ICPC … would have to be … determined by expert testimony," yet they have proffered none. *Id*. at 74. Thus, Plaintiffs have failed to carry their burden with respect to any possible sub-class.

* * * * *

This Court should affirm the District Court's decision for the independent reason that the named Plaintiffs are not adequate class representatives. "A proposed class representative is not adequate … if it is subject to a unique defense that threatens to pay a major role in the litigation." *In re Milk Prods. Antitrust Litig.*, 195 F.3d 430, 437 (8th Cir. 1999). Here, the named Plaintiffs are subject to the unique defense of issue preclusion. Specifically, they assert that Wellmark's pricing discriminates against chiropractors relative to other providers, Appellants' Br. at 47, but they already lost that claim in *Abbas* years ago.

For issue preclusion to apply, "(1) the issue in the present case must be identical, (2) the issue must have been raised and litigated in the prior action, (3) the issue must have been material and relevant to the disposition of the prior case, and (4) the determination of the issue in the prior action must have been essential to the resulting judgment." *Fischer v. City of Sioux City*, 654 N.W. 2d 544, 547 (Iowa 2002). Each element is present here.

First, the damages theories are identical, as shown below:

Abbas	***Chicoine***
Wellmark "fix[es] the price of chiropractic services … at a discriminatorily low level and … restrict[s] patient access to and coverage for treatment by Iowa-licensed doctors of chiropractic." Pls.' Non-Conf. App'x at 11.	Wellmark "set[s] prices paid for chiropractic services at a discriminatory low level and … restrict[s] patient access to and coverage for chiropractic treatment." Appellants' Br. at 20–21.

Moreover, Plaintiffs are relitigating this issue with the same evidence. ***All*** of the evidence they submitted in support of class certification is from the *Abbas* record.

Second, Plaintiffs raised and litigated this issue in *Abbas*, "stipulat[ing] that the issues for … decision" included whether Wellmark's fee schedules were "unlawfully discriminatory." Pls.' Non-Conf. App'x at 43–44. The Iowa Insurance Commissioner found they were not. *Id.* at 480.

Third, as Plaintiffs' discrimination claim was the alleged violation, it was "material and relevant" to that case. *See Stender v. Blessum*, 897 N.W2d 491, 514 (Iowa 2017).

Fourth, the Commissioner's determination was essential to the judgment. Because his judgment had multiple independent bases, his finding that Wellmark does not discriminate against chiropractors is preclusive if it was "considered and upheld" on appeal. Rest. (2d) of Judgments § 27 cmt. o

(Am. Law Inst. 1982). And this Court affirmed the Commissioner's judgment regarding discrimination. *Abbas*, 893 N.W.2d at 893.

Because the named Plaintiffs cannot relitigate whether Wellmark's rates discriminate against chiropractors, they are not adequate representatives. *See Zenith Labs, Inc. v. Carter-Wallace, Inc.*, 530 F.2d 508, 512 (3d Cir. 1976) (affirming denial of class certification where named plaintiff was subject to res judicata).

CONCLUSION

For the reasons discussed above, Wellmark respectfully requests that the Court affirm the District Court's decision denying Plaintiffs' motion for class certification in full.

REQUEST FOR ORAL ARGUMENT

Wellmark respectfully requests to be heard in oral argument in this appeal.

Dated: February 6, 2023

By: _____

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CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATION

This brief complies with the typeface requirements and type-volume limitation of Iowa R. App. P. 6.903(1)(d) and 6.903(1)(g)(1) because this brief has been prepared in a proportionally spaced typeface using Times New Roman in size 14 and contains 13,765 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

Zachary D. Holmstead

CERTIFICATE OF SERVICE

I hereby certify that on February 6, 2023, I electronically filed the foregoing with the Clerk of the Supreme Court of Iowa using the Iowa Electronic Document Management System, which will send notification of such filing to counsel of record.

Zachary D. Holmstead