No. 16-

IN THE

Supreme Court of the United States

INTERNATIONAL PAPER COMPANY, *et al.*,
Petitioners,

v.

KLEEN PRODUCTS LLC, *et al.*,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

CARTER G. PHILLIPS*
C. FREDERICK BECKNER III
KATHLEEN MORIARTY MUELLER
PAUL J. RAY
1501 K Street, NW
Washington, DC 20005
(202) 736-8000
cphillips@sidley.com

Counsel for Petitioners

* Counsel of Record

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QUESTIONS PRESENTED

1. Whether an antitrust class may be certified under Fed. R. Civ. P. 23(b)(3) based on a presumption that an increase in an index price demonstrates class-wide antitrust injury, even though most sales in the industry are individually negotiated and executed at prices below the index price.

2. Whether the fact that individualized inquiries are needed to determine the amount of damages due each class member is, as the Seventh Circuit held here, legally irrelevant to the predominance inquiry under Fed. R. Civ. P. 23(b)(3).

PARTIES TO THE PROCEEDING

Petitioners (defendants-appellants below) are International Paper Company, Temple-Inland Inc., and Weyerhaeuser Company. Respondents are WestRock, CP LLC (formerly RockTenn CP, LLC) and Georgia-Pacific LLC (also defendants-appellants below) and Kleen Products LLC, Ferraro Foods of North Carolina, LLC, MTM Packaging Solutions of Texas, LLC, Ferraro Foods, Inc., RHE Hatco, Inc., R.P.R. Enterprises, Inc., Chandler Packaging, Inc., and Mighty Pac, Inc. (plaintiffs-appellees below, who represent a certified class of purchasers of containerboard and corrugated products).

RULE 29.6 STATEMENT

Petitioner International Paper Company is a publicly held corporation; it has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

Petitioner Temple-Inland Inc.'s parent company is International Paper Company, which owns 100% of its stock.

Petitioner Weyerhaeuser Company is a publicly held corporation; it has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

International Paper Company, Temple-Inland Inc., and Weyerhaeuser Company respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The court of appeals' opinion is reported at 831 F.3d 919 and reproduced at Pet. App. 1a-22a. The district court's opinion granting class certification is reported at 306 F.R.D. 585 and reproduced at Pet. App. 23a-74a.

JURISDICTION

The court of appeals entered judgment on August 4, 2016. Pet. App. 1a. On October 13, 2016, Justice Kagan extended the time for filing a petition for a writ of certiorari to and including December 2, 2016, and on November 14, 2016, Justice Kagan extended the time for filing the petition to and including January 1, 2017. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTES AND RULES INVOLVED

This case involves Federal Rule of Civil Procedure 23(b)(3), the Rules Enabling Act, 28 U.S.C. §2072, and the Clayton Act provision authorizing a private cause of action to seek damages for antitrust violations, 15 U.S.C. §15(a), which are reproduced at Pet. App. 75a-77a.

INTRODUCTION

In this case, the Seventh Circuit approved the use of fatally flawed procedures that allowed plaintiffs to shoehorn thousands of disparate individual damages claims into a massive antitrust class action seeking nearly $12 billion in aggregate damages. Plaintiffs are companies that purchase containerboard or corrugated products made with containerboard. They allege that some (though not all) of the nation's containerboard manufacturers conspired to restrict production of containerboard and to issue coordinated price-increase announcements between February, 2004 and November, 2010. There is, however, no "list" price for containerboard or the broad array of corrugated products at issue, which include rolls of containerboard weighing thousands of pounds, custom-made boxes, packaging material and store displays. Instead, prices and terms of sale are established through negotiations between individual buyers and sellers. Many buyers have substantial negotiating leverage because of the volumes they purchase, their ability to turn to substitute products, or their ability to play suppliers against one another. As a result, prices and contract terms vary widely.

The presence of this individualized pricing should have precluded class certification of the sprawling and disparate class certified here. Litigation of the individual questions of whether each class member paid artificially inflated prices and, if so, the amount of the overcharge will overwhelm the trial, predominating over the one common question of whether the alleged conspiracy in fact existed. See Fed. R. Civ. P. 23(b)(3). The district court, nevertheless, certified the class. It held that the individual damages questions are legally irrelevant to the predominance analysis required by Rule 23(b)(3),

and that individual injury questions can be avoided simply by presuming, contrary to common sense and fact, that all class members were injured. The Seventh Circuit affirmed in an erroneous decision that warrants this Court's review.

First, by endorsing the district court's reliance on a presumption that a conspiracy to fix prices harms all purchasers even when prices are individually negotiated, the Seventh Circuit exacerbated an existing split in the circuits. Like the Seventh Circuit here, the Tenth Circuit and many district courts have relied on the presumption of class-wide harm to avoid individualized inquiries that would preclude class certification. In contrast, the First, Fifth and Eighth Circuits have held (correctly) that class-wide harm cannot be presumed when prices vary because of individual negotiations and other factors.

Second, the Seventh Circuit further erred in holding that the fact that damages would require individualized inquiries was wholly irrelevant to the predominance analysis. The drafters of Rule 23(b)(3) had the opposite view. In fact, they included the predominance requirement in Rule 23(b)(3) precisely because the possibility that damages will need to be determined individually means that "'class action treatment is not as clearly called' for" in an action for damages as it is in an action for injunctive relief. *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 613-15 (1997) (quoting Fed. R. Civ. P. 23 advisory committee's 1966 note on subd. (b)(3)).

The Seventh Circuit's affirmance of class certification despite the lack of any common method for determining the amount of damages conflicts with this Court's acknowledgement that predominance is not met where "[q]uestions of individual damage calculations will inevitably overwhelm questions

common to the class." *Comcast Corp.* v. *Behrend*, 133 S. Ct. 1426, 1433 (2013). It also creates a circuit split. The Second, Fourth, and Fifth Circuits have held (correctly) that predominance is not met where the class contains thousands of members and the amount of damages to which each class member is entitled cannot be determined with a formula, but requires a series of mini-trials. This Court's review is needed to resolve the conflict among the lower courts.

STATEMENT OF THE CASE

1. Containerboard is a thick paper product that is made in various grades and weights.[1] A.180-81. It is used to make corrugated products, including wraps, protective packaging, bulk bins, and floor displays found in retail stores. A.547. Containerboard also is used to make corrugated boxes in a wide variety of sizes and designs that vary depending on their intended use. A.546-47.

Defendants manufacture containerboard and corrugated products, but sell them to different types of customers. Defendants sell containerboard to sheet plants and box plants that produce boxes and other corrugated products that are sold to end users in competition with defendants. A.182-84; A.446-47. Defendants sell corrugated products (*e.g.*, boxes) directly to the companies that use or resell those products. A.447. Defendants also face competition from manufacturers of containerboard and corrugated products that are not included in the

[1] This Statement cites documents filed under seal in the district court, but unsealed in the Seventh Circuit. *See* Dkt. 59, 63, 65. Citations are to the Seventh Circuit appendices and district court docket entries.

alleged conspiracy. *E.g.,* A.570 (other firms produced 26% of the containerboard sold in the U.S. in 2007).

The prices class members paid varied because "pricing is very customer specific." A.573; see also, *e.g.*, A.817 ("variability of prices" in defendants' sales data). Indeed, the "vast majority" of class members bought "customized" products for which they provided defendants precise specifications. A.401. The class thus includes diverse purchasers such as box plants that bought rolls of containerboard; restaurants that purchased boxes for carry-out pizza; manufacturers that purchased boxes to ship a wide variety of products; and retail chains that purchased store displays, to name just a few. See A.377; A.547; Ex. 17 to Class Opp; see also Ex. 10 to Dkt. 763, at 74 (boxes for "everything you can think of … that comes in a box").

Prices were agreed upon in individual negotiations between individual class members and individual defendants. A.573-74. The class contains a number of highly-sophisticated companies with significant bargaining power because of the size of their purchases and the ability to play would-be suppliers against each other. *E.g.*, Ex. 13 to Dkt. 763, at 77-78 (customer with $30 million in annual purchases); Ex. 44 to Dkt. 763 (largest purchasers include Fortune 500 companies). The prices individual purchasers negotiated varied with the size of the order, A.766 (discussing "volume discounts") and seasonal demand for a particular box type, A.417-18.

Prices also varied depending on where the purchasers were located and what type of corrugated product they purchased, A.479, A.802. Some corrugated products (*e.g.*, produce cartons) had substitute products (*e.g.*, plastic containers) a purchaser could use to increase its negotiating

leverage. A.479. Some box purchasers had multiple box suppliers to whom they could turn in search of a better deal, while other purchasers had fewer options. A.402 ("due primarily to significant freight costs," box plants generally supply customers within a 150 mile radius).

Furthermore, many sales occurred under a variety of long-term contracts, A.307-08, some of which prohibited or limited price hikes for the contract's duration. A.379. And many class members received substantial discounts, rebates, payments, or credits from defendants. A.150-52.

2. As noted, plaintiffs alleged that defendants conspired to raise the price of containerboard and thereby to raise the price of corrugated products. Defendants supposedly accomplished this by agreeing "to restrict the supply of containerboard by cutting capacity, slowing back production, taking downtime, idling plants, and tightly restricting inventory, all of which set the stage for coordinated price increases of all Containerboard Products." Dkt. 660, at 1.

Named Plaintiffs—none of whom ever purchased containerboard—sought certification of a class of companies that purchased containerboard or corrugated products directly from the defendants between February 15, 2004 and November 8, 2010 (with limited exceptions irrelevant here). Pet. App. 24a-25a. Defendants opposed class certification, arguing, among other things, that "individual issues overwhelm the common questions" and the predominance requirement of Rule 23(b)(3) is not met because plaintiffs have no common way to prove "antitrust impact," *i.e.*, that all class members were injured by the alleged conspiracy. Pet. App. 38a.

Plaintiffs conceded that predominance requires "a showing that the key elements" of their case, including conspiracy and impact, "can be established using common proof at trial." Dkt. 660, at 1-2. But they claimed to have met that burden with the expert report of Dr. Michael Harris, who opined that the structure of the market for containerboard made it "ripe for collusion," and also "that Defendants' conduct is more likely the result of collusion than independent behavior." Pet. App. 42a. Plaintiffs also produced an expert report from Dr. Mark Dwyer purporting to show that nine of the 15 allegedly coordinated price-increase announcements during the class period succeeded in raising the "PPW" index price, an index that purports to measure prices for a specific type of containerboard based on a survey of some purchasers. *Id.* at 48a-50a.

Plaintiffs acknowledged, however, that costs of key containerboard inputs—most notably wood pulp—also increased significantly over the nearly seven-year class period. A.467. Dwyer "absolutely" agreed that defendants' costs played a role in determining prices during the class period. A.430-31. Yet, he made no attempt to determine how much of the increase in the PPW index price during the class period was caused by increased costs (or other legitimate factors such as an increase in demand) rather than the asserted conspiracy. A.325.

It is also undisputed that the PPW index price is not the actual price paid by the overwhelming majority of class members. It is the price paid for a particular type of containerboard by some limited subset of purchasers in a particular geographic market, as self-reported in a survey published in a

trade periodical.[2] Pet. App. 49a. It does not include prices for corrugated *products* that comprise about 80% of the damages plaintiffs seek. Further, as noted, the prices individual class members paid for containerboard or finished products varied depending on the prices they negotiated. See *supra* pp. 5-6; A.575 ("customer prices do not change uniformly," with every month having some customers with "price declines" and others with "price increases over the prior month").

The district court nevertheless held that "the lock-step increase in the PPW index that followed and tracked Defendants' collective price-increase announcements demonstrates that nearly all class members suffered antitrust impact." Pet. App. 50a. The court reasoned that even though the PPW index is not the price class members actually paid, the PPW index is used to negotiate contracts and to set prices for corrugated products, and "the starting point for those negotiations would be higher if the market price for the product was artificially inflated." *Id.* at 52a. This "creat[es] an inference of class-wide impact even where prices are individually negotiated."[3] *Id.* (quoting *In re Urethane Antitrust*

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[2] The PPW index purports to represent a price for a particular type of containerboard that is "normalized to represent prices paid by small to mid-size buyers." Ex. 12 to Dkt. 763, at 7. It is based on a survey of open-market transactions that excludes "transactions that are contractually linked to a published price" and "orders filled over a period of less than one month without the expectation of future business." *Id.*

[3] The court cited Harris's analysis of the structure of the containerboard market, but only as evidence that the alleged conspiracy could have caused "an elevated baseline price for the Containerboard Products," Pet. App. 52a, which warrants the "*inference* of class-wide impact," *id.* at 53a (emphasis added).

Litig., 768 F.3d 1245, 1254 (10th Cir. 2014), *cert. dismissed*, 137 S. Ct. 291 (2016)).

3. Defendants also opposed class certification on the grounds that individualized damages questions would overwhelm any common issues. Pet. App. 53a-54a. As explained above, the prices paid—and hence the damages, if any, sustained—during the alleged conspiracy varied from class member to class member. See *supra* pp. 5-6. Additionally, the price paid by individual class members often did not track PPW (for instance due to price-stabilizing provisions in contracts, A.800, A.820), thus requiring an individualized inquiry into when each class member was affected—if at all—by each price increase.

Furthermore, many class members settled prior lawsuits or negotiated contracts that limit the amount of damages they may receive and the conduct on which they may rely in this case. The settlement agreements contained broad language releasing all claims relating to the sale of containerboard or corrugated products prior to execution of the settlement, thus covering at least some of the transactions at issue here. See Ex. 39 to Dkt. 763 Similarly, some sales contracts limit the amount or method of recovery (for instance, by shortening the statute of limitations or barring certain remedies, such as treble damages). See Ex. 41 to Dkt. 763, at 6; Ex. 42 to Dkt. 763, at 8. Calculating individual damages will require determining how much of any potential recovery is foreclosed by these unique settlements and sales contracts.

Plaintiffs responded with a multiple regression model created by Dr. Dwyer that purported to calculate aggregate, class-wide overcharges. A.153-59. Dwyer readily admitted, however, that his model cannot estimate the price that any individual class

member would have paid but for the conspiracy, and cannot calculate the amount of damages any individual class member should receive. A.270, A.281 ("[t]hat's not the purpose of the model"). The district court summarily dismissed defendants' concerns about the lack of a common method for determining the damages due individual class members. The court asserted that "in a complicated antitrust case such as this …, 'plaintiffs are permitted to use estimates and analysis to calculate a reasonable approximation of their damages'," and "individualized damages … alone will not defeat class certification." Pet. App. 64a. The district court added that defendants could seek to decertify the class, or modify the class action to decide only "liability and impact," if "discovery demonstrate[s] that individual damages issues indeed threaten to overwhelm the common issues." *Id.* at 65a.

The district court then certified the class. Pet. App. 65a, 69a, 74a. Although the exact number of class members is unknown, the class is enormous. Plaintiffs identified 230,884 "class member identifications" across defendants' datasets. A.147, n.20. Class members entered into millions of transactions, and Dwyer claims that the class paid, in the aggregate, nearly $3.8 billion in overcharges. Pet. App. 8a.

4. Defendants sought and were granted interlocutory review in the Seventh Circuit under Fed. R. Civ. P. 23(f). Pet. App. 2a.

On appeal, defendants argued that the district court was wrong to follow the Tenth Circuit's decision *In re Urethane* and presume that class members were injured by an increase in the PPW index. Defendants instead urged the Seventh Circuit to follow the First and Fifth Circuits in *In re New Motor Vehicles*

Canadian Export Antitrust Litigation, 522 F.3d 6, 29 (1st Cir. 2008), and *Robinson* v. *Texas Automobile Dealers Ass'n*, 387 F.3d 416, 423-24 (5th Cir. 2004), and hold that the presumption cannot support certification. See Dkt. 26, at 32-34; Dkt. 46, at 13-15.

The Seventh Circuit, however, affirmed the district court's reliance on *In re Urethane*. The Seventh Circuit noted plaintiffs' assertion "that every person or entity in North America paid the overcharges that resulted from Defendants' collusive practices," and held that "[e]ven for transactions where prices were negotiated individually or a longer term contract existed, the district court found, reasonably, that the 'starting point for those negotiations would be higher if the market price for the product was artificially inflated.'" Pet. App. 17a.

Defendants further argued on appeal that individual issues predominated over common issues because calculating damages would require an individualized, fact-intensive trial for virtually each class member. Pet. App. 18a. The Seventh Circuit acknowledged that plaintiffs' damages model was designed to show aggregate damages to the class as a whole, and not the individual damages owed each class member. *Id.* The court nevertheless held that an estimation of aggregate damages is sufficient, and "at the class certification stage, plaintiffs are not obliged to drill down and estimate each individual class member's damages." *Id.* The court reasoned that "allocation of [the] total sum [of aggregate damages] among the class members can be managed individually, should the case ever reach that point"; the prospect of such (completely unspecified) individualized proceedings did not alter the court's conclusion that Rule 23(b)(3)'s predominance requirement was satisfied. *Id.* at 19a.

REASONS FOR GRANTING THE PETITION

I. THE LOWER COURTS ARE DIVIDED ON THE IMPORTANT AND RECURRING QUESTION OF WHETHER CLASS-WIDE ANTITRUST IMPACT CAN BE PRESUMED WHEN ACTUAL PRICES ARE INDIVIDUALLY NEGOTIATED.

Although price-fixing is a per se violation of the antitrust laws, proof of a conspiracy to fix prices "does not establish civil liability under §4 of the Clayton Act." *Alabama* v. *Blue Bird Body Co.,* 573 F.2d 309, 317 (5th Cir. 1978). Plaintiffs also must prove that the conspiracy caused them to be "injured in [their] business or property." 15 U.S.C. §15(a); see *Atl. Richfield Co.* v. *USA Petroleum Co.*, 495 U.S. 328, 344 (1990) (Even "in a case involving horizontal price fixing … plaintiffs [a]re still required to 'show that the conspiracy caused *them* an injury for which the antitrust laws provide relief'"). Thus, in order for common issues to predominate in a class action on behalf of a large number of plaintiffs, the fact of injury (or "antitrust impact") must be "capable of proof at trial through evidence that is common to the class rather than individual to its members." *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 311-12 (3d Cir. 2009).

Here, plaintiffs alleged that the conspiracy injured class members by making them pay supra-competitive prices for containerboard and corrugated products. That should have precluded class certification because, as the leading antitrust treatise explains, "[w]hen transaction prices are negotiated," "proof of antitrust injury is bound to be individualized." 2A P.E. Areeda & H. Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* §398c, at 423 n.21 (4th ed.

2016). The district court, however, held that plaintiffs could prove that class members were injured with evidence of "the lock-step increase in the PPW index" from which the fact-finder could infer that "even for negotiated prices, the starting point for those negotiations" was higher. Pet. App. 50a, 52a. In affirming that finding as "reasonabl[e]," Pet. App. 17a, the Seventh Circuit exacerbated a clear circuit split that warrants this Court's review.

A. The Circuits Are Divided Over Whether Class-Wide Harm Can Be Presumed When Prices Are Negotiated.

The circuits are hopelessly divided on whether a presumption of class-wide harm may be used to facilitate certification of an antitrust class action where actual prices vary as a result of individual negotiations or other factors. On one side are the First, Fifth and Eighth Circuits, which have properly rejected any such presumption of class-wide harm.

The Fifth Circuit squarely addressed the issue in *Robinson* v. *Texas Automobile Dealers Association*, where a class of automobile purchasers alleged that car dealers had conspired to remove a vehicular tax from a vehicle's base price and to list the tax as a separate line item on the sticker. 387 F.3d at 419. The district court had found that class-wide impact could be shown with common evidence because it presumed that the separate listing of the vehicle tax "increase[d] the final purchase price for every consumer." *Id.* The Fifth Circuit reversed. It held that the presumption of harm "defies the realities of haggling that ensues in the American [automobile] market." *Id.* Although purchasers who negotiated "a price that excludes taxes, titles and fees" may have been hurt by the alleged conspiracy, "[b]ottom-line purchasers" who "base their negotiations on the *final*

purchase price, including every tax, fee, and surcharge," would not have been harmed. *Id.* at 423. Therefore, a proper determination of injury would require "evidence regarding *each purported class member and his transaction*," which "would destroy any alleged predominance." *Id.* at 424; see also *Alabama* v. *Blue Bird Body,* 573 F.2d at 327-28 (reversing class certification of alleged conspiracy among school bus manufacturers where school districts ordered buses with different specifications and negotiated prices, so court could not envision "how the plaintiffs can prove in a manageable manner that the conspiracy … did in fact cause damage").

Likewise, the First Circuit in *In re New Motor Vehicles Canadian Export Antitrust Litigation*, reversed class certification in a case involving an alleged conspiracy to increase car prices by preventing importation of lower-priced *Canadian* cars. Noting plaintiffs' obligation to show "that each member of the class was in fact injured," the court rejected plaintiffs' reliance "on an inference that any upward pressure" on the manufacturers' suggested retail price ("MSRP") and the dealer invoice price "would necessarily raise the prices actually paid by individual consumers." 522 F.3d at 28-29. The First Circuit reasoned that "[e]ven if it is fair to assume that hard bargainers will usually pay prices closer to the dealer invoice price and poor negotiators will usually pay prices closer to the MSRP, a minimal increase in national pricing would not necessarily mean that *all* consumers would pay more." *Id.* at 29. "Too many factors play into an individual negotiation" to allow such an assumption. *Id.*

Similarly, the Eighth Circuit in *Blades* v. *Monsanto Co.*, recognized that class-wide injury cannot be

presumed from evidence that a conspiracy raised average prices, or prices for some class members. 400 F.3d 562, 572-74 (8th Cir. 2005). Plaintiffs in *Blades* were farmers who alleged a conspiracy to charge supra-competitive list price premiums on genetically modified ("GM") seeds. Although plaintiffs produced "evidence suggesting that [defendants] adhered to a price-fixing agreement that raised the average price of GM seeds," all agreed that prices for the seeds "varied widely, and [that] some farmers paid negligible premiums or no premiums at all." *Id.* at 572-73. The Eighth Circuit therefore held that injury could not be established with common proof. *Id.* at 573-74. The court explained that "[t]he undisputed presence of negligible and zero list premiums indicates that if [defendants] performed their agreement, their performance was not across the board," and individualized evidence is needed to determine whether each farmer paid inflated prices. *Id.*

In contrast, the Tenth Circuit in *In re Urethane Antitrust Litigation* affirmed the certification of an antitrust class action based on the "prevailing view" in the district courts that "price-fixing affects all market participants, creating an inference of class-wide impact even when prices are individually negotiated." 768 F.3d at 1254. Although some class members may have avoided the allegedly collusive announced price increases through individual negotiations, the Tenth Circuit held that impact was a "common question that was capable of class-wide proof" with plaintiffs' evidence that the "price-increase announcements had affected the starting point for price negotiations." *Id.* at 1255; see also *id.* at 1254 (the "inference of class-wide impact is especially strong where, as here, there is evidence

that the conspiracy artificially inflated the baseline for price negotiations").

In certifying the class in this case, the district court expressly relied on *In re Urethane Antitrust Litigation*, Pet. App 52a, and district court cases holding that even though prices vary as a result of individual negotiations, plaintiffs can show class-wide impact with evidence that "defendants conspired to maintain an inflated 'base' from which all pricing negotiations began," *id.* at 39a-40a (quoting *Hedges Enters., Inc.* v. *Cont'l Grp., Inc.* 81 F.R.D. 461, 475 (E.D. Pa. 1979)). In affirming that finding as "reasonabl[e]," *id.* at 17a, the Seventh Circuit joined the Tenth Circuit and the "litany" of district courts that have "rejected the argument that diverse purchasing practices prevent a showing of common impact" in antitrust cases. *In re Foundry Resins Antitrust Litig.*, 242 F.R.D. 393, 410 (S.D. Ohio 2007) (citing cases). See also, *e.g.*, *In re Cardizem CD Antitrust Litig.*, 200 F.R.D. 326, 345 (E.D. Mich. 2001) ("courts have routinely rejected [defendants'] arguments" based on "differences in prices paid by class members, where the plaintiffs show that the 'minimum baseline for beginning negotiations, or the range of prices which resulted from negotiations, was artificially raised'"); *In re Commercial Tissue Prods.*, 183 F.R.D. 589, 595 (N.D. Fla. 1998) (same). Indeed, one commentator estimates that plaintiffs seeking certification on the theory that "the baseline from which prices were set is higher" "win this battle *the vast majority of the time*." J. Davis & E. Cramer, *Antitrust Class Certification and The Politics of Procedure*, 17 Geo. Mason L. Rev. 969, 986 (2010 (emphasis added).

Although district courts commonly invoke the presumption of class-wide injury as a basis for class

certification even where prices are individually negotiated, the propriety of the presumption often escapes appellate review. Interlocutory review is difficult to obtain because the circuits agree that interlocutory "review of class certification decisions should not be routine." 2 J.M. McLaughlin, *McLaughlin on Class Actions: Law and Practice* §7.2 (13th ed. 2016). And appellate review following final judgment is rare because class certification frequently forces defendants to settle. See *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 476 (1978); Fed. R. Civ. P. 23 advisory committee's note to 1998 amendment on subd. (f). The pressure to settle is particularly intense where, as here, the class contains thousands of members seeking *billions* of dollars in damages. Faced with the risk of such astronomical or possibly ruinous liability, defendants understandably may decide not to "roll the[] dice." *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995). But "[i]f they settle, the class certification—the ruling that will have forced them to settle—will never be reviewed." *Id.*

It is therefore profoundly wrong to allow the issue to "percolate" any longer. This case presents a rare opportunity for this Court to stop the use of the presumption of harm that has been employed to coerce settlements, and absent reversal by this Court, will continue to be used to certify class actions where prices are individually negotiated.

B. Presuming Class-Wide Harm Where Prices Are Negotiated Evades The Requirements Of Rule 23 And Violates The Rules Enabling Act And Due Process.

The presumption of class-wide harm where prices are individually negotiated effectively relieves

plaintiffs of the burden of establishing compliance with Rule 23 and alters the parties' substantive rights in violation of the Rules Enabling Act.

1. Class certification based on a presumption of class-wide harm is incompatible with this Court's admonition that a "party seeking class certification must affirmatively demonstrate his compliance with" Rule 23. *Wal-Mart Stores, Inc.* v. *Dukes*, 564 U.S. 338, 350 (2011). "[A]ctual, not *presumed*, conformance" with these requirements is "indispensable." *Gen. Tel. Co. of S.W.* v. *Falcon*, 457 U.S. 147, 160 (1982) (emphasis added). But the lower courts here upheld certification based precisely on such "presumed" conformance with Rule 23.

2. Class certification based on a presumption of class-wide harm also modifies substantive rights in violation of the Rules Enabling Act. 28 U.S.C. §2072(b). Proof of injury is a necessary element of any antitrust class action that is separate and distinct from proof of a conspiracy itself. *Atl. Richfield*, 495 U.S. at 344 (plaintiffs are required to show "that the conspiracy caused *them* an injury"); see also, *e.g.*, *Blades*, 400 F.3d at 572 ("[P]roof of conspiracy is not proof of common injury.").

As noted, the district court held that plaintiffs could prove that class members were injured with evidence of the increase in the PPW index even though the PPW index is not the price most class members actually paid. Pet. App. 50a-51a. That the PPW index may have been used as a benchmark for setting the price or used as a "starting point" for some of those negotiations, Pet. App. 52a, is not proof that the prices the class members actually paid were inflated by the alleged conspiracy. As this Court held in *Brooke Group, Ltd.* v. *Brown & Williamson Tobacco Corp.*, it is "unreasonable to draw

conclusions about the existence of tacit coordination or supracompetitive pricing from data that reflect only list prices" when "list prices were not the actual prices paid by consumers." 509 U.S. 209, 236 (1993); *id.* at 235-36 ("volume rebates," "coupons, stickers and giveaways" reduced "the actual cost of cigarettes to consumers below list prices").

That analysis applies even more so here. When the PPW index increased, customers of containerboard and corrugated products did not readily agree to a corresponding increase in their prices. The class is comprised of sophisticated business purchasers who, when faced with announced price increases, could and did "exercise [their] option in going to the market" to obtain a lower price. PSA.186; see also, *e.g.*, A.573 (customers "refus[ed] to take the price increase" or negotiated a "rebate from the contractually agreed upon price"); PSA.26 (one defendant "lost "225k tons of local business" when it raised prices); Ex. 17 to Dkt. 763 (multiple accounts International Paper lost on pricing); Ex. 16 to Dkt. 763, at 1 ("pizza box business in Northern California is becoming highly competitive" and "sell price has been dropping as we have been responding to market pressure on existing volume as well as getting aggressive in order to grow the business").

Moreover, not all contracts had pricing terms tied to the PPW index. A.572-73. And even where pricing terms were tied to the PPW index, purchasers frequently negotiated substantial rebates, discounts or caps on price increases, or contract provisions giving them a right to look for a better price elsewhere. See A.203, A.572-73; Ex. 15 to Dkt. 763, at 2-5. The amount of the discount varied from customer to customer and with the amount of the price increase. See A.573; Ex. 22 to Dkt. 763, at 32

("Statistical analysis supports anecdotal evidence that the discount level increases when price increases are put into effect.").

Given all of this negotiation and individualized pricing, here, as in *Brooke Group*, it is unreasonable to presume that all purchasers paid supra-competitive prices from evidence that supposedly coordinated price-increase announcements caused an increase in the PPW index. Class certification based on such a presumption therefore violates the Rules Enabling Act by effectively relieving plaintiffs of the burden of proving that each individual class member was in fact injured by the conspiracy.

3. Class certification based on the presumption of class-wide harm also strips defendants of their right to assert "defenses to individual claims." *Wal-Mart*, 564 U.S. at 367. In an individual trial, defendants could raise as a defense that the plaintiff was not injured by any alleged conspiracy, and they could use evidence of the plaintiff's own contracts and negotiations to support that contention. In a class trial involving tens of thousands of purchasers that bought different products at different prices over nearly seven years, it simply is not possible for defendants to raise such individualized defenses and no trial court would allow such a proceeding. Using the presumption to find predominance is thus tantamount to certifying a class on the impermissible "premise that [the defendant] will not be entitled to litigate its statutory defenses to individual claims."*Id.* It also violates due process. *Lindsey* v. *Normet*, 405 U.S. 56, 66 (1972) ("Due process requires that there be an opportunity to present every available defense").

C. This Case Is An Excellent Vehicle To Resolve The Propriety Of Presuming Class-Wide Impact.

The lower courts had to rely on the inference that an increase in the PPW index injured all class members even though actual prices were individually negotiated because none of their other common evidence could establish class-wide impact.

1. Plaintiffs' expert, Dr. Dwyer, analyzed the prices paid by a sample of class members before and after the price-increase announcements, and concluded that 92% of the companies in the sample had a price increase on at least one occasion when the PPW index increased. A.147-49. Dwyer conceded, however, that he assumed every price increase was caused by the alleged conspiracy, even if it was less than the supposedly conspiratorial increase in the PPW index, and even if there were cost increases or other market forces that would have caused prices to rise in the absence of any collusion. A.325-26. As defendants' expert explained, that analysis does not distinguish between lawful price increases caused by non-conspiratorial changes in economic conditions and unlawful price increases (if any) caused by the alleged conspiracy. A.486-87.

Additionally, Dwyer's "before-and-after" price analysis cannot show class-wide impact because, as defendants' experts showed, the analysis looked at purchases by a sample of class members that is not representative of many class members. A.501-02. The analysis is also unreliable for a number of reasons, not the least of which is that it finds a substantial number of "false positives" in the form of customers who are "impacted" in periods when the PPW index was unchanged or was falling. A.488-94; cf. *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244,

254 (D.C. Cir. 2013) (class certification cannot be based on expert model with "propensity toward false positives").

2. Dwyer also conducted a regression analysis that purports to show a correlation between "aggregate class prices" and increases in the PPW index. A.153-54. But the analysis of *aggregate* class prices says nothing about the prices paid by *individual* class members, let alone whether individual prices exceeded "but for" competitive levels or were justified by market factors that would have caused prices to rise without any alleged conspiracy. The aggregate class prices examined by Dwyer are the unweighted average prices of many different products bought by many different purchasers that were "rolled up" into "aggregate" prices. This metric necessarily glossed over the substantial variation in individual prices that determine whether any individual class member was injured. See A.153 & n.28.

3. The district court did not rely on this evidence. As noted, see *supra* p. 8, it instead held that plaintiffs could prove class-wide impact with evidence of "the lock-step increase in the PPW index that followed and tracked Defendants' collective price-increase announcements." Pet. App. 50a. Although the PPW index is not the price most class members actually paid, "Plaintiffs have produced evidence showing that (1) Defendants largely rely on the PPW index in setting prices, and (2) in most individually negotiated contracts, the PPW index factored into the negotiated price." *Id.* at 51a. According to the district court, this evidence creates "an inference of class-wide impact" because it "would allow a fact-finder to infer that, even for negotiated prices, the starting point for those negotiations" would be higher. *Id.* at 52a.

The Seventh Circuit affirmed using the same reasoning. Although it cited some of Dwyer's additional analyses (*id.* at 8a, 16a), the Seventh Circuit did not find them to be independent grounds that rendered the presumption of class-wide impact unnecessary. To the contrary, the Seventh Circuit ultimately relied on the presumption of impact as the reason why it was rejecting defendants' argument that the class was certified on the "the same kind of 'trial by formula'" disapproved in Wal-Mart. *Id.* at 17a. The Seventh Circuit found that, unlike Wal-Mart, plaintiffs here were not "extrapolating" from a sample of class members because

> they assert that every person or entity in North America paid the overcharges that resulted from Defendants' collusive practices. Even for transactions where prices were negotiated individually or a longer term contract existed, the district court found, reasonably, that the "starting point for those negotiations would be higher if the market price for the product was artificially inflated."

Id. (emphasis added).[4]

4. If plaintiffs were to (mis)read the Seventh Circuit's opinion as holding that Dwyer's impact analyses provided independent proof of class-wide impact that renders the presumption of injury unnecessary, that would only raise additional ways in which the Seventh Circuit erred and departed from decisions of this Court and other circuit courts. First,

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[4] The Seventh Circuit also noted Harris's analysis of the structure of the market, but correctly acknowledged that such evidence alone is insufficient to predict "what kind of conduct would ensue, and how competitively the market would perform." Pet. App. 15a-16a.

Dwyer's impact analysis never sought to determine what prices would exist "but for" the supposed conspiracy—a critical omission given that the costs of manufacturing containerboard increased substantially over the period, and there were periods of increased demand as well. See *supra* p.7. The Seventh Circuit found this was of little moment because a plaintiff may "establish antitrust injury (in the form of cartel pricing here)" with evidence of increased prices without regard to whether those prices were higher than they would have been "but for" the alleged conspiracy. See Pet. App. 14a (comparison of actual market to but-for market is "one way in which a plaintiff could satisfy its burden, but we think that the formulation is too narrow"). The Seventh Circuit's determination that antitrust impact can be established without reference to market conditions "but for" the alleged conspiracy is in stark conflict with the Eighth Circuit's decision in *Blades*. See 400 F.3d at 569 ("To establish antitrust impact, an expert 'is required to construct a hypothetical market, a but-for market, free of the restraints and conduct alleged to be anticompetitive'").[5]

Second, the Seventh Circuit departed from this Court's decision in *Comcast* and created a split with the Third Circuit by accepting plaintiffs' expert reports "for what they are worth at this stage" and declining to "discuss the opposing views expressed by Defendants' experts because they did not undermine

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[5] The Seventh Circuit's analysis is also fundamentally inconsistent with the Clayton Act. A company that negotiates to pay the same price when suppliers are colluding that it would pay when they are not colluding cannot be injured in its "business or property," as required under the Clayton Act's private cause of action. 15 U.S.C. §15(a).

the class certification decision" and "Defendants did not challenge [plaintiffs'] experts under *Daubert* and Federal Rule of Evidence 702." Pet. App. 21a; see also *id.* at 3a ("at this stage we need say little about" plaintiffs' experts because no *Daubert* challenge was filed). That directly contravenes *Comcast*, which reversed class certification even though defendants had not moved to exclude plaintiffs' expert, because his damages model could not "establish that damages could be measured on a classwide basis." *Comcast*, 133 S. Ct. at 1431, n.4.

The Third Circuit has taken the next logical step and held that "a plaintiff cannot rely on challenged expert testimony, when critical to class certification, to demonstrate conformity with Rule 23 unless the plaintiff also demonstrates, and the trial court finds, that the expert testimony satisfies the standard set out in *Daubert*." *In re Blood Reagents Antitrust Litig.*, 783 F.3d 183, 187 (3d Cir. 2015). Whether Rule 23 requires a district court to go so far as to issue an evidentiary ruling about the admissibility of experts that defendants have not sought to exclude, it at a minimum requires the court to address all of the objections and criticisms raised in the opposition to the motion for class certification. As *Comcast* explains, a court may not ignore a challenge to an expert's methodology raised by defendants opposing class certification on the theory that the objections will be addressed later. To do so would be to suggest that "*any* method of measurement is acceptable so long as it can be applied classwide, no matter how arbitrary the measurements may be. Such a proposition would reduce Rule 23(b)(3)'s predominance requirement to a nullity." 133 S. Ct. at 1433.

II. THE CIRCUITS ARE DIVIDED ON THE IMPORTANT AND RECURRING QUESTION OF WHETHER THE FACT THAT INDIVIDUALIZED INQUIRIES ARE NEEDED TO DETERMINE THE AMOUNT OF DAMAGES DUE EACH CLASS MEMBER IS RELEVANT TO THE PREDOMINANCE INQUIRY UNDER FED. R. CIV. P. 23(b)(3).

This Court's review is also needed to resolve confusion in the lower courts about whether the fact that individualized inquiries are needed to determine the damages due each class member is irrelevant to the predominance inquiry under Rule 23(b)(3). As noted above, the district court certified the class even though plaintiffs had no common evidence or formula to determine the amount of damages due any of the tens of thousands of class members. *Supra* pp. 9-10. In the district court's view, that was irrelevant because the presence of "individualized damages issues … alone will not defeat class certification." Pet. App. 64a. The Seventh Circuit affirmed, holding "as a matter of law" that at the class certification stage, plaintiffs need only have a method for calculating aggregate damages for the class as a whole, not for allocating that award among individual class members. *Id*. at 18a-19a. That decision is contrary to Rule 23(b)(3), this Court's decision in *Comcast*, and decisions in other circuits, and it permits certification of a damages class action even where there may be no lawful way to distribute any award.

1. The fact that Rule 23(b)(3) allows class certification of an action for individualized money damages is what distinguishes Rule 23(b)(3) from Rule 23(b)(2), which allows class certification when "the party opposing the class has acted or refused to

act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). As this Court recognized in *Wal-Mart*, 564 U.S. at 362, the "procedural protections attending the (b)(3) class—predominance, superiority, mandatory notice, and the right to opt out—" are critical protections that are uniquely necessary when the remedy sought is money damages rather than injunctive relief:

> When a class seeks an indivisible injunction benefitting all its members at once, there is no reason to undertake a case-specific inquiry into whether class issues predominate or whether class action is a superior method of adjudicating the dispute. Predominance and superiority are self-evident. But with respect to each class member's individualized claim for money, that is not so—which is precisely why (b)(3) requires the judge to make findings about predominance and superiority *before allowing the class*.

Id. at 362-63 (emphasis added).

Thus, far from being irrelevant, the question of how damages will be resolved is absolutely essential to determining whether "the questions of law or fact common to the class predominate over any questions affecting only individual members," and "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). To be sure, common questions can predominate over individual questions even though "damages or some affirmative defenses peculiar to some individual class members" will have to be tried separately. *Tyson Foods, Inc.* v. *Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016). But it is equally true that "Rule 23(b)(3) predominance" does *not* exist if

"[q]uestions of individual damage calculations will inevitably overwhelm questions common to the class." *Comcast*, 133 S. Ct. at 1433.

The district court and court of appeals both failed to undertake the analysis required by *Comcast*. The district court dismissed defendants' arguments that damages would require inquiries into the individualized prices and contracts negotiated by tens of thousands of class members because it was under the profoundly mistaken belief that "individualized damages issues … alone will not defeat class certification." Pet. App. 64a. The court saw no reason to determine at the class certification stage how individual damages could be determined, because it thought it could decertify the class later if "individual damages issues indeed threaten to overwhelm the common issues." *Id.* at 65a.

The Seventh Circuit affirmed, holding that "at the class certification stage, plaintiffs are not obliged to drill down and estimate each individual class member's damages," because the allocation of damages among class members "can be managed individually, should the case ever reach that point." Pet. App. 18a-19a. But nowhere did either the district court or the Seventh Circuit explain how the determination of each class member's damages could be "managed individually" in this sprawling class in which Dwyer conceded that his damages model "cannot be applied to individual plaintiffs." *Id.* at 64a.

Rule 23 precludes this certify-first-and-ask-questions-later approach to predominance. This Court has declared explicitly that a class may be certified only if it is clear that the requirements of Rule 23 "*in fact*" are met. *Comcast*, 133 S. Ct. at 1432. A court therefore has a duty to determine whether there is a lawful and administratively feasible way to

calculate each class member's damages *before* it certifies a class action. See *Wal-Mart*, 565 U.S. at 363 (Rule 23(b)(3) "requires the judge to make findings about predominance and superiority before allowing the class"); *Comcast*, 133 S. Ct. at 1433 (class may not be certified where common method of proving damages is legally flawed); *Windham* v. *Am. Brands, Inc.*, 565 F.2d 59, 70 (4th Cir. 1977) (issues raised by the difficulty in computing individual damages "must be resolved *before* a class is certified"') (emphasis added) (quoting *In re Hotel Tel. Charges*, 500 F.2d 86, 90 (9th Cir. 1974)). The Seventh Circuit's failure to engage in this analysis "reduce[s] Rule 23(b)(3)'s predominance requirement to a nullity." *Comcast*, 133 S. Ct. at 143.

2. The Seventh Circuit's failure to determine whether there is a lawful and administratively feasible way to determine the amount of damages due each class member before it affirmed certification of this massive class is in conflict with the approach in other circuits. The Second, Fourth and Fifth Circuits have squarely held that individualized damages issues preclude a finding of predominance where the class contains thousands of members and the amount of damages due each class member cannot be calculated with a common formula, but would require detailed, individual inquiries or a series of mini-trials.

In *Windham* v. *American Brands, Inc.*, the Fourth Circuit held that the district court properly refused to certify an antitrust class action on behalf of more than 20,000 farmers alleging there was a conspiracy to fix prices in auctions where tobacco was sold. 565 F.2d at 62-64. The court began by acknowledging that because the Clayton Act only authorizes a plaintiff to recover "threefold the damages by *him* sustained," it

would violate the Rules Enabling Act to permit "[g]eneralized or class-wide proof of damages" that cannot be apportioned among the individual class members in accordance with the damages each sustained. *Id.* at 66. Thus, if the injury and damages of individual class members were "capable of mathematical or formula calculation, the existence of individualized claims for damages" would be "no barrier to class certification." *Id.* at 68 (footnote omitted). In *Windham*, however, "the issue of damages and impact [did] not lend itself to such a mechanical calculation," and the "computation of damages would be a complex, highly individualized task," so "the damage aspect of the case predominate[d]." *Id.* at 68, 70; see also *Broussard* v. *Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 342-43 (4th Cir. 1998) (reversing class certification and classwide damages award because "plaintiffs' expert based his lost profits testimony on abstract analysis of averages," when "each putative class member's claim for lost profits damages was inherently individualized and thus not easily amenable to class treatment").

The Fifth Circuit in *Bell Atlantic Corp.* v. *AT&T Corp.*, followed the Fourth Circuit in holding that "where the issue of damages does not lend itself to … mechanical calculation, but requires separate mini-trial[s] of an overwhelmingly large number of individual claims, the need to calculate individual damages will defeat predominance." 339 F.3d 294, 307 (5th Cir. 2003) (alteration and omission in original). The court held that plaintiffs failed to show that common issues predominated over individual issues in a large antitrust action, because their damages formula was based on averages and failed to account for "differences among class members that

would have affected the amount, if any, of actual economic damages suffered." *Id.* at 305; see also *Ibe* v. *Jones*, 836 F.3d 516, 530 (5th Cir. 2016) (class certification properly denied where the question of damages "raised complex and individualized issues that could not be resolved by common evidence").

Similarly, in *McLaughlin* v. *American Tobacco Co.*, the Second Circuit held that the "fact that damages may have to be ascertained on an individual basis" is "a factor that we must consider in deciding whether issues susceptible to generalized proof 'outweigh' individual issues." 522 F.3d 215, 231 (2d Cir. 2008). *McLaughlin* was a large RICO class action in which plaintiffs sought to calculate aggregate damages based on estimates of the average damages suffered by class members with valid claims and to distribute the award in an individual claims process, after which any unallocated amounts would be distributed on the basis of cy pres principles. *Id.* The Second Circuit held that class certification based on that procedure violated the Rules Enabling Act and due process, because "even if defendants were able to avoid overcompensating *individual* plaintiffs, they would still be overpaying in the aggregate." *Id.* at 232. Because "numerous issues" in the case, including the amount of damages due individual class members, were not "susceptible to generalized proof but would require a more individualized inquiry," the court held that "the predominance requirement of Rule 23" was not satisfied. *Id.* at 234.

3. Had this case been brought in the Second, Fourth or Fifth Circuits, the class would not have been certified because individualized inquiries needed to determine the damages due each of the tens of thousands of class members would have overwhelmed any common questions about the existence of the

conspiracy. The evidence showed that prices varied depending on the purchaser, the product, the season, and the geographic location. *Supra* pp. 5-6. The class includes purchasers of varying size and bargaining power, from some of this country's largest manufacturing companies to pizzarias. *Supra* p. 5. In addition, many customers' payments were offset by rebates or other cash incentive programs of differing values. *Supra* p. 6. Other customers contractually limited their potential recovery in whole or in part through a variety of waivers or arbitration agreements. *Supra* p. 9; A.479.

These are "differences among class members that would have affected the amount, if any, of actual economic damages suffered." *Bell Atl.*, 339 F.3d at 305; cf. *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651. 658 (7th Cir. 2002) (when there are some large and some small buyers, "price fixers [may] engage in price discrimination, giving large discounts to the big buyers and no (or small) discounts to the small ones"). Indeed, because the Seventh Circuit has allowed plaintiffs to *presume*, rather than to prove, that all class members were injured, individualized inquiries also will be needed to ensure that the many uninjured class members do not recover damages. See *Tyson Foods*, 136 S. Ct. at 1053 (Roberts, C.J., concurring) (because "Article III does not give federal courts the power to order relief to any uninjured plaintiff," if "there is no way to ensure that the jury's damages award goes only to injured class members, that award cannot stand").

In short, the determination of the amount of damages due each individual class member, if any, is not "susceptible to generalized proof." *McLaughlin*, 522 F.3d at 234. It "would be a complex, highly individualized task," *Windham*, 565 F.2d at 70, that

cannot be done with the class of tens of thousands of members certified here.

Thus, had this case been filed in Virginia or Texas or New York, there would be no certification of this nearly $12 billion class action. Given the stakes, the outcome of a litigation like this cannot be decided purely by geography. This Court's review is critical to restore unity in the lower courts and to reiterate that a class may be certified only when the "proposed class is 'sufficiently cohesive to warrant adjudication by representation;'—the focus of the predominance inquiry under Rule 23(b)(3)." *Amgen, Inc.* v. *Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1195 (2013).

* * *

Class certification of a massive antitrust case frequently compels defendants "to settle more quickly or on more favorable terms," and "[p]roblematically, it may induce some defendants to settle even though they truly believe they have not violated the antitrust laws" because "the risk of a massive award is simply too high." 2A Areeda & Hovenkamp, *supra*, §331a; see also *supra* p. 17. Scrupulous adherence to the requirements of Rule 23(b)(3) is therefore essential to prevent the misuse of this powerful procedural device. Although there are many circumstances in which "class-action treatment" is a "convenient and desirable" way to resolve many people's claims in one proceeding, the drafters of Rule 23(b)(3) emphasized that a class should be certified only when "a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." Fed. R. Civ. P. 23 advisory committee's note to 1966 amendment. When

plaintiffs are permitted to presume, rather than to prove, that all class members were injured in order to prove liability on a class-wide basis, procedural fairness and due process are sacrificed. See *supra* pp. 17-20. When no common evidence or formula can show the amount of damages, if any, that each class member is entitled to receive, then class certification does not achieve economies of time, effort and expense. See *supra* pp. 26-33. This Court should grant review to make clear that Rule 23(b)(3) does not permit class certification where there is such disparity in the damages claims of individual class members.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

CARTER G. PHILLIPS*
C. FREDERICK BECKNER III
KATHLEEN MORIARTY MUELLER
PAUL J. RAY
1501 K Street, NW
Washington, DC 20005
(202) 736-8000
cphillips@sidley.com

Counsel for Petitioners

December 30, 2016

* Counsel of Record

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
SEVENTH CIRCUIT

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Nos. 15-2385
15-2386

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KLEEN PRODUCTS LLC, *et al.*,

Plaintiffs-Appellees,

v.

INTERNATIONAL PAPER COMPANY, *et al.*,

Defendants-Appellants.

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Argued December 8, 2015

Decided August 4, 2016

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OPINION

Before Wood, Chief Judge, and Bauer and Williams, Circuit Judges.

Wood, Chief Judge.

The antitrust laws prohibit competing economic actors from colluding to agree on prices, either directly or through such mechanisms as output restrictions. See *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 60 S.Ct. 811, 84 L.Ed. 1129 (1940); *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46, 111 S.Ct. 401, 112 L.Ed.2d 349 (1990). That is just what the plaintiffs in the case before us allege the producers and sellers of containerboard did. The plaintiff-purchasers filed this

suit under Sherman Act § 1, 15 U.S.C. § 1, seeking to recover treble damages for the overcharges they allegedly paid. See Clayton Act § 4, 15 U.S.C. § 15. What brings the case before us at this time—well before the merits have been resolved—is the district court's decision to certify a nationwide class of purchasers under Federal Rule of Civil Procedure 23. The defendants, International Paper Company, Georgia-Pacific LLC, Temple-Inland Inc., RockTenn CP, LLC, and Weyerhauser Company (to whom we will refer collectively as Defendants unless the context requires otherwise), asked us to accept this interlocutory appeal from the certification decision pursuant to Rule 23(f). We agreed to do so. Finding no abuse of discretion in the district court's decision, however, we affirm.

I

The Purchasers allege in their complaint that the defendant companies agreed "to restrict the supply of containerboard by cutting capacity, slowing back production, taking downtime, idling plants, and tightly restricting inventory." These actions predictably led to an increase in the price of containerboard—a price increase that caused Purchasers to pay more for containerboard products than they would have paid in the absence of the illegal agreement. The named plaintiff on the complaint is Kleen Products LLC. It asked the district court to certify the following class:

> All persons that purchased Containerboard Products directly from any of the Defendants or their subsidiaries or affiliates for use or delivery in the United States from at least as early as February 15, 2004 through November 8, 2010.

The proposed definition carved out the defendants themselves, entities or personnel related to them, and governmental entities. The Defendants opposed class certification on a number of grounds: whether common questions predominate; whether antitrust injury can be proved using a common method; whether the amount of damages can be proved using a common method; and whether a class action is superior.

As the Supreme Court emphasized in *Wal-Mart Stores*, *Inc. v. Dukes*, 564 U.S. 338, 131 S.Ct. 2541, 180 L.Ed.2d 374 (2011), "Rule 23 does not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate his compliance with the Rule. . . ." *Id.* at 350, 131 S.Ct. 2541. We must therefore take a careful look at the evidence that the Purchasers presented in support of class certification as we assess the district court's ruling. Some of that evidence was provided by experts, but at this stage we need say little about them, because no defendant challenged the Purchasers' experts under Federal Rule of Evidence 702 or the Supreme Court's decision in *Daubert v. Merrell Dow Pharm*., *Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). See *Tyson Foods*, *Inc. v. Bouaphakeo*, —— U.S. ——, 136 S.Ct. 1036, 1049, 194 L.Ed.2d 124 (2016) (where there is no *Daubert* challenge, district court may rely on expert evidence for class certification). The district court also pointed out that "[f]or the most part, the parties agree on the basic facts, and both parties' experts rely upon the same data, so there are little if any factual disputes that the Court must resolve to decide class certification." For that reason, the court concluded that there was no need for a comprehensive evidentiary hearing. This, in our view, was a case-management decision that we have no reason to second-guess, despite Defendants' complaints. See *American Honda*

Motor Co. v. Allen, 600 F.3d 813, 815 (7th Cir. 2010) (evidentiary hearing should be held "if necessary"); *West v. Prudential Sec., Inc.*, 282 F.3d 935, 938 (7th Cir. 2002) (same).

Two final points are worth making before we turn to the evidence. First, nothing in *Wal-Mart* changed the applicable standard of review, which is deferential (as the cases say, only for "abuse of discretion"). *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 811 (7th Cir. 2012). Second, it remains true that Rule 23 does not demand that *every* issue be common; classes are routinely certified under Rule 23(b)(3) where common questions exist and predominate, even though other individual issues will remain after the class phase. See, *e.g.*, *McMahon v. LVNV Funding*, 807 F.3d 872, 875-76 (7th Cir. 2015); *Pella Corp. v. Saltzman*, 606 F.3d 391, 393 (7th Cir. 2010).

II

Although the requirements for class certification under Rule 23 are familiar, we set out the critical sections of the rule here for ease of reference:

> (a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:
>
> > (1) the class is so numerous that joinder of all members is impracticable;
> >
> > (2) there are questions of law or fact common to the class;
> >
> > (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
> >
> > (4) the representative parties will fairly and adequately protect the interests of the class.

* * *

(b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:

* * *

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

Our focus is on the predominance requirement of subpart (b)(3), since, as the district court noted, "Defendants have conceded that typicality, commonality, and adequacy have been satisfied so long as [Purchasers] have adequately proven predominance," and no one is arguing about numbers either.

A

We begin with some background facts about the containerboard industry. "Containerboard" is the term for a sheet of heavy paper with a smooth top and

bottom (the linerboard) and a fluted layer between the two (the corrugated medium). It is made in large, expensive mills; as of 2008, no new mills had been built in the United States for more than 12 years. The containerboard sheets are cut and folded into products such as boxes of varying sizes. The industry is dominated by vertically integrated producers, which means simply that the fabrication of the containerboard and then its processing into final products are handled internally by a firm. This means, importantly for antitrust purposes, that the Purchasers bought directly from the alleged conspirators, not through intermediaries. See *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 97 S.Ct. 2061, 52 L.Ed.2d 707 (1977) (distinguishing between direct-purchaser suits, which are permitted under Clayton Act § 4, and indirect-purchaser suits, which are not).

Containerboard is a commodity, sold in standardized compositions and weights. The final products are also standardized; one trade association commented that "boxes are essentially commodity items used in well established markets." The most common containerboard product sold in the United States in 2010 was unbleached kraft linerboard weighing 42 pounds per thousand square feet. Pulp & Paper Week (PPW), an industry periodical, publishes weekly price indices that include the price for the 42-pound linerboard for delivery east of the Rocky Mountains. The PPW index, as it is called, is widely used within the industry as a benchmark.

A small and shrinking number of firms produce most of the containerboard in North America. As of 1997, the five largest firms (*i.e.* the current defendants or their predecessors) were responsible for 41% of North American production. By 2007, the Defendants

furnished 74% of that production. Add in the next two firms, and the number swelled to 84%. (This evidence is ambiguous: a cartel's market share will shrink over time, to the extent that the high prices attract new entry from fringe competitors or imports, but its market share will grow to the extent that the cartel successfully uses exclusionary devices. The existing record does not resolve that ambiguity, but it does not matter for purposes of class certification.)

There was a great deal of evidence designed to show that the hypothesis that Defendants had organized a cartel was one that a jury could accept. We do not need to review all of it, but we offer some key points. During the class period, which ran from February 15, 2004, through November 8, 2010, Defendants attempted 15 price increases, and with one exception, all Defendants joined each one, at roughly the same time (11 out of 15 times within the same month). Twelve times out of 15 they increased prices by identical amounts; the remaining times the increases of different firms varied by less than 2% of the average price.

Capacity in the industry over this period was declining in North America, though increasing elsewhere; meanwhile, demand was constant or increasing. Defendants increased prices at least once during the recession of 2008 and 2009, and they raised prices again twice in 2010. Inventory levels were decreasing, because of several steps they took: they closed many mills; they indefinitely idled some; they temporarily idled others; and they slowed down production. In 2005, they announced mill closures representing 931,000 tons of capacity, and shortly thereafter they raised prices $30/ton. They did much the same thing in 2009. Communication among the Defendants was easy, thanks to trade associations.

These and other facts spurred the Purchasers to bring this suit and to structure it as a class action. They filed their motion for class certification only after extensive discovery. In that motion, they relied on the type of industry facts we have just mentioned, as well as on reports from two experts, Michael J. Harris and Mark Joseph Dwyer. Defendants countered with reports from two other experts, Dennis Carlton and Janusz Ordover. Harris concluded that the structure of the containerboard industry made it likely that a conspiracy among the Defendants could succeed in increasing prices for all or nearly all purchasers; he also opined that Defendants' strategy would not have made sense if it had been undertaken unilaterally by each company. Carlton and Ordover disagreed, contending that Defendants' pricing behavior could be explained by oligopolistic interdependence (that is, by parallel but independent behavior undertaken by firms in a concentrated market). They suggested ways in which the supply restrictions might have been rational under the circumstances. Tellingly, however, they never said that there might have been a cartel with respect to some purchasers and not with respect to others.

On the subject of damages, Purchasers' expert Dwyer examined price movements. For example, he compared the actual prices paid by a sample of class members before and after the Defendants' price increases and found that in 92% of cases those prices increased. He also constructed a regression model to estimate the overcharges made possible by the conspiracy. That model indicated that the class paid overcharges of approximately 3.08%, or in dollar terms, approximately $3.8 billion too much. Defendants' experts criticized the sample size that Harris had used, and they asserted that Purchasers' experts had

failed adequately to account for external factors influencing price and capacity.

B

The district court began its analysis of predominance—the central disputed issue in the case—by recalling the Supreme Court's statement in *Amchem Products*, *Inc. v. Windsor*, 521 U.S. 591, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997), that "[t]he Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Id.* at 623, 117 S.Ct. 2231. It also acknowledged that, as the Supreme Court puts it, "Rule 23(b)(3)'s predominance criterion is even more demanding than Rule 23(a)." *Comcast Corp. v. Behrend*, —— U.S. ——, 133 S.Ct. 1426, 1432, 185 L.Ed.2d 515 (2013). Predominance is satisfied when "common questions represent a significant aspect of a case and . . . can be resolved for all members of a class in a single adjudication." *Messner*, 669 F.3d at 815 (internal quotation marks omitted); see also *Wal-Mart*, 564 U.S. at 350, 131 S.Ct. 2541 (a common contention for Rule 23(a)(2) purposes "must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke"). With those principles in mind, the court evaluated the two central elements of the Purchasers' case: the alleged violation of the antitrust laws, and the causal link between that violation and their alleged injury. It set the question of damages to one side, noting that "it is well established that the presence of individualized questions regarding damages does not prevent certification under Rule 23(b)(3)." *Messner*, 669 F.3d at 815 (citing *Wal-*

Mart, 564 U.S. at 362, 131 S.Ct. 2541 ("individualized monetary claims belong in Rule 23(b)(3)")).

With respect to proof of liability, the court had this to say:

> To prove each element of a conspiracy, virtually all class members would be relying on the same evidence that Plaintiffs have submitted in support of class certification—namely, the documents, emails, phone records, and other indirect evidence necessary to prove that Defendants conspired in violation of antitrust laws. . . . [I]t is much more efficient to have a single trial on the alleged conspiracy rather than thousands of identical trials all alleging identical conspiracies based on identical evidence.

While acknowledging that Defendants hotly contested the conspiracy allegation, the court found that their arguments went to the merits, not to the suitability of the case for class treatment.

Turning to causation, to which it also referred as "antitrust impact," the court rejected the Defendants' effort to equate this case to *Comcast*, where the Supreme Court found a mismatch between the plaintiffs' damages theory and the evidence they presented to show predominance. First, on the question of impact, defined as whether Purchasers were harmed, the court found that at the class-certification stage the plaintiffs needed to demonstrate that the element of impact is capable of class-wide proof at trial, through evidence common to all class members. Looking at all the evidence, the court found this element satisfied. For example, the Defendants' price increases were not tailored to each individual purchaser; this was a

commodity market with a structure conducive to collusion; communications took place at a high level; the common use of the PPW index affected all market participants; and the Defendants lacked any other reasonable explanation for the tight correlation between the index and their announcements of price increases.

With respect to damages, the court found that the Purchasers had the burden of producing a reliable method of measuring classwide damages based on common proof. It rejected the Defendants' argument that the eventual need to examine each individual purchaser's damages was enough to defeat a finding of predominance. Nothing in *Comcast*, the court said, requires a different outcome. As this court noted in *In re IKO Roofing Shingle Products Liability Litigation*, 757 F.3d 599 (7th Cir. 2014), the plaintiffs' damages expert in *Comcast* had estimated harm based on the assumption that all four theories of liability that plaintiffs offered had been established. The class certified by the court, however, was limited to only one of those theories. This, we explained, is what the Supreme Court said, "made class treatment inappropriate: without a theory of loss that matched the theory of liability, the class could not get anywhere." *Id.* at 602. With that point established, the court assessed Dwyer's report, concluded that both the methodology and the data were reliable, and concluded that it could be used to demonstrate class-wide damages.

Finally, the court held that Purchasers had shown the superiority of proceeding under Rule 23(b)(3). The fact that some class members had signed releases as a part of a settlement of an earlier class action (dealing with an alleged linerboard conspiracy that took place

between 1993 and 1995) did not require a contrary finding. As the court said,

> [t]he conduct at issue in the prior litigation was Defendants' allegedly collusive behavior in the mid-nineties. The actions at issue here are coordinated market manipulation and price-increase announcements that occurred nearly a decade later . . . . Under Defendants' argument, they are free to keep colluding in violation of antitrust laws so long as they conspire in the same way as they were alleged to have behaved in a prior settled case. The Court is unaware of any case supporting this argument; indeed, several cases are to the contrary.

The court also rejected similar arguments based on particular contractual provisions, and it decided that retaining defendant Rock-Tenn in the case would not violate its bankruptcy discharge.

C

1

We follow the same general outline that the district court used, looking first at predominance and then at superiority. Within predominance, we consider two points: whether common methods of proof can be used to demonstrate the existence of the alleged collusion and its effect on prices in the containerboard market; and whether the existence and impact of any such collusion predominate over other factors that may affect an individual plaintiff's damages. These inquiries apply to all defendants. Defendant RockTenn raises some additional arguments related to its bankruptcy; we address these at the close of the opinion.

In order to secure class certification, the Purchasers had to demonstrate (not merely allege) that there is proof common to all class members, and that this proof would show that they suffered "injuries that reflect the anticompetitive effect of either the violation or the anticompetitive acts made possible by the violation." *James Cape & Sons Co. v. PCC Const. Co.*, 453 F.3d 396, 399 (7th Cir. 2006); see *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 97 S.Ct. 690, 50 L.Ed.2d 701 (1977).

Purchasers tendered extensive evidence that, if believed, would be enough to prove the existence of the alleged conspiracy. Not surprisingly, it is largely circumstantial. But they offered voluminous written materials of various types, which in the aggregate pointed to the existence of both agreement and actions to violate the antitrust laws. Indeed, Defendants do not contest that the existence of the conspiracy could be (perhaps had to be) proven by evidence common to the class.

The more difficult question (though not too difficult in the end) is whether the common evidence could show the fact of injury on a classwide basis. See *Messner*, 669 F.3d at 819 ("The ability to use such common evidence and common methodology to prove a class's claims is sufficient to support a finding of predominance on the issue of antitrust impact for certification under Rule 23(b)(3)."). At base, Defendants argue that it is not enough for Purchasers to prove aggregate injury and one aggregate overcharge, without allocating how much of that overcharge was paid by each individual class member. They urge that Purchasers have the burden of showing that every class member must prove at least some impact from the alleged violation. For that proposition, they rely on

In re Hydrogen Peroxide Antitrust Litigation, 552 F.3d 305, 311 (3d Cir. 2008), and *In re Rail Freight Fuel Surcharge Antitrust Litigation*, 725 F.3d 244, 252 (D.C. Cir. 2013).

While we have no quarrel with the proposition that each and every class member would need to make such a showing in order ultimately to recover, we have not insisted on this level of proof at the class certification stage. To the contrary, we said in *Suchanek v. Sturm Foods*, *Inc.*, 764 F.3d 750 (7th Cir. 2014), that "[i]f the [district] court thought that no class can be certified until proof exists that every member has been harmed, it was wrong." *Id.* at 757; see also *Parko v. Shell Oil Co.*, 739 F.3d 1083, 1084-85 (7th Cir. 2014); *McReynolds v. Merrill Lynch*, *Pierce*, *Fenner & Smith*, *Inc.*, 672 F.3d 482, 491 (7th Cir. 2012). There is no evidence to make us think that the class defined by the district court either excludes too many purchasers or contains troublesome internal conflicts, either of which would indicate it should be rejected. We therefore move on to the adequacy of the Purchasers' showing that the conspiracy had an effect on the prices they paid.

The parties have jousted over the need for some kind of "but-for" analysis, by which Defendants mean an expert construction of a hypothetical market free of any anticompetitive restraint, to which the actual market can be compared. See *Blades v. Monsanto Co.*, 400 F.3d 562, 569 (8th Cir. 2005). That might be one way in which a plaintiff could satisfy its burden, but we think that the formulation is too narrow. What is essential is whether the class can point to common proof that will establish antitrust injury (in the form of cartel pricing here) on a classwide basis. Like the

district court, we are satisfied that Purchasers have done so.

The Purchasers built up their case with several types of evidence. First, expert Harris's report showed that the structure of the containerboard market was conducive to successful collusion. He pointed to the concentration of manufacturers; the vertical integration of the market; the capital-intensive manufacturing process (which affected the pace and likelihood of new entry); weak competition from imported containerboard; no good substitutes for the product; a low elasticity of demand; and a standardized, commodity product. These are all well accepted characteristics of a market that is subject to cartelization. See, *e.g.*, *In re Text Messaging Antitrust Litig.*, 782 F.3d 867, 872 (7th Cir. 2015); *Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845, 859-60 (7th Cir. 2012) (*en banc*); *In re High Fructose Corn Syrup Litig.*, 295 F.3d 651, 657 (7th Cir. 2002); *Jack Walters & Sons Corp. v. Morton Bldg., Inc.*, 737 F.2d 698, 710-11 (7th Cir. 1984).

Defendants pooh-pooh these cases as examples of the discredited structure-conduct-performance (SCP) paradigm that ruled antitrust from the 1950s until the mid-1970s. See, *e.g.*, *United States v. Von's Grocery Co.*, 384 U.S. 270, 86 S.Ct. 1478, 16 L.Ed.2d 555 (1966) (striking down a merger between a firm with 4.7% of the market and a firm with 4.2%). We put to one side the fact that the SCP paradigm was used during that era primarily in merger cases and this is a cartel case alleging hard-core price-fixing—the kind of case in which lack of market power or reasonableness of price is no defense. The evidence here goes well beyond the structural. The flaw in the old SCP notion was the thought that it was enough to know the structure of a market in order to predict what kind of conduct would

ensue, and how competitively that market would perform. No such chain of assumptions taints the Purchasers' proof. They have shown actual price increases, a mechanism for those increases, the communication channels the conspirators used, and factors suggesting that cartel discipline can be maintained. We are not saying that any of these points have been proven, of course, but we are saying that this evidence is enough to support class treatment of the merits.

Defendants also object to the Purchasers' definition of the market. The Purchasers, they say, have conflated the market for containerboard (the material) with the market for finished corrugated products. The district court responded that the uniform vertical integration found in this industry makes it appropriate to look to the finished products. That is correct: Purchasers (and we) have no reason to dig inside the defendant companies to evaluate their internal pricing of the raw materials they use in producing the boxes and other products they sell.

Next, Defendants criticize Dwyer's examination of the 15 price increases they announced and his use of the PPW index in that connection. He analyzed "industry-wide reflections of price and actual prices paid by class members before and after" the price-increase announcements, and he found that nine of the 15 efforts succeeded (*i.e.* resulted in a durable price increase). He also performed a regression analysis comparing classwide aggregate prices to the PPW index and found that "more than 97% of variation in aggregate prices is explained by changes in the index." He reviewed 738 contracts (those the Defendants had produced) and found that 96% of them "contained provisions that tied pricing to the PPW index." The

Defendants protest that the Purchasers have shown only correlation, not causation, but we think, taking into account the rest of the evidence, Purchasers have not fallen into that trap.

Defendants also argue that Dwyer's approach is the same kind of "trial-by-formula" that the Supreme Court rejected in *Wal-Mart*. But in that case the Court disapproved the plaintiff's attempt to take a sample of the class members, who alleged employment discrimination, to determine what percentage of that sample had actually experienced discrimination, and then to extrapolate that percentage for the whole class. The Purchasers here are doing nothing of the sort: they assert that every person or entity in North America paid the overcharges that resulted from Defendants' collusive practices. Even for transactions where prices were negotiated individually or a longer term contract existed, the district court found, reasonably, that the "starting point for those negotiations would be higher if the market price for the product was artificially inflated."

We have already discussed the Purchasers' common proof of damages, but we add a few more words here to respond to the Defendants' *Comcast* arguments. Defendants understand *Comcast* to hold that "individualized damages *do* foreclose predominance if plaintiffs present no classwide method to adjudicate damages tethered to their theory of antitrust violations *and* if resolving those individualized damages issues would 'overwhelm questions common to the class.'" Brief for Appellants at 36 (quoting 133 S.Ct. at 1433). We agree with Defendants that *Comcast* insists that the damages theory must correspond to the theory of liability, but that is all *Comcast* said that is pertinent to our case. We must see if there is a classwide method

for proving damages, and if not, whether individual damage determinations will overwhelm the common questions on liability and impact.

Dwyer conducted a preliminary analysis to demonstrate the feasibility of estimating damages on a classwide basis. He created two categories of products, intermediate and final, and he used two benchmark periods (before and after the class period) to compare prices. He also accounted for many other variables, such as downstream demand, production and delivery, inflation, and seasonal factors, in order to control for other influences on price and to isolate the impact of the conspiracy. Using a "dummy variable," he calculated an average overcharge of 2.92% for the final products category and 3.81% for the intermediate products category. He then multiplied the average overcharges by the dollar amount of purchases by class members, subtracting purchases that had taken place under previously contracted prices. He found that the class members paid $801.27 million more for intermediate products and $2.991 billion more for final products than they would have absent the conspiracy.

Defendants complain that it is wrong to calculate aggregate rather than individual damages for the class. The district court rejected that position as a matter of law, as do we. We held in *Loeb Indus., Inc. v. Sumitomo Corp.*, 306 F.3d 469 (7th Cir. 2002), that plaintiffs are permitted to use estimates and analysis to calculate a reasonable approximation of their damages. *Id.* at 493. And we already have confirmed that at the class certification stage, plaintiffs are not obliged to drill down and estimate each individual class member's damages. The determination of the aggregate classwide damages is something that can

be handled most efficiently as a class action, and the allocation of that total sum among the class members can be managed individually, should the case ever reach that point. If in the end the Defendants win on the merits, this entire matter will be over in "one fell swoop." (See WILLIAM SHAKESPEARE, MACBETH, act 4, sc. 3, l. 220 (David Bevington ed., Pearson Longman 6th ed. 2009.)) If Purchasers prevail on the common issues, both liability and aggregate damages will be resolved. The district court did not commit reversible error when it concluded that the class issues predominated.

2

Everything we have said thus far also points to the superiority of the class device for this case. We need to address only two potential flies in the ointment that Defendants see: first, the significance (if any) of certain releases that some class members signed; and second, the relevance of contract defenses that might apply.

Some class members settled claims in an earlier lawsuit against the same companies, dealing with the same industry. Defendants represent that there are 39 relevant settlement agreements implicating almost 10,000 of the individual claims at issue. The Purchasers respond that these numbers are wrong, because they involve double-counting and give an exaggerated impression of the real number of affected class members, since most people who signed releases did so with multiple defendants. More importantly, Purchasers also note that the Defendants' numbers imply that most people who signed releases did so *after* the events giving rise to the present case, whereas in reality the releases are heavily distributed toward the beginning of the class period or earlier. Purchasers

suggest the simple expedient of limiting the recovery period for any class member who signed a release to purchases made after that release was signed. That strikes us as an easy and effective way to handle this problem. Moreover, as the district court observed, the fact that some plaintiffs released the defendants from further liability for their actions in the mid-1990s is not a life-time inoculation against antitrust liability in the same industry.

The other contract defenses to which Defendants point involve such provisions as mandatory arbitration and mediation clauses, forum-selection clauses, jury waivers, provisions shortening the statute of limitations, and clauses eliminating remedies such as treble damages. Taking these limitations into account, they say, will destroy the cohesion of the class. The problem is that Defendants are relying on a case that involved a class-action waiver: *Lozano v. AT&T Wireless Services*, *Inc.*, 504 F.3d 718, 728 (9th Cir. 2007), and there is no such waiver here. The Purchasers point out that Defendants have identified only 190 class members affected by this group of limitations, out of over 100,000 notices that were sent out pursuant to Rule 23(c)(2)(B). As the record stands, this smattering of individual contract defenses does not undermine the superiority of the (b)(3) class action.

III

We noted earlier that defendant RockTenn is in a different position from the other defendants, because it filed for bankruptcy and received a discharge on June 30, 2010, approximately four months before the end of the class period. The district court refused to dismiss RockTenn on that basis because it found evidence that RockTenn re-joined the conspiracy after the discharge. (For example, on the very evening

of the day when the discharge order was entered, RockTenn's president sent an email stating "I assume we are announcing tomorrow," after three other defendants announced a simultaneous price increase.) The court also found that RockTenn might be jointly and severally liable for actions undertaken by its co-conspirators before the discharge, based on its post-discharge participation. See *Havoco of Am., Ltd. v. Shell Oil Co.*, 626 F.2d 549, 554 (7th Cir. 1980) ("[A] co-conspirator who joins a conspiracy with knowledge of what has gone on before and with an intent to pursue the same objectives may, in the antitrust context, be charged with the preceding acts of its co-conspirators.").

The district court's reasoning was sound. RockTenn is free to argue at trial that it did not re-join the conspiracy. There is no conflict with bankruptcy law, however, if it did so, because in that case its liability would be predicated on post-discharge conduct. To the extent that these nuances need to be brought to the jury's attention, we are confident that the district court can do so through proper instructions.

IV

We conclude by noting again the basis of our ruling. First, with respect to the central issue of class certification under Federal Rule of Civil Procedure 23(a) and (b)(3), the only contested points relate to predominance and superiority. Defendants did not challenge Purchasers' experts under *Daubert* and Federal Rule of Evidence 702, and so we accept their reports for what they are worth at this stage. We did not discuss the opposing views expressed by Defendants' experts because they did not undermine the class certification decision. Defendants' experts' reports will be important, we assume, at the merits stage, but the

fact that class certification decisions must be supported by evidence does not mean that certification is possible only for a party who can demonstrate that it will win on the merits.

We AFFIRM the class-certification order of the district court.

APPENDIX B

UNITED STATES DISTRICT COURT,
N.D. ILLINOIS,
EASTERN DIVISION

Case No. 10 C 5711

KLEEN PRODUCTS LLC, *et al.*, individually and on behalf of all those similarly situated,

Plaintiffs,

v.

INTERNATIONAL PAPER, *et al.*,

Defendants.

Signed March 26, 2015

MEMORANDUM OPINION AND ORDER

HARRY D. LEINENWEBER, District Judge.

Before the Court are Defendants' Motion to Strike [ECF No. 845], and Plaintiffs' Motion for Class Certification [ECF No. 657.] These Motions have resulted in a deluge of briefing; the Class Certification Motion alone spawned seven separate briefs that total more than 300 pages (not including the attached exhibits) and that include two sur-replies and several notices of supplemental authority. The Court has rigorously analyzed all of the parties' submissions, and for the following reasons, Defendants' Motion to Strike [ECF No. 845] is granted in part and denied in part,

and Plaintiffs' Class Certification Motion [ECF No. 657] is granted.

I. BACKGROUND

Plaintiffs are a proposed class of entities that directly purchased Containerboard Products from Defendants. Containerboard Products include containerboard itself and the various products made out of containerboard, such as containerboard sheets, which are used to make corrugated products like displays, boxes, and other containers. Plaintiffs allege that Defendants engaged in a conspiracy to artificially manipulate the market in order to increase the price of Containerboard Products in violation of antitrust laws. *See*, 15 U.S.C. § 1. The crux of Plaintiffs' Complaint is that Defendants agreed "to restrict the supply of containerboard by cutting capacity, slowing back production, taking downtime, idling plants, and tightly restricting inventory." [Pl.'s Mot. for Class Cert. at 1, ECF No. 660.] According to Plaintiffs, these actions illegally increased the price of containerboard, which caused them to pay more for Containerboard Products than they otherwise would have paid absent the conspiracy.

Plaintiffs seek to certify as a class:

> All persons that purchased Containerboard Products directly from any of the Defendants or their subsidiaries or affiliates for use or delivery in the United States from at least as early as February 15, 2004 through November 8, 2010.

The proposed class definition also excludes certain groups from being class members:

> Specifically excluded from this Class are the Defendants; officers, directors, or employees of

> any Defendant; any entity in which any Defendant has a controlling interest; and any affiliate, legal representative, heir or assign of any Defendants. Also excluded from this Class are any federal, state or local governmental entities, any judicial officer presiding over this action and the members of his or her immediate family and judicial staff, and any juror assigned to this action.

Defendants oppose certification, arguing that Plaintiffs have not satisfied Rule 23.

II. LEGAL STANDARD

"To be certified, a proposed class must satisfy the requirements of Federal Rule of Civil Procedure 23(a), as well as one of the three alternatives in Rule 23(b)." *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 811 (7th Cir.2012). Rule 23(a) requires Plaintiffs to prove "numerosity, typicality, commonality, and adequacy of representation." *Id.* Plaintiffs in this case seek certification under Rule 23(b)(3), which also requires them to prove that: (1) the questions of law or fact common to the members of the proposed class predominate over questions affecting only individual members; and (2) a class action is superior to other available methods of resolving the controversy. *Id.*

Plaintiffs bear the burden of satisfying Rule 23, which is not "'a mere pleading standard.'" *Comcast Corp. v. Behrend*, —— U.S. ——, 133 S.Ct. 1426, 1432, 185 L.Ed.2d 515 (2013) (quoting *Wal-Mart Stores, Inc. v. Dukes*, —— U.S. ——, 131 S.Ct. 2541, 2551-52, 180 L.Ed.2d 374 (2011)). To meet this burden, Plaintiffs must "satisfy through evidentiary proof" each of Rule 23's elements. *Id.* In deciding a class certification motion, the Court must conduct a "rigorous analysis"

before it can determine whether Plaintiffs have satisfied Rule 23's requirements. *Id.* (internal quotation marks omitted). This often means that a Court must resolve issues that also bear on the merits of the claim, but only if those issues overlap with class certification issues. *Id.*

Despite the need for rigorous analysis, "the court should not turn the class certification proceedings into a dress rehearsal for a trial on the merits." *Messner*, 669 F.3d at 811. Instead, the Court need only consider the evidence submitted by the parties and determine whether Plaintiffs have proven each of Rule 23's elements by a preponderance of the evidence. *Id.*

III. ANALYSIS

There are two preliminary issues the Court must address. First, the Seventh Circuit has held that "[w]hen an expert's report or testimony is 'critical to class certification,' . . . a district court must make a conclusive [*Daubert*] ruling on any challenge to that expert's qualifications or submissions before it may rule on a motion for class certification." *Id.* at 812 (quoting *Am. Honda Motor Co. v. Allen*, 600 F.3d 813, 815-16 (7th Cir.2010)). Expert reports in this case are indeed critical to class certification, but no Defendant has yet challenged Plaintiffs' experts on Rule 702 or *Daubert* grounds. To the contrary, Defendants have "expressly reserve[d] their right to move to exclude [Plaintiffs' experts] under *Daubert* and Rule 702." [Def.'s Mem. in Opp. to Pl.'s Mot. for Class Cert. ("Def.'s Opp. Br.") at 40 n.35, ECF No. 763.] Although Defendants vigorously challenge Plaintiffs' experts' methodology and conclusions in the context of arguing that Plaintiffs' have not satisfied Rule 23, none of those arguments are based on Rule 702 or *Daubert.* Defendants have not challenged, for example,

Plaintiffs' experts' education or qualifications. The Court therefore reserves ruling on Plaintiffs' experts' admissibility until Defendants raise and brief that issue.

Second, Defendants seek a full evidentiary hearing prior to the Court deciding whether to certify the class. Plaintiffs oppose such a hearing, arguing that it is unnecessary and would waste time and money. Several courts have held evidentiary hearings prior to deciding a class certification motion, *see*, *e.g.*, *In re Groupon, Inc. Sec. Litig.*, No. 12 C 2450, 2014 WL 2035853, at *2 (N.D.Ill. May 16, 2014), but as far as the Court is aware, such hearings are not required. Rather, the Supreme Court and Seventh Circuit have admonished district courts not to simply accept Plaintiffs' pleadings as true and to conduct a "rigorous analysis" of the Plaintiffs' class certification claims. *See*, *Comcast Corp.*, 133 S.Ct. at 1432 ("Repeatedly, we have emphasized that it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question. . . .") (internal quotation marks omitted). As stated above, the parties have submitted an avalanche of briefing and opposing expert reports that set forth the parties' positions on the issues. Included in this briefing are thousands of pages of documents substantiating the parties arguments. Moreover, the parties' central dispute is legal, not factual. The dispute centers mainly on the proper legal standard under Rule 23 and whether Plaintiffs' experts' reports are enough to satisfy that standard. For the most part, the parties agree on the basic facts, and both parties' experts rely upon the same data, so there are little if any factual disputes that the Court must resolve to decide class certification. Given the extensive paper record and the completeness of the parties' briefing, an evidentiary

hearing would not add much to the Court's analysis. Thus, the Court is confident that it can determine class certification based on a careful examination of the evidentiary record the parties have submitted.

Having resolved those threshold issues, the Court must first decide Defendants' Motion to Strike some of the materials Plaintiffs submitted with their reply brief. Once that issue is decided, the Court can then determine whether Plaintiffs have satisfied Rule 23. All Defendants have joined in a single response to Plaintiffs' Class Certification Motion, to which Plaintiffs have replied. Defendant RockTenn joined in the combined response but also filed a separate response to the Class Certification Motion based on arguments that apply only to RockTenn. Plaintiff replied to RockTenn's response, to which RockTenn filed a Sur-reply, which prompted Plaintiffs to file a Sur-sur-reply. After deciding the Motion to Strike, the Court will first consider the joint opposition to class certification and then consider RockTenn's unique opposition.

A. Motion to Strike Plaintiffs' Reply Experts' Reports

Plaintiffs' initial Class Certification Motion contained expert reports from Drs. Mark Dwyer and Michael Harris. Defendants' combined response to the Motion included expert reports from Drs. Janusz Ordover and Dennis Carlton, who both criticized Plaintiffs' experts' reports in a number of ways, including a criticism of Plaintiffs' experts' choice of testing and methodology to prove class-wide injury. In response, Plaintiffs obtained reply expert reports from Drs. Dwyer and Harris, and also obtained a report from a new expert, Dr. Douglas Zona. Defendants have moved to strike certain portions of Dr. Dwyer's reply report and all of Dr. Zona's report.

Federal Rule of Civil Procedure 26(a)(2) governs expert discovery and "requires a party to disclose to the other parties a written report of a retained expert that includes 'a complete statement of all opinions the witness will express and the basis and reasons for them.'" *Sloan Valve Co. v. Zurn Indus., Inc.*, No. 10 C 204, 2013 WL 3147349, at *1 (N.D.Ill. June 19, 2013) (quoting FED.R.CIV.P. 26(a)(2)(b)(i)). An expert rebuttal report is meant to "contradict or rebut evidence" disclosed in the initial report, FED.R.CIV.P. 26(a)(2)(D)(ii), and its "proper function . . . is to contradict, impeach or defuse the impact of the evidence offered by an adverse party." *Peals v. Terre Haute Police Dep't*, 535 F.3d 621, 630 (7th Cir.2008). Rule 26 does not address reply expert reports, but, much like reply briefs, parties may not advance new arguments for the first time in a reply expert report. *Sloan Valve Co.*, 2013 WL 3147349, at *1. If a reply expert report is truly rebuttal evidence, then it is admissible and the opposing party is not entitled to respond to it. *Id.* at *4. If, however, the reply report contains new opinions that are not proper rebuttal testimony, the report must be stricken. *Id.* at *2-3.

1. Dr. Dwyer's Reply Report

Plaintiffs' disclosed Dr. Dwyer as an expert within the time frame outlined in the Court's scheduling order. The question is whether his reply report constitutes new and alternative opinion testimony or is instead proper rebuttal testimony in support of his original report.

Sloan Valve Co. is instructive. In that case, the plaintiff's initial expert report calculated damages based on "collateral unit sales ratios," and in that report the expert included data on both weighted and unweighted ratios. *Id.* at *2. Despite including both

sets of data, the expert's damages calculation relied solely on the weighted ratios. *Id.* In response, the defendant's expert attacked the plaintiff's expert for relying upon only the weighted ratios. *Id.* Consequently, the plaintiff's expert's reply report conducted a new calculation using the unweighted ratios in order to demonstrate that using the unweighted ratios would not change his initial conclusions. *Id.* The court found that this was proper reply expert testimony because, "rather than offering a new opinion and changing the basis for the calculation of the collateral unit sales, [the plaintiff's reply expert] included the [new] calculation to refute [the defendant's expert's] criticisms." *Id.*

The plaintiff's reply expert report also included a "revised and increased estimate of incremental costs" based on data that the defendant first disclosed in its rebuttal expert's report. *Id.* at *3. The court refused to strike that reply expert testimony because it was based on data that was previously unavailable to the plaintiff's expert due to the defendant's failure to disclose it. *Id.* Finally, the court struck a portion of the plaintiff's expert report that constituted "a new, alternative collateral sales calculation" based on data that was available to the plaintiff's expert when he filed his initial report. *Id.* The plaintiff argued that the new calculation was in response to the defendant's expert's criticism, but the court found that the opinion was new because it included a new opinion based on data that was not a part of the plaintiff's expert's initial report, though it was available to him. *Id.*

In this case, Dr. Dwyer's initial report concluded that "all or nearly all members of the proposed class were impacted by price increases implemented by the defendants," which is explored more thoroughly below

in the Court's analysis regarding class certification. Dr. Dwyer's conclusion was based on "systematic, empirical comparisons of net prices paid by class members of Containerboard Products before and after price increase implementation dates previously announced by the defendants." Defendants' experts criticized Dr. Dwyer for conducting what Defendants call a "one penny more" analysis, where any increase in price is attributed to Defendants' alleged conduct. This, according to Defendants, means that Dr. Dwyer's methods did not account adequately for other factors that would have caused an increase in price even without a conspiracy. Defendants' experts argue that Dr. Dwyer should have done a "but-for" analysis to determine antitrust impact.

In his reply, Dr. Dwyer does the analyses that Defendants' experts argue he should have done initially. Importantly, Dr. Dwyer does not abandon his prior methods or conclusions. Rather, he conducted the additional analyses to refute Defendants' arguments and to show that his original conclusions and opinions are sound and a reliable method of assessing antitrust impact. This makes Dr. Dwyer's reply report remarkably similar to the reply report allowed in *Sloan Valve Co.* Much like the reply report in that case that included new calculations based on the same data included in the initial report, here Dr. Dwyer's reply report is based on the same data in his original report and does not seek to include new data. Instead of abandoning his prior methods in favor of the new ones, Dr. Dwyer's reply concludes that the new calculations support his initial methodology and opinions. Dr. Dwyer further concludes that Defendants' experts are wrong when they say that the additional testing and methods show that there is no antitrust impact. This is the very purpose of a reply report: to refute

a defendant's expert's arguments and to provide further support, rather than abandoning, one's initial opinions. Dr. Dwyer will be held to the original methodology and opinions in his initial report, but that does not mean he cannot respond to Defendants' experts' criticisms in defending his initial conclusions. Thus, the Court denies Defendants' Motion to Strike to the extent that it seeks to strike portions of Dr. Dwyer's reply report.

2. Dr. Zona's Reply Report

Dr. Zona was not initially an expert disclosed before class certification briefing. Dr. Zona is an expert Plaintiffs hired to examine "the opening expert reports submitted by Drs. Harris and Dwyer, as well as the reports submitted by Drs. Carlton and Ordover." He also conducted his own "but-for" analysis and concludes that Dr. Dwyer's "methodology and opinions on both impact and damages [is] reliable and valid."

Defendants are probably correct that Dr. Zona's report should be stricken. The Court need not engage in lengthy analysis, however, because Plaintiffs do not need Dr. Zona's report to satisfy Rule 23, a point Plaintiffs concede. Thus, the Court grants Defendants' Motion to Strike Dr. Zona's report.

B. Class Certification—Combined Arguments

Having narrowed the range of expert evidence to only the reports and deposition testimony of Drs. Dwyer, Harris, Ordover, and Carlton, the Court now considers whether to certify Plaintiffs' proposed class based on the parties' combined briefing.

1. Rule 23(a) Elements

In order to warrant class certification, Plaintiffs must prove "numerosity, typicality, commonality,

and adequacy of representation." *Messner*, 669 F.3d at 811. As Defendants correctly note, Rule 23(b)'s predominance standard often overlaps with typicality, commonality, and adequacy. Thus, Defendants have focused their arguments on predominance issues rather than individually attacking each of Rule 23(a)'s elements. Essentially, Defendants have conceded that typicality, commonality, and adequacy have been satisfied so long as Plaintiffs have adequately proven predominance.

As to numerosity, Defendants have not specifically challenged that element in their briefing, and the element is easily satisfied in this case. The sales data relied upon by both parties' experts establish that the proposed class numbers in the thousands. A potential class that large is sufficiently numerous for Rule 23(a) purposes. *See*, *Schmidt v. Smith & Wollensky LLC*, 268 F.R.D. 323, 326 (N.D.Ill.2010).

2. Rule 23(b)(3) Elements

Plaintiffs seek certification under Rule 23(b)(3), which requires that "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." The Court will discuss predominance first and then, if necessary, superiority.

i. Predominance

The parties' statements of the proper legal standard for determining predominance differ greatly. To read Plaintiffs' version, one would think that predominance naturally flows from the fact that this is an antitrust case. [Pl.'s Mot. for Class Cert. at 49, ECF No. 660.] Defendants' version, on the other hand, would lead one

to believe that the Supreme Court's opinion in *Comcast* makes satisfying predominance nearly insurmountable. [Def.'s Opp. Br. at 23-27, ECF No. 763.] The truth is somewhere in the middle.

The predominance inquiry under Rule 23(b)(3) "'trains on the legal or factual questions that qualify each class member's case as a genuine controversy,' with the purpose being to determine whether a proposed class is 'sufficiently cohesive to warrant adjudication by representation.'" *Messner*, 669 F.3d at 814 (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997)). Predominance is similar to Rule 23(a)'s typicality and commonality requirements, but "the predominance criterion is far more demanding." *Id.* (internal quotation marks omitted). And although the Supreme Court has said that "predominance is a test readily met" in antitrust cases, that simply means that "in antitrust cases, Rule 23, when applied rigorously, will frequently lead to certification." *Id.* at 815 (internal quotation marks and citation omitted). This does not, however, make class certification automatic in antitrust cases. *See*, *id.*

Generally, predominance is satisfied when "'common questions represent a significant aspect of [a] case and . . . can be resolved for all members of [a] class in a single adjudication.'" *Id.* (quoting 7AA Wright and Miller, Federal Practice & Procedure § 1778 (3d Ed.2011)). In other words, "common questions can predominate if a common nucleus of operative facts and issues underlies the claims brought by the proposed class." *Id.* (internal quotation marks omitted). The presence of some individual questions is not fatal, but individual questions cannot predominate over the common ones. *Id.* To determine if a question

is common, the Court must look to the evidence necessary to answer that question; if "the members of a proposed class will need to present evidence that varies from member to member" to answer the question, then the question is an individual one. *Id.* (internal quotation marks omitted). Conversely, "if the same evidence will suffice for each member" to answer the question at issue, then the question is common. *Id.*

"Analysis of predominance under Rule 23(b)(3) 'begins, of course, with the elements of the underlying cause of action.'" *Id.* (quoting *Erica P. John Fund, Inc. v. Halliburton Co.*, —— U.S. ——, 131 S.Ct. 2179, 2184, 180 L.Ed.2d 24 (2011)). In the antitrust context, plaintiffs must prove: "(1) that [Defendants] violated federal antitrust law; and (2) that the antitrust violation caused them some injury." *Id.* Plaintiffs must also show damages, but "[i]t is well established that the presence of individualized questions regarding damages does not prevent certification." *Id.* (citing *Wal-Mart*, 131 S.Ct. at 2558).

To provide a clearer analysis, the Court will discuss each antitrust element separately, keeping in mind that "Rule 23(b)(3) . . . does *not* require a plaintiff seeking class certification to prove" that each individual element is "susceptible to classwide proof." *Amgen Inc. v. Conn. Ret. Plans and Trust Funds*, —— U.S. ——, 133 S.Ct. 1184, 1196, 185 L.Ed.2d 308 (2013). "Rather, the inquiry is more holistic." *In re High-Tech Employee Antitrust Litig.*, 985 F.Supp.2d 1167, 1184 (N.D.Cal.2013). And although predominance analysis is not simply "bean counting," *Butler v. Sears, Roebuck and Co.*, 727 F.3d 796, 801 (7th Cir.2013), analyzing each element separately is useful in isolating what questions are common and determining whether those questions predominate.

a. Plaintiffs' Liability Proof

Plaintiffs have established that common questions regarding liability predominate over any individual issues. Plaintiffs' theory of liability is based on Defendants' alleged conspiracy to coordinate supply restrictions and price increase announcements in order to cause the price of Containerboard Products to increase. To prove each element of a conspiracy, virtually all class members would be relying on the same evidence that Plaintiffs have submitted in support of class certification—namely the documents, emails, phone records, and other indirect evidence necessary to prove that Defendants conspired in violation of antitrust laws. This type of alleged conspiracy is the prototypical example of an issue where common questions predominate, because it is much more efficient to have a single trial on the alleged conspiracy rather than thousands of identical trials all alleging identical conspiracies based on identical evidence. *See*, 7AA Wright & Miller, Federal Practice & Procedure § 1781 (3d Ed.2014) ("[W]hether a conspiracy exists is a common question that is thought to predominate over the other issues in the case and has the effect of satisfying the prerequisite in Rule 23(b)(3).").

Defendants' arguments on this issue go entirely to the merits of Plaintiffs' conspiracy claims. Defendants argue that Plaintiffs have not established a conspiracy, offering up several innocent reasons for their conduct. Defendants also attach great significance to Plaintiffs' failure to produce any explicit, direct agreement among Defendants to fix prices. Because Plaintiffs have not proven an actual conspiracy, Defendants argue that the Court should deny class certification.

But whether Defendants actually conspired is not the issue before the Court. The issue is whether the conspiracy question will be decided by evidence common to the class, and both parties have demonstrated that the evidence either proving or disproving a conspiracy will be common to the entire class. Defendants' arguments on this point are identical to the defendants' liability arguments in *In re Polyurethane Foam Antitrust Litigation*, No. 1:10 MD 2196, 2014 WL 6461355 (N.D.Ohio Nov. 17, 2014). In that case, the defendants argued that "the price-fixing conspiracy alleged in the Complaint did not exist," based on "the failure of discovery to yield evidence of any agreement among foam manufactures to fix the timing or content of price increase letters." *Id.* at *16 (internal quotation marks and alterations omitted). The defendants also argued that their conduct was "consistent with legal and economic theory predictions of behavior" in the relevant markets. *Id.* The court rejected those arguments at the class certification stage, noting that those arguments "do not succeed in showing liability questions—however answered—cannot be answered through common proof." *Id.*

Like the defendants in *In re Polyurethane Foam*, Defendants' arguments here do not demonstrate the lack of common proof; rather, Defendants' own evidence tending to disprove a conspiracy is common to the entire class. Defendants' arguments, if correct, might entitle them to summary judgment or a verdict in their favor, but such merits arguments are inapplicable at this stage. *Id.* Thus, Plaintiffs have established that common questions predominate the liability issue.

b. Plaintiffs' Impact Proof

The heart of the battle in this case lies in the second element, *i.e.*, causation, which is often referred to as antitrust impact. According to Defendants, individual issues overwhelm the common questions regarding impact because Plaintiffs' experts have not provided a just and reliable method of proving that the alleged antitrust violations harmed all or nearly all class members. Thus, according to Defendants, Plaintiffs' only avenue of proving causation is through individual proof relating to each of the thousands of class members, which makes class certification inappropriate.

Given the parties' overlapping arguments relating to impact and damages, the Court must first outline an important distinction: "impact" and "damages" are two separate elements in an antitrust claim. *In re Ethylene Propylene Diene Monomer (EPDM) Antitrust Litigation*, 256 F.R.D. 82, 88 (D.Conn.2009). Impact is "*whether* the plaintiffs were harmed," whereas "damages quantify *by how much.*" *Id.* Parties and courts often conflate the two, leading to "confusion about what a plaintiff's burden precisely is at the motion for class certification stage." *Id.* Oftentimes, demonstrating impact and damages involves "comparing the 'but-for' price—the price a customer would have paid in the absence of the conspiracy—and the actual price paid." *Id.* When that happens, the single comparison establishes both impact and damages. *Id.* Thus:

> [O]ne way of demonstrating predominance is to show that there is a common method for proving that the class plaintiffs paid higher actual prices than in the but-for world, such as using an econometric regression model incorporating a variety of factors to demonstrate that a conspiracy

> variable was at work during the class period, raising prices above the "but-for" level for all plaintiffs.

Id. Defendants in this case base a large portion of their impact arguments on the perceived lack of a "but-for" analysis.

But, "where other methods of common proof exist to show class-wide impact such as lock-step increases of national price lists in an oligopolistic market, comparing 'but-for' prices with actual transaction prices is not the *only* way for plaintiffs to succeed in an motion for class certification." *Id.* For example, "'if it appears that plaintiffs may be able to prove at trial . . . the price range was affected generally,'" then the plaintiffs can show impact without a "but-for" comparison, and this is so even if there are negotiated prices or a variety of prices. *Id.* (quoting *In re NASDAQ Market-Makers Antitrust Litig.*, 169 F.R.D. 493, 523 (S.D.N.Y.1996)); *see also*, *In re Urethane Antitrust Litig.*, 768 F.3d at 1254-55. The court in *Hedges* summed up this point succinctly:

> The proof necessary to demonstrate that the defendants conspired to maintain an inflated "base" from which all pricing negotiations began and that this "base" price was higher than the "base" price which would have been established by competitive conditions would be common to all members of the class. Proof of a conspiracy to establish a "base" price would establish at least the fact of damage, even if the extent of the actual damages suffered by the plaintiffs would vary. . . . [T]he proof with respect to the "base" price from which these negotiations began, or the structure of the conspiracy to affect individual negotiations, would be common to the class. Accordingly . . . the

> fact of damage is predominantly, if not entirely, a common question.

Hedges Enters., Inc. v. Cont'l Grp., Inc., 81 F.R.D. 461, 475 (E.D.Penn.1979). Courts have long held that a plaintiff can demonstrate antitrust impact by showing that the conspiracy caused an increase to the standard market price of the product at issue. *See*, *e.g.*, *In re Urethane Antitrust Litig.*, 768 F.3d at 1254-55 (finding impact satisfied for class certification purposes based in part on evidence of "parallel issuance of similar product . . . price-increase announcements"); *In re Urethane Antitrust Litig. (Urethane II)*, 251 F.R.D. 629, 638 (D.Kan.2008) ("[E]vidence of a standardized pricing structure, which (in light of the alleged conspiracy) presumably establishes an artificially inflated baseline from which any individualized negotiations would proceed, provides generalized proof of class-wide impact."); *In re Indust. Diamonds Antitrust Litig.*, 167 F.R.D. 374, 383 (S.D.N.Y.1996) ("[I]f a plaintiff proves that the alleged conspiracy resulted in artificially inflated list prices, a jury could reasonably conclude that each purchaser who negotiated an individual price suffered some injury.").

This distinction between impact and damages is crucial in a case like this, where Plaintiffs have presented (1) record and expert evidence independently showing impact and (2) an econometric model that attempts to prove both damages and therefore impact. Because Plaintiffs do not rely solely on their econometric damages model for their impact proof, Defendants' impact arguments based on the lack of a "but-for" comparison are ineffective. *See*, *e.g.*, *In re EPDM Antitrust Litigation*, 256 F.R.D. at 88-89. Those arguments go to damages, not impact. With this distinction in mind, the Court now addresses impact.

Demonstrating antitrust impact for class-certification purposes does not require that Plaintiffs *prove* antitrust impact. Instead, Plaintiffs need "only to demonstrate that the element of antitrust impact *is capable of proof at trial* through evidence that is common to the class rather than individual to its members." *Messner*, 669 F.3d at 818 (internal quotation marks omitted). The focus, then, is on the evidence necessary to establish antitrust impact, not on whether Plaintiffs have adequately proven it. Again, the Court's overriding concern is whether Plaintiffs have established that the proposed class is "sufficiently cohesive to warrant adjudication by representation." *Amgen Inc.*, 133 S.Ct. at 1196 (internal quotation marks omitted).

Although Defendants have concentrated their impact arguments on the expert evidence, the Court looks to all the evidence to determine whether Plaintiffs have established that evidence common to the class is capable of proving antitrust impact. *See*, *In re Urethane Antitrust Litig.*, 768 F.3d 1245, 1255-56 (10th Cir.2014). The evidence in this case that goes to antitrust impact consists of (1) record evidence, which Plaintiffs allege shows illegal and anticompetitive conduct that increased the base price for Containerboard Products, (2) testimony from Dr. Harris regarding Defendants' industry and its susceptibility to collusive conduct, and (3) testimony from Drs. Dwyer and Harris that purport to establish that all or nearly all class members suffered harm as a result of the conspiracy.

First, Plaintiffs' have mustered a large amount of record evidence relevant to impact, which is mostly duplicative of their conspiracy evidence. Specifically, Plaintiffs produced evidence of what appears to be

coordinated price increases, coordinated supply reductions, and other similar conduct that, according to Plaintiffs, Defendants would not have engaged in unless acting as part of a conspiracy. Plaintiffs also point to memoranda, phone calls, and trade association meetings that show the ability for Defendants to communicate with and monitor each other regarding their allegedly collusive activity.

Defendants respond by pointing to other evidence showing that they added capacity and supply during the class period, which would negate some of Plaintiffs' factual claims. Defendants also argue there are innocent reasons for their conduct. The Court need not decide at this stage which evidence to believe, however, because regardless of these factual disputes, the evidence on both sides is common to all class members. The question is whether Defendants' industry made it possible for them to collude in a way that would allow them to harm all or nearly all class members, and the evidence that both parties rely on to answer that question is common to the class.

Second, Plaintiffs rely on Dr. Harris to establish that the Containerboard Products market was ripe for collusion during the class period, and that Defendants' conduct is more likely the result of collusion than independent behavior. Dr. Harris conducted a "structure, conduct, performance" ("SCP") analysis to determine whether "the structure, conduct, and performance of [Defendants'] industry [was] consistent with, and likely to facilitate, collusive conduct, thereby providing a motive to collude and suggesting that any collusion would be broadly successful." [Declaration of Dr. Harris at 5, ECF No. 658-2.] Dr. Harris also considered whether Defendants' conduct during the class period was more consistent

with "concerted action or their unilateral self-interest." [*Id.*] Ultimately, Dr. Harris concludes that (1) "the economic evidence shows that Defendants had the motive, opportunity, and means to collude and were they to do so, . . . they would have succeeded," and (2) "the conduct of the Defendants was more consistent with collusion than with independent economic decision-making." [*Id.*].

In support of these opinions, Dr. Harris looked at a variety of industry-wide figures like capacity, operating rates, inventory, demand, and pricing in the containerboard market. Importantly, Dr. Harris found that the "vast majority of sales of Containerboard Products are pegged to published price indices," the most common of which is the price for "42# Kraft liner [published] in Pulp and Paper Weekly ("PPW")." The PPW index in this case is critical because Drs. Harris and Dwyer rely in part on the movement of that index in demonstrating that all or nearly all class members suffered antitrust impact, as discussed more thoroughly below.

As to the "structure" portion of the SCP analysis, Dr. Harris analyzed the extent to which the Containerboard Products market is highly concentrated and the barriers to entry in that market. The evidence shows that, in 2003, only six North American firms controlled 72% of the Containerboard Products market, and by 2007, those six firms became five and accounted for 74% of the market. The evidence also shows, and Defendants do not challenge, that there are significant barriers to any new firms entering the market, such as the enormous amount of capital necessary to start a new firm. Dr. Harris also analyzed Containerboard Products to determine whether they are homogenous, which would mean that class

members would see all Defendants as essentially offering the same product. If this is so, then the primary method of competition in the Containerboard Products market is price, rather than some other factor. Dr. Harris concludes that product homogeneity makes collusion easier, and finds that Containerboard Products are interchangeable commodities that are highly homogenous. This conclusion is based on Defendants' own statements, presentations, and tax filings, which tend to show that Defendants admit the commodity nature of Containerboard Products.

Finally, Dr. Harris analyzed the frequency of Defendants' interactions amongst each other and their participation and membership in trade associations. A conspiracy is much less likely to exist, Dr. Harris concludes, if firms communicate rarely, On the other hand, constant communication and participation in trade association events provide a fertile ground for collusion. Dr. Harris relies on academic economic literature for his conclusion "that trade associations tend to facilitate collusive conduct," and the evidence indeed shows that Defendants frequently interacted with each other as a part of their business operations and at various trade association meetings. Based on all this evidence and his own expert experience and opinion, Dr. Harris concludes that the "structural characteristics of the industry . . . are consistent with and would facilitate successful collusion among the Defendants."

As to the conduct portion of the SCP analysis, Dr. Harris looked at mill closures, operating rates/inventories/trades, downtime/slowback, coordinated pricing, monitoring, direct communication among Defendants, and Defendants' prior history of antitrust violations. In general, Dr. Harris concludes

that, in the face of constant and increasing demand during the class period, Defendants reduced capacity—and therefore supply—by closing or slowing down the rate of production at mills. Specifically, Dr. Harris points to strategic mill closures or "downtime" that reduced capacity and supply in the face of "strong growth in box demand." Also important to Dr. Harris's analysis are the various price increase announcements that occurred during the class period. Defendants collectively announced fifteen price increases during the class period, nine of which were fully implemented. Defendants made these various announcements at near-identical times and for near-identical amounts. These announcements often occurred very shortly after various trade association meetings. Dr. Harris concludes that this conduct runs contrary to what independent firms would do when faced with similar market conditions and that Defendants' conduct is more consistent with collusive behavior than with normal, unilateral activity.

As to the "performance" portion of the SCP analysis, Dr. Harris relies on Dr. Dwyer's report, which Dr. Harris concludes is sound and founded in accepted economic theory. Based on Defendants' actual economic performance, Dr. Harris concludes that Defendants' performance is consistent with collusion.

Defendants hurl several attacks at Dr. Harris's opinions. First, Defendants argue that Dr. Harris failed to define the relevant market for purposes of his SCP analysis. According to Defendants, this failure is fatal and makes Dr. Harris's analysis useless. Defendants contend that Containerboard Products cannot possibly be a single market, because Containerboard Products include containerboard and corrugated products, which are not interchangeable

and thus are not part of the same market. *See*, *Sargent-Welch Scientific Co. v. Ventron Corp.*, 567 F.2d 701, 710 (7th Cir.1977).

Dr. Harris correctly responds, however, that the Containerboard Products market is the relevant market, and this is so despite the fact that the market includes both containerboard and corrugated products. Defendants draw an analogy between components of a personal computer and the personal computer itself, arguing that the components and the computer could not possibly be the same market, and therefore containerboard and corrugated products likewise cannot comprise a single market. The analogy fails because the analogs are not truly analogous; containerboard is not *a* component that goes into a corrugated product, it is *the* component. As Dr. Harris points out, containerboard is simply a corrugated product that hasn't been folded yet. Moreover, containerboard has no other use except for being folded into a corrugated product. And, there are no substitutes for containerboard—that is, corrugated products cannot come from some other source other than containerboard. Perhaps most importantly, Defendants' businesses are vertically integrated such that "the firms who manufacture the containerboard are the very same firms who convert that containerboard into corrugated products." [Reply Declaration of Dr. Harris at 24, ECF No. 826-2.] This means that there is no useful or principled way to separate the two into separate markets; they appear to be part in parcel of the same market. Thus, the Court finds that Plaintiffs have established and defined the relevant market for antitrust purposes.

Defendants next criticize Dr. Harris for failing to conduct a "but-for" analysis for each event that Dr.

Harris analyzed, such as mill closures and downtime. In short, Defendants argue that Dr. Harris should have looked to each individual event during that class period, such as each mill closure, and then determined whether that specific event would have occurred even absent a conspiracy, and then further analyzed whether that specific event caused all or nearly all class members to pay higher prices than they otherwise would have paid.

Aside from "but-for" analysis not being required to show antitrust impact, this argument fails because it sets the hurdle too high. Defendants have not pointed to any case law or economic theory that says an expert conducting a SCP analysis must look at all events in isolation, and then view each individual event to see if that event specifically is the one that caused antitrust impact. To the contrary, it is a well-accepted practice to look to industry events as a whole to determine whether a defendant's conduct is consistent with collusion, as Dr. Harris does with his SCP analysis. *See*, *In re Processed Egg Prods. Antitrust Litig.*, —— F.Supp.3d ——, ——, No. 08-md-2002, 2015 WL 337224, at *11 (E.D.Penn. Jan. 26, 2015). Dr. Harris correctly notes that "[n]othing in economic theory suggests that individuals or firms act on the basis of a single reason or animating event." [Reply Declaration of Dr. Harris at 24, ECF No. 826-2.] Dr. Harris's analysis simply looked at all of Defendants' capacity-reducing decisions in total to determine whether they were more likely the result of collusion or not. Plaintiffs' theory of harm is that Defendants' collusive actions caused an increase in the market price of Containerboard Products, which harmed all or nearly all class members, and Dr. Harris's SCP analysis is consistent with and supports that theory. Several courts have relied on an expert's analysis on

the structures and features of a market in certifying a class. *See*, *e.g.*, *In re EPDM Antirust Litig.*, 256 F.R.D. at 90 ("The plaintiffs have not merely alleged that these prices lists existed and that they affected all EPDM purchasers—they have . . . provided expert opinion that the structural characteristics of the EPDM market would support collusive increases of prices to artificially high levels.").

Third, Plaintiffs rely on Dr. Dwyer's analysis of Defendants' conduct and the corresponding movement of the PPW index to demonstrate impact. Dr. Dwyer looked at "industry-wide reflections of price and actual prices paid by class members before and after" Defendants' price increase announcements. [Report of Mark Joseph Dwyer, Ph.D., at 7, ECF No. 658-4.] Dr. Dwyer's analysis started with looking at the nature of Defendants' price increase announcements. Of those fifteen announcements, fourteen included all Defendants. For eleven of those fifteen, the announcements were made during the same month. And, for all fifteen, the amount of the increased price was either identical or near-identical across all Defendants. Because of the "lock-step" nature of these price increase announcements, Dr. Dwyer found that "[t]he extent to which the [Defendants'] price increase announcements are reflected—both in timing and in magnitude—in a published price index for linerboard is indicative of impact on prevailing market prices and therefore of the class-wide price impact of such announcements." [*Id.* at 8.] Such a method is a common way that courts have allowed experts to demonstrate impact. *See*, *In re Urethane Antitrust Litig.*, 768 F.3d at 1254-55.

As briefly mentioned above, the PPW index is the price index Dr. Dwyer relied on for his analysis. PPW

and its price index are published by "RISI," which is a private publisher that has been publishing the PPW index consistently for thirty years, including throughout the class period. As Dr. Dwyer explains:

> Every third week of the month, PPW publishes price indexes for a variety of paper products, including linerboard and corrugated medium. These transaction price indexes are based on surveys of buyers and sellers of a particular containerboard grade. RISI included in the prices it published in its surveys only those related to transactions between nonaffiliated parties. Internal transfers and trades between producers were excluded. PPW also excludes transactions that were contractually tied to a price index. These filters make the indexes more representative of the prices class members actually paid.

[Report of Mark Joseph Dwyer, Ph.D., at 9, ECF No. 658-4.] Of the various products that PPW provides an index for, Dr. Dwyer relied on the price for "42 lb. unbleached kraft linerboard." [*Id.*] This index price, according to Dr. Dwyer, "is used as the industry linerboard price in [Defendants'] own analysis of industry pricing." [*Id.*] This is supported by evidence indicating that Defendants do indeed rely upon the PPW index in setting their prices for Containerboard Products, negotiating prices in individual contracts, and analyzing the market. [Pl.'s Mot. for Class Cert. at 9, ECF No. 660 (citing evidence ranging from Defendants' own documents to deposition testimony demonstrating the pervasive use of the PPW index in determining Containerboard Product pricing).]

In comparing the PPW index and Defendants' price increase announcements, Dr. Dwyer found that

nine of the fifteen announcements "are reflected by increases in the PPW Index after the effective dates of those announced increases." [Report of Mark Joseph Dwyer, Ph.D., at 11, ECF No. 658-4.] Most importantly, in all nine instances, the dollar amounts that the PPW index increased matched Defendants' announced increase. According to Dr. Dwyer, "[i]f a substantial portion of survey participants had reported that they did not experience a price increase, the PPW Index would not reflect an increase identical to what the defendants had announced." [*Id.*] In other words, Defendants collectively announced near-identical price increases, and shortly following those announcements, the PPW index showed that most customers experienced an increase in price exactly equal to the price increase Defendants announced. Thus, the lock-step increase in the PPW index that followed and tracked Defendants' collective price-increase announcements demonstrates that nearly all class members suffered antitrust impact.

Defendants first counter Dr. Dwyer's PPW index assessment by arguing that there is nothing surprising about the fact that a published index price would increase once manufacturers in a market announce that prices are increasing. In logical terms, Defendants characterize Dr. Dwyer's analysis as running afoul of the *post hoc ergo propter hoc* fallacy: that the PPW index increased *after* Defendants announcements does not necessarily mean it increased *because* of those announcements.

But, as Dr. Dwyer states, there is more than simple correlation here. First, there is more to the relationship between Defendants' price increase announcements and the PPW index than, say, the relationship between a Chicagoan jumping on one foot

and not being eaten by a wild lion. It would be absurd to say that, because the Chicagoan was not eaten by a lion after jumping on one foot, jumping on one foot must keep lions away. That is because there are several reasonable, common-sense alternatives for why the Chicagoan was not eaten by a lion—for one, the lack of wild lions roaming Chicago. But here, as Dr. Dwyer demonstrates, there does not appear to be any other reasonable explanation for such a close relationship between the PPW index and Defendants' price increase announcements. Moreover, the source of the PPW index is known; the index represents actual prices purchasers paid following Defendants' price increase announcements. This constitutes strong evidence that Defendants' price increase announcements caused the PPW index to increase. And this, in turn, constitutes strong evidence that all or nearly all class members were impacted by the increased price, given Plaintiffs' evidence regarding the paramount importance of the PPW index in setting prices.

Defendants also argue that Plaintiffs' reliance on the PPW index in analyzing impact is misplaced. Defendants argue that the index does not reflect class member's actual transaction prices because it is "not a mathematical reflection of actual transaction prices; it is a level that virtually nobody actually pays for tonnage within assessed specifications." [Def.'s Opp. Br. at 14, ECF No. 763.] Additionally, Defendants argue that a large number of class members individually negotiated a price rather than simply paying the index price. These arguments miss the mark because Plaintiffs have produced evidence showing that (1) Defendants largely rely on the PPW index in setting prices, and (2) in most individually negotiated contracts, the PPW index factored into the negotiated price. At the least, Plaintiffs have presented sufficient

evidence that would allow a fact-finder to infer that, even for negotiated prices, the starting point for those negotiations would be higher if the market price for the product was artificially inflated. This comports with the "prevailing view" that "price-fixing affects all market participants, creating an inference of class-wide impact even when prices are individually negotiated." *In re Urethane Antitrust Litig.*, 768 F.3d at 1254. Thus, Defendants' attempt to minimize the importance of the PPW index fails to defeat class certification. And, to the extent that Defendants' arguments regarding the merits of relying on the PPW index are correct, those arguments are still based on class-wide evidence, which supports a finding of predominance.

Although Plaintiffs have provided additional testimony from Drs. Dwyer and Harris to prove the merits of antitrust impact—that all or nearly all class members *actually* suffered antitrust harm—at this point the Court is satisfied that Plaintiffs demonstrated that the impact element of their antitrust claim is capable of proof at trial through evidence common to the class. Each class member, if forced to proceed on an individual basis, would be relying on the same evidence of the structure, conduct, and performance of Defendants' industry and their uniform price-increase announcements in order to show an elevated baseline price for the Containerboard Products they purchased during the class period. Thus, the impact evidence in this case is common to the class, and because the evidence, if true, establishes that Defendants' conspiracy caused a market-wide increase to the price of Containerboard Products, Plaintiffs have established impact for class certification purposes. Numerous cases have found that when a plaintiff produces evidence that the alleged

conspiracy increased the baseline price of a product, "there is an inference of class-wide impact." *In re Urethane Antitrust Litig.*, 768 F.3d at 1254 (collecting cases across several jurisdictions). Evidence that multiple defendants issued "parallel . . . price-increase announcements" especially supports the inference of class-wide impact, and this is true "even when prices are individually negotiated." *Id.* at 1254-55. Defendants' arguments that, in fact, most class members were not impacted by the alleged conspiracy may ultimately prove successful at trial or summary judgment. But at the class certification stage, those issues are not before the Court. Therefore, Plaintiffs have established that common questions predominate over individual issues as to impact.

c. Plaintiffs' Damages Proof

Damages are but one element that the Court considers in determining predominance under Rule 23(b)(3). *Roach v. T.L. Cannon Corp.*, 778 F.3d 401, 408-09 (2nd Cir.2015). To establish predominance, a plaintiff must produce a reliable method of measuring classwide damages based on common proof. *See*, *id.* But, "[i]t is well established that the presence of individualized questions regarding damages does not prevent certification." *Messner*, 669 F.3d at 815 (citing *Wal-Mart*, 131 S.Ct. at 2558). Thus, if Defendants are correct that Plaintiffs' multiple-regression model is not capable of proving class-wide damages, that alone will not defeat certification. *See*, *id.* Instead, the Court would need to consider whether the individual issues in calculating damages would overwhelm the common issues relating to liability and impact.

Defendants resist these principles, arguing that the Supreme Court changed the law in this area with its decision in *Comcast.* Defendants argue that, "since

Comcast, a class should not be certified if the plaintiffs fail to present a damages model applicable to individual class members on a class-wide basis or through a simple computation." [Def.'s Opp. Br. at 55, ECF No. 763.] As several courts since *Comcast* have noted, however, *Comcast* did not change the well-established rule that the existence of individual damage issues does not automatically defeat class certification. *See*, *e.g.*, *In re Nexium Antitrust Litig.*, 777 F.3d 9, 21 (1st Cir.2015) (stating, post-*Comcast*, that "the Supreme Court . . . and the circuits in other cases have made clear that the need for some individualized determinations at the . . . damages stage does not defeat class certification").

The Seventh Circuit has also stated *Comcast's* meaning in the class certification context, explaining that *Comcast* was concerned with a damages methodology that measured the harm resulting from four theories of liability, three of which the district court had rejected. *In re IKO Roofing Shingle Prods. Liability Litig.*, 757 F.3d 599, 602 (7th Cir.2014). Because the damages model did "not even attempt" to "measure only those damages attributable to" the remaining liability theory, *Comcast Corp.*, 133 S.Ct. at 1433, "the class could not get anywhere," *In re IKO Roofing Shingle Prods. Liability Litig.*, 757 F.3d at 602. Also, the plaintiffs relied solely on their damages model to also prove impact, rather than presenting separate evidence of impact. Finally, as several courts have noted, *Comcast* was based entirely on one key concession: the plaintiffs in that case inexplicably did not challenge the district court's conclusion that it could not certify the class unless damages were measurable "on a class-wide basis through use of a common methodology." *Comcast Corp.*, 133 S.Ct. at 1430; *see also*, *In re Urethane Antitrust Litig.*, 768 F.3d

at 1258 ("First, unlike the claimants in *Comcast*, our plaintiffs did not concede that class certification required a method to prove class-wide damages through a common methodology."). Plaintiffs in this case have not made a similar concession, and they have presented additional classwide evidence showing that impact is capable of proof at trial, as discussed above. Thus, the Court will consider whether Plaintiffs' damages model is capable of quantifying damages on a class-wide basis. If so, Plaintiffs have established predominance as to each element of their antitrust claim and the class will be certified. If not, the Court will determine whether individual damages issues will overwhelm the common issues.

In establishing damages, Plaintiffs rely on Dr. Dwyer, who conducted a "preliminary analysis that demonstrates the feasibility of reliably estimating damages on a class-wide basis through the use of . . . multiple regression analysis." Although no expert in this case explains in simple terms what a "multiple regression analysis" entails, the method is common enough to understand through case law and references like the *Reference Manual on Scientific Evidence* by Professor Daniel Rubinfeld, which the Seventh Circuit has deemed a reliable source for understanding this type of technical evidence. *See*, *ATA Airlines, Inc. v. Fed. Express Corp.*, 665 F.3d 882, 889-90 (7th Cir.2011). "Multiple regression analysis is a statistical tool for understanding the relationship between or among two or more variables." Daniel L. Rubinfeld, *Reference Guide on Multiple Regression*, in Reference Manual on Statistical Evidence 305 (3d Ed.2011). The tool looks at a dependent variable, which is the variable to be explained, and independent variables, which are the variables "thought to influence the dependent

variable." *In re EPDM Antitrust Litig.*, 256 F.R.D. at 95. Here, the price of Containerboard Products is the dependent variable, and the independent variables are the various factors that might have an effect on price, like the alleged conspiracy and the costs involved in producing the products. This type of statistical tool "allows economists to estimate whether a certain market factor has an effect on the dependent variable and to what degree. By determining whether a particular variable in the equation influences the dependent variable, the economist can accept or reject that variable as having an influence on the dependent variable." *Id.* Multiple regression analysis is common in antitrust cases, where the plaintiffs use it to show that an alleged "conspiracy" has a statistically significant impact on the dependent variable—usually price. Rubinfeld, *Reference Guide on Multiple Regression* 305-07.

Dr. Dwyer purports to do precisely this type of analysis in measuring damages. But, the Court cannot simply accept Dr. Dwyer's report simply because it appears to do a multiple regression analysis. Rather, "as painful as it may be," *ATA Airlines*, *Inc.*, 665 F.3d at 896, the Court must rigorously screen expert evidence when certifying a class to ensure that the damages model only seeks to prove damages that flow from the harm alleged, *Comcast Corp.*, 133 S.Ct. at 1435.

The reliability of an expert's multiple regression analysis depends on the choices the expert makes in choosing variables and setting up the model. *See*, Daniel L. Rubinfeld, *Reference Guide on Multiple Regression* 311-17. In determining whether a model is set up correctly, courts consider several questions: "has the expert correctly identified the dependent

variable; has he or she chosen the correct explanatory variable that is relevant to the question at issue; are the additional variables chosen all correct or are some missing [or] irrelevant; is the form of the analysis correct?" *In re EPDM Antitrust Litig.*, 256 F.R.D. at 95. (citing a prior edition of Professor Rubinfeld's *Reference Guide on Multiple Regression*).

Here, Dr. Dwyer estimates the economic damages attributable to the alleged conspiracy by looking at prices class members actually paid and what they would have paid "but for" the alleged conspiracy. To do this, Dr. Dwyer created two categories of products: Intermediate Containerboard Products ("ICP"), which consists of roll stock and corrugated sheets, and Final Containerboard Products ("FCP"), which consists of all other Containerboard Products. [Report of Mark Joseph Dwyer, Ph.D., at 19, SCF No. 658-4.] Dr. Dwyer then selected a benchmark period of months before and after the class period to compare the prices class members paid during the class period to those prices outside the period. Next, Dr. Dwyer conducted a multiple regression analysis whereby he analyzed the change in the price of Containerboard Products during the class period. He included several independent variables to control for non-conspiratorial economic factors that normally influence price, and he also included a "dummy variable," which is the independent variable that tests whether the alleged conspiracy influenced price. "A positive estimated effect for this dummy variable indicates that prices during the class period are higher than can be explained by the economic factors serving as controls and therefore supports the inference that the elevation is attributable to the collusion alleged by plaintiffs." [*Id.*].

As the Court understands it, under Dr. Dwyer's model, if the non-conspiratorial economic factors fully explain the increase in price during the class period, then the dummy variable indicator would be close to zero, which means that the conspiracy had virtually no effect on price. If this is the case, there are no damages because the conspiracy did not increase prices above what the prices would have been absent the conspiracy. Conversely, if the increase in price is attributable solely to the conspiracy and no other economic factor, then the dummy variable would be close to one. If this is the case, the damages would be astronomical because the full amount of the price increases during the class period would be attributed solely to the conspiracy.

Dr. Dwyer accounted for numerous variables in an attempt control [sic] for economic factors that might explain the change in price during the class period. The Court need not list them all, but Dr. Dwyer grouped them into four categories: downstream demand; production and delivery; inflation; and seasonal factors. Importantly, these categories include independent variables that account for various costs that affect price like the price of pulp that goes into making containerboard, labor costs, and fuel costs associated with production and delivery.

With the potential variables selected, Dr. Dwyer ran regressions for the ICP and FCP categories. Dr. Dwyer used two different procedures to determine which independent variables, in addition to the dummy variable, would be included in the regression. Under the first procedure, the Alkaike Information Criterion (the "AICC method"), the dummy variable reflected an overcharge of 4.05% for the ICP product category and 3.61% for the FCP product category. Under the second

procedure, the Bayesian Information Criterion (the "BIC method"), the ICP overcharge was 4.04% and the FCP overcharge was 2.38%.

Dr. Dwyer also attempted to assess the robustness of his results by including only the 10 independent variables "with the most explanatory power." [*Id.*] This regression shows an overcharge attributable to the conspiracy of 3.33% for the FCP products and 2.78% for the ICP products. Dr. Dwyer then used the average overcharge amounts mentioned above to calculate damages. The average overcharge was 2.92% for the FCP products and 3.81% for the ICP products.

To arrive at a total damages figure, Dr. Dwyer multiplied the average ICP and FCP overcharges by the dollar amount of purchases class members made during the class period. Dr. Dwyer also attempted to subtract out of the total purchases those that were made during the class period, but whose prices were part of a contract entered into before the class period. This method is consistent with Plaintiffs theory of harm that Defendants' conspiracy raised the market price that all class members paid for Containerboard Products during the class period. During the class period, class members paid $21.06 billion for ICP products. Based on Dr. Dwyer's overcharge of 3.81%, class members paid $801.27 million dollars more than they would have absent the conspiracy. Class members also paid $102.25 billion for FCP products. Based on Dr. Dwyer's overcharge of 2.92%, class members paid $2,991 billion dollars more than they would have absent the conspiracy. Dr. Dwyer's report also breaks down the total amount of damages caused by each Defendant. In sum, Dr. Dwyer's preliminary estimate of damages is $3.792 billion.

Defendants first argue briefly that Dr. Dwyer's report cannot be trusted because it only shows damages based on the class period reflected in Plaintiffs Amended Complaint, rather than the period initially alleged. Defendants cite no authority for disregarding an expert's methodology because he relied upon the class period as alleged in an amended complaint. Dr. Dwyer did what was asked of him based on the class period supplied to him by Plaintiffs. That Plaintiffs amended their Complaint does not change the Court's analysis on whether Dr. Dwyer's model is capable of demonstrating class-wide damages. To the extent Defendants' arguments are relevant, they go to the weight a jury might give Dr. Dwyer's testimony, not its reliability or admissibility. *See*, *In re Urethane Antitrust Litig.*, 768 F.3d at 1263 (refusing to reverse district court based on the defendants' argument that the plaintiffs' expert moved the class period start date to maximize damages).

As to the substance of Dr. Dwyer's damages model, Defendants' experts first attack Dr. Dwyer's use of a technique called "principal components" to address a collinearity problem. The parties' experts appear to agree that running regressions in this case presents a collinearity problem, which occurs when two independent variables are highly correlated or related. Including collinear variables in a regression often skews the results.

To correct for collinearity, Dr. Dwyer inserted 150 independent variables into a computer program that would then select "principal components," which are those components that, according to the program, best explain the covariance across the independent variables. The program produced 133 principal components, which Dr. Dwyer then inserted into two

different "stepwise regression" programs—AICC and BIC. Both programs operate the same way by starting "with a core model in which the variables that are entering into the model selection are absent." [Dwyer Dep. 137:25-138, Aug. 12, 2014, Ex. 3, ECF No. 763-2.] The programs then "consider[ ] adding a variable one step at a time," creating a model "until none of the remaining factors meet a certain threshold of explanatory power." [Dwyer Dep. 138:2-6, Ex. 3, ECF No. 763-2.] The only difference between AICC and BIC is the relevant threshold at which the program stops selecting new variables from the 133 available.

Defendants broadly claim that, according to economists, "'stepwise regression is to be avoided.'" [Def.'s Opp. Br. at 51 (quoting Peter Kennedy, *A Guide to Econometrics* 49 (6th Ed.2008)), ECF No. 763.] But as Dr. Dwyer points out in his reply report, the "stepwise regression" that "is to be avoided" is not the same regression that Dr. Dwyer performed, though admittedly economists often use "stepwise regression" to describe Dr. Dwyer's approach, a point Dr. Dwyer alluded to in his deposition. [Dwyer Dep. 120:3-5 ("Stepwise can sometimes have a particular meaning that would be inappropriate here."), Ex. 3, ECF No. 763-2.] Dr. Dwyer provides academic support for the type of model selection procedures he used, and the Court has compared the description of the stepwise method that is disfavored and Dr. Dwyer's method, and the two are indeed different. Furthermore, Dr. Dwyer notes that the model selection methods he used are included in most or all statistical software packages. The Court finds it unlikely that a model selection method that supposedly is rejected by the academic community would be included in all the

software that same community uses to run regressions. Finally, Defendants have not cited any case law that rejects an expert's model solely because of the expert's use of Dr. Dwyer's model selection method. The Court therefore refuses to ignore Dr. Dwyer's report solely because he employed a stepwise regression.

Defendants next take issue with the way Dr. Dwyer used the AICC and BIC model selection methods. Defendants assert that, despite Dr. Dwyer's claim that his model is neutral, he did not allow either selection model to select variables in a neutral fashion. This is so, Defendants argue, because Dr. Dwyer "limited the variables the stepwise software could exclude so that the conspiracy dummy variable *had to be included*." [Def.'s Opp. Br. at 51, ECF No. 763.] Defendants interpret this method as forcing the model to assign the conspiracy variable a value even if the model would have otherwise excluded it as having no explanatory value. Defendants argue that Dr. Dwyer should have simply let the software select from all the available variables, and Defendants contend that, by doing so, the conspiracy variable would not have been selected.

Dr. Dwyer, however, had good reason for including the conspiracy variable in each of his regressions. As he correctly states, allowing the conspiracy variable to be omitted would tell the experts nothing about the conspiracy's effect on price. Moreover, Defendants are incorrect that forcing the model to test for the alleged conspiracy's effect on price necessarily means the model will find such an effect. Presumably, if the conspiracy had no effect on price, the model would show that the conspiracy variable had a zero or statistically insignificant effect on price. Because the

independent variable at issue is the existence of a conspiracy, Dr. Dwyer reasonably included that variable in his regressions. Otherwise, his regressions would tell us nothing about the conspiracy's effect on price.

Additionally, Defendants' arguments are inconsistent. On the one hand, Defendants criticize Dr. Dwyer for using a stepwise regression to select which independent variables to include in each model, rather than using his own independent judgment to select those variables. On the other hand, they criticize him for using his economic judgment to use the conspiracy and inflation variables in each model, rather than letting the program pick all of the variables. Both experts state that the stepwise method can exclude variables that the program finds less explanatory, even though economic principles compel inclusion of the variable. Dr. Dwyer used his economic expertise to select certain factors that test for conspiracy and control for inflation, along with other factors selected by the stepwise programs. To the extent that Defendants challenge the specific factors included and excluded from his model, those arguments go to the weight and probative value of his testimony, not to the underlying methodology. *See*, *In re Urethane Antitrust Litig.*, 768 F.3d at 1260-61.

Of course, in some instances, inclusion or exclusion of a certain variable might be egregious enough to render an expert's report inadmissible altogether. *See*, *In re Scrap Metal Antitrust Litig.*, 527 F.3d 517, 530 (6th Cir.2008). But that is not the case here. Defendants have not pointed to some specific, major factor that Dr. Dwyer excluded that shows his model is wholly without merit. To the contrary, Dr. Dwyer went to great lengths to include in his independent

variables all sorts of factors that might otherwise explain the price increases during the class period. His methodology therefore appears to be firmly rooted in sound economic and econometric principles, and the large majority of Defendants' experts' criticisms go to the merits of whether the price of Containerboard Products "increased disproportionately to the cost of inputs as the result of a conspiracy to raise/maintain prices, or instead resulted from a non-collusive cause." *In re EPDM Antitrust Litig.*, 256 F.R.D. at 98. This is a merits question that the Court does not need to resolve in order to decide whether to certify the class.

Defendants finally argue that Dr. Dwyer's damages calculations do not support class certification because his model "cannot be applied to individual plaintiffs, and Dwyer admitted that comparing a customer's price to the price predicted by his regression model would not indicate whether or not the customer had been damaged." [Def.'s Opp. Br. at 56, ECF No. 763.] But in a complicated antitrust case such as this, where the theory of harm is that the entire market price of a product was inflated as a result of a conspiracy, "plaintiffs are permitted to use estimates and analysis to calculate a reasonable approximation of their damages." *Loeb Indus., Inc. v. Sumitomo Corp.*, 306 F.3d 469, 493 (7th Cir.2002); *See also*, *In re Scrap Metal Antitrust Litig.*, 527 F.3d 517 at 529 (approving a method of comparing a defendant's profits before and after a violation in "proving antitrust damages").

Moreover, to the extent that there are individualized damages issues, that alone will not defeat class certification, especially where, as here, common issues predominate the liability and impact elements of Plaintiffs' claim. *Butler*, 727 F.3d at 801. And,

should discovery demonstrate that individual damages issues indeed threaten to overwhelm the common issues such that class certification becomes inappropriate, Defendants may seek to decertify the class or modify the class so that only liability and impact are decided on a class-wide basis. *Messner*, 669 F.3d at 826. In light of the key, overwhelming common questions of liability and impact in this case, Defendants have not demonstrated that individual damages issues threaten to overwhelm the litigation.

In sum, the Court has poured over the parties [sic] submissions and accompanying evidentiary record and finds that Plaintiffs have satisfied the predominance requirement of Rule 23(b)(3) based on competent evidence common to the class.

ii. Superiority

Lastly, Plaintiffs must demonstrate that proceeding on a class basis is superior to other forms of resolving the dispute. Plaintiffs have made a sufficient showing that class treatment in this case is superior to individual cases. The overarching liability and impact issues are common to the class and can "be resolved in one stroke." *Butler*, 727 F.3d at 801 (internal quotation marks omitted). And given the breadth and importance of the common issues, "the superiority requirement . . . poses no serious obstacle to class certification here." *Messner*, 669 F.3d at 814 n. 5.

In attempting to defeat superiority, Defendants argue first that releases they obtained as a result of settling a prior antitrust lawsuit bar many class members' claims in this suit. Second, Defendants argue that many class members purchased Containerboard Products pursuant to contracts that include

various "disqualifying clauses," such as forum selection clauses, jury waivers, and clauses that set the available time to bring a claim and the available damages. Defendants conclude that these issues make a class action unmanageable and create a "quagmire" that causes individual issues to predominate the common questions.

As to the first argument, when parties settle a case, a "court may release not only those claims alleged in the complaint and before the court, but also claims which could have been alleged . . . in connection with any matter or fact set forth or referred to in the complaint." *Wal-Mart Stores, Inc. v. Visa*, 396 F.3d 96, 107 n. 13 (2d Cir.2005) (internal quotation marks omitted). Such a "general release is valid as to all claims of which a signing party has actual knowledge or that he could have discovered upon reasonable inquiry." *Oberweis Dairy, Inc. v. Associated Milk Producers, Inc.*, 568 F.Supp. 1096, 1101 (N.D.Ill.1983) (citing *Goodman v. Epstein*, 582 F.2d 388, 402-04 (7th Cir.1978)). In other words, "a release applies only as long as the released conduct arises out of the identical factual predicate as the settled conduct." *In re Digital Music Antitrust Litig.*, 812 F.Supp.2d 390, 399 (S.D.N.Y.2011) (internal quotation marks omitted).

Defendants settled with various opt-in and opt-out plaintiffs the [sic] *In re Linerboard Antitrust Litigation* lawsuit in the Eastern District of Pennsylvania. The lawsuit involved an alleged conspiracy that occurred between 1993 and 1995, although some individual cases did not settle until as late as 2008. According to Defendants, a "typical" settlement agreement from the *Linerboard* litigation released Defendants from all claims "relating in any way to any conduct prior to the Effective Date" of the

agreement "concerning the purchase, sale, distribution, or pricing of linerboard, medium, corrugated containers [or] corrugated sheets." [Def.'s Opp. Br. at 64 n. 59, ECF No. 763.] Defendants argue that such a broad agreement bars the claims at issue here, and that determining whether those claims are barred makes class action impracticable.

The Court disagrees. Although the release language is very broad, Plaintiffs' claims in this case are not based on an "identical factual predicate as the settled conduct." *In re Digital Music Antitrust Litig.*, 812 F.Supp.2d at 399. The conduct at issue in the prior litigation was Defendants' allegedly collusive behavior in the mid-nineties. The actions at issue here are coordinated market manipulation and price increase announcements that occurred nearly a decade later. And even though the collusive behavior that was alleged in the prior litigation is similar to the behavior alleged here, the claims in this case are not based on Defendants' alleged price-fixing behavior of the nineties. Under Defendants' argument, they are free to keep colluding in violation of antitrust laws so long as they conspire in the same way as they were alleged to have behaved in a prior settled case. The Court is unaware of any case supporting this argument; indeed, several cases are to the contrary. *See*, *id.* Because none of the *Linerboard* releases apply to this new case that is based on different facts, the Court finds that those releases do not defeat class certification.

Defendants' second argument is that several contractual provisions apply to disqualify some class members from participating in the class. According to Defendants, "the multitude of individualized issues (under the laws of multiple states) presented by

the disqualifying clauses . . . render the class action mechanism inefficient." [Def.'s Opp. Br. at 72.].

The Court rejects this argument for several reasons. First, Defendants' argument relies on *Lozano*, in which the Seventh Circuit approved of a district court relying on class action waivers in arbitration agreements to find class certification inappropriate. *Lozano v. AT & T Wireless Servs., Inc.*, 504 F.3d 718, 728 (7th Cir.2007). Unlike the arbitration agreements in *Lozano*, however, none of the clauses here preclude class actions. *Lozano* therefore provides no support for Defendants' position.

Second, Defendants rely heavily on *In re Titanium Dioxide Antitrust Litigation*, in which the court enforced clauses contained within individual class members' contracts. *In re Titanium Dioxide Antitrust Litigation*, 962 F.Supp.2d 840, 851-52 (D.Md.2013). That case also fails to support Defendants' argument because there, the court *did not* find the existence of contractual provisions to be an impediment to class certification. *Id.* at 846 (stating that the defendants' motion to modify the class definition to exclude class members who were subject to various contractual provisions was premature until "after the expiration of the class opt-out period"). Plaintiffs are correct that the majority of cases hold that the existence of contractual provisions does not automatically defeat class certification. *See*, *e.g.*, *id.; Herkert v. MRC Receivables Corp.*, 254 F.R.D. 344, 350 (N.D.Ill.2008) ("[A] possibility that some of the putative class members could have cardmember agreements with varying terms . . . does not necessarily preclude class certification.").

In the alternative, Defendants ask that the Court at least modify the class definition to exclude those class

members that purchased pursuant to a disqualifying clause. This may indeed be necessary, but the Court agrees with the court in *Titanium Dioxide* that the more appropriate time to address this issue is after the class is certified and Defendants can determine which specific class members are subject to potentially disqualifying contractual provisions. The Court has the authority under Rule 23(c)(1)(C) to modify the class any time before final judgment. To the extent that class members are not eligible to participate due to their specific contracts, Defendants may file a motion to modify the class to exclude those specific members once that information is known.

Because Plaintiffs have proven beyond mere pleading each of Rule 23's elements, the Court finds that class certification is appropriate. The only remaining issue is Defendant RockTenn's arguments as to why a class action cannot proceed against it.

C. Class Certification—Defendant RockTenn's Argument

RockTenn's position in this case is unique. (The Court uses "RockTenn" for ease of reference, although RockTenn was formally known as Smurfit-Stone Container Corporation during its bankruptcy proceedings). Unlike any other Defendant, RockTenn filed for bankruptcy prior to this lawsuit, which resulted in a bankruptcy discharge order dated June 30, 2010 that released RockTenn from any claims predating the discharge order. Thus, according to RockTenn, Plaintiffs' must independently establish a separate, RockTenn-specific class with a period starting no earlier than June 30, 2010.

In all the briefing on this issue, both parties rely on the exact same source material to support their

argument: Judge Milton Shadur's statements during a hearing on November 24, 2010. According to RockTenn, Judge Shadur made it crystal clear that Plaintiffs would need to define and seek certification on a wholly separate class applicable just to RockTenn. Plaintiffs, on the other hand, argue that Judge Shadur could not have stated in any plainer terms that such a separation was unnecessary. The Court can resolve this issue easily by simply referring to what Judge Shadur said, in light of case law that supports those statements.

Neither party really explains the context for the hearing before Judge Shadur, but from reading the entire transcript of that hearing, it appears that RockTenn asked the bankruptcy court to enjoin this Court from hearing a claim against RockTenn. Judge Shadur set the hearing to inform RockTenn of his position on RockTenn's motion and to provide an avenue for communicating his opinion to the bankruptcy court without having to get into a "tug-of-war" with that court. Judge Shadur informed RockTenn that he had read the complaint and its allegations and found that Plaintiffs were only seeking to hold RockTenn liable for its post-discharge conduct. Understandably, Judge Shadur found it inappropriate for RockTenn to ask the bankruptcy court to enjoin this Court from entertaining a cause of action that is founded on postdischarge conduct over which the bankruptcy court has no jurisdiction. Judge Shadur stated that he found it "flat-out misleading [for RockTenn] to characterize the lawsuit before [the Court] as seeking relief from [RockTenn] that is at odds with its discharge in bankruptcy." [Hr'g Tr. 6, Nov. 24, 2010, ECF No. 108.].

Judge Shadur acknowledged that the complaint's allegations "speak . . . of [RockTenn's] pre[-]discharge conduct," but he noted the key difference between *basing liability* on pre-discharge conduct and *relying* in part on pre-discharge conduct as evidence supporting a post-discharge conspiracy. RockTenn's argument, in other words, "conflates evidence with claims." [*Id.* at 7.] RockTenn is correct that the Court promised to hold Plaintiffs to their word that their complaint is about imposing liability based on post-discharge conduct. But, contrary to both parties' assertions, Judge Shadur did not mention or address any issues related to the proper size or scope of the class to be certified. That is the issue currently before the Court.

The issue presented by Plaintiffs' complaint is novel. Plaintiffs have provided evidence that RockTenn participated in the alleged conspiracy post-bankruptcy. If a fact-finder found this to be true, RockTenn's bankruptcy discharge order would not protect it, since that order applies only to predischarge conduct. Plaintiffs have also sued RockTenn's alleged co-conspirators, and co-conspirators are joint and severally liable "for *all damages* caused by the [entire] conspiracy." *Paper Sys. Inc. v. Nippon Paper Indus. Co.*, 281 F.3d 629, 632 (7th Cir.2002) (emphasis added). No problem so far. But, the conspiracy for which Plaintiffs seek to hold RockTenn's co-conspirators liable predates RockTenn's discharge from bankruptcy, and that pre-discharge conspiracy included RockTenn. The question, then, is whether RockTenn, based on its post-discharge conduct, can be jointly and severally liable for its co-conspirators' damages when the basis for the co-conspirators' liability is pre-discharge conduct that includes RockTenn. RockTenn argues that to hold it jointly liable is to

punish it for pre-discharge conduct. Plaintiffs argue that such a result is the consequence of the general joint and several liability principles in the antitrust context.

Neither party has cited a case directly on point, nor can the Court find one. RockTenn cites cases that preclude class certification against defendants that emerged from bankruptcy, but in those cases liability was premised on solely pre-discharge conduct. *See*, *In re Travel Agent Comm'n Antitrust Litig.*, 583 F.3d 896, 901 (6th Cir.2009). Plaintiffs cite cases involving joint and several liability, but none of the defendants in those cases had filed for bankruptcy. *See*, *e.g.*, *Paper Sys. Inc.*, 281 F.3d at 632. Moreover, the Court notes that important principles weigh on both sides of the issue. On the one hand, bankruptcy is meant to absolve a debtor of liability for its pre-discharge conduct. *In re Ruben*, 774 F.3d 1138, 1141 (7th Cir.2014) ("A principal goal of bankruptcy is to provide the debtor with . . . a fresh start.") (internal quotation marks omitted). On the other hand, joint and several liability is a "vital instrument for maximizing deterrence." *Paper Sys. Inc.*, 281 F.3d at 633.

In the absence of controlling, binding authority, the Court finds that holding RockTenn jointly and severally liable does not violate the bankruptcy discharge order for several reasons. Plaintiffs alleged that RockTenn joined (or more correctly, re-joined) the conspiracy post-bankruptcy. Generally speaking, "a co-conspirator who joins a conspiracy with knowledge of what has gone on before and with an intent to pursue the same objectives may, in the antitrust context, be charged with the preceding acts of its co-conspirators." *Havoco of Am., Ltd. v. Shell Oil Co.*, 626 F.2d 549, 554 (7th Cir.1980). Although a debtor

discharged in bankruptcy is indeed provided a clean slate, what the debtor does with that slate matters. Assuming that RockTenn did, in fact, re-join the conspiracy as alleged, RockTenn certainly would have had knowledge of what has gone on before and presumably would have had the intent to pursue the same objectives. *See*, *id.*, Seen properly, RockTenn would not be "held liable" for its pre-discharge conduct. Liability would be premised solely on its post-discharge conduct. It only *appears* that it is being held liable for pre-discharge conduct because of the joint and several liability rule, which makes RockTenn on the hook for its co-conspirators' actions. But it is the *co-conspirators'* liability that is based on pre-discharge conduct, not RockTenn's.

The distinction may be a fine one, but it is important. If, for example, RockTenn is ultimately correct on the merits, *i.e.*, its post-discharge conduct does not give rise to an antitrust violation, RockTenn will be absolved of all liability, despite its participation in the pre-discharge conspiracy. The Court has made clear that it will hold Plaintiffs to their burden of proof that RockTenn's postdischarge conduct gives rise to liability. But, once liability is established, the general rule of joint and several liability applies. It would be a windfall to defendants to allow them to join a conspiracy post-bankruptcy, with the perfect knowledge and intent to continue causing damages to vast numbers of consumers, and then refuse to enforce joint and several liability while the remaining coconspirators are all subject to such liability. If RockTenn did in fact choose to rejoin the alleged conspiracy, it cannot be heard to complain that it may be on the hook for all the damages the conspiracy caused.

Admittedly, this creates potential problems for trial. For example, what is a jury to do with evidence of both pre- and post-discharge conduct in determining RockTenn's liability? For one, the Court may give a limiting instruction that explains to the jury that, in order to determine whether RockTenn violated antitrust laws, it must only consider RockTenn's post-discharge conduct and determine whether that conduct violated the law. These problems, however, can be addressed later if the case goes to trial. For now, the Court agrees with Plaintiffs that this case can proceed as a single class action.

IV. CONCLUSION

For the reasons stated herein, Defendants' Motion to Strike [ECF No. 845] is granted in part and denied in part. Plaintiffs' Class Certification Motion [ECF No. 657] is granted. Named Plaintiffs are hereby designated as class representatives, and Michael J. Freed of Freed Kanner London & Millen LLC and Daniel J. Mogin of The Mogin Law Firm, P.C., are hereby designated as Co-Lead Counsel.

IT IS SO ORDERED.

APPENDIX C

FEDERAL STATUTES

15 U.S.C. § 15. Suits by persons injured

(a) Amount of recovery; prejudgment interest

Except as provided in subsection (b) of this section, any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. The court may award under this section, pursuant to a motion by such person promptly made, simple interest on actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. In determining whether an award of interest under this section for any period is just in the circumstances, the court shall consider only—

(1) whether such person or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking in merit as to show that such party or representative acted intentionally for delay, or otherwise acted in bad faith;

(2) whether, in the course of the action involved, such person or the opposing party, or either party's representative, violated any applicable rule, statute, or court order providing for sanctions for dilatory

behavior or otherwise providing for expeditious proceedings; and

(3) whether such person or the opposing party, or either party's representative, engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof.

* * * *

28 U.S.C. § 2072. Rules of procedure and evidence; power to prescribe

(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals.

(b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

(c) Such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title.

APPENDIX D

FEDERAL RULE

Federal Rules of Civil Procedure Rule 23. Class Actions

* * * *

(b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:

* * * *

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

* * * *