No. 15-8006

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

KLEEN PRODUCTS LLC, ET AL.,
individually, and on behalf of all others similarly situated,

Plaintiffs – Respondents,

v.

INTERNATIONAL PAPER CO., ET AL.

Defendants – Petitioners.

On Petition For Permission To Appeal
From The United States District Court For The Northern District Of Illinois
Case No. 1:10-cv-05711 – Hon. Harry D. Leinenweber (Under Seal)

REPLY IN SUPPORT OF PETITION FOR PERMISSION TO APPEAL FROM ORDER GRANTING CLASS CERTIFICATION

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INTRODUCTION

Eager to insulate the district court's class-certification ruling in this massive, multibillion-dollar antitrust case from appellate review, plaintiffs praise that decision as an "exemplary" model of judicial craft and the very "defin[ition]" of "'rigorous analysis.'" Pls.' Resp. to Defs.' Joint Rule 23(f) Pet. ("Resp.") 1, 8, 9, 16. Those plaudits, however, come curiously unaccompanied by any serious effort to defend the district court's rulings in light of the manifold legal errors defendants have identified, proving that the heralded "rigorous analysis" in the class-certification order is much less "exemplary" than advertised.

As the petition demonstrated, the expert analyses at issue here are incapable of proving on a class-wide basis—as antitrust law and Rule 23 require—that class members paid a higher price *because of* the alleged conspiracy, let alone *how much* each individual class member purportedly overpaid. Indeed, plaintiffs cannot dispute that their own expert admitted that any price increases could be explained in part by non-collusive factors. Plaintiffs paper over this dispositive defect by asserting that the district court merely resolved "factual issues," but this is wrong: The district court's error was not simply in its flawed analysis (though flawed it was) of the expert evidence presented; more fundamentally, it was that the evidence does not measure up to the legal standards that govern expert testimony *or* antitrust liability. The court legally erred by *excusing* plaintiffs from presenting any reliable common method for proving antitrust impact and damages. No degree of deference to purported factual findings can save the decision below from that error of law.

It is undisputed that the district court short-circuited the scrutiny of expert evidence required before a class can be certified by refusing—contrary to this Court's case law—to resolve definitively, *before* ruling on class certification, whether that evidence was in fact reliable. Plaintiffs insist that the district court acted appropriately because defendants did not move to exclude plaintiffs' experts for all purposes under *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). But plaintiffs offer neither authority nor reasoned explanation for that conclusion, and ignore a recent Third Circuit decision that—relying on this Court's cases—flatly rejected it.

Plaintiffs also echo without analysis the district court's conclusion that numerous individualized defenses pose no obstacle to class litigation. In doing so they embrace the same legal error as the court below, dismissing the complicating effect of settlements reached between some class members and some defendants in the *Linerboard* litigation based on a fundamental misunderstanding of contract law. The broader lesson of *Linerboard* is that this industry is constantly at risk of antitrust strike suits simply by dint of the market's structure, and that given the potentially massive damages plaintiffs seek, class certification may force defendants to settle at tremendous expense claims that are entirely meritless. Plaintiffs incredibly claim that the $11 *billion* in trebled damages they seek here is insufficient to exert such pressure. This Court's cases hold otherwise, and make clear that this case is precisely the sort for which Rule 23(f) review was intended.

ARGUMENT

I. The Massive Stakes Of This Case In Which Plaintiffs Seek More Than $11 Billion In Trebled Damages Amply Justify Interlocutory Review.

This Court has made clear that "an appeal under Rule 23(f) is in order" "when the stakes are large and the risk of a settlement or other disposition that does not reflect the merits of the claim is substantial." *Blair* v. *Equifax Check Servs., Inc.*, 181 F.3d 832, 835 (7th Cir. 1999). Plaintiffs quibble over nomenclature, disputing whether the "death knell" label aptly describes cases where a class-certification ruling pressures a party to settle meritless claims rather than litigate them. Resp. 8. Regardless of the label, plaintiffs do not and cannot deny the principle settled in this Court that Rule 23(f) review is warranted if the stakes are large enough to create a "substantial" risk that the case's outcome will turn on the *size* of the plaintiffs' claims rather than their *merits*. *Blair*, 181 F.3d at 835.

Plaintiffs' assertion that the stakes here fall short of that standard defies credulity. Even the almost-$4 billion figure plaintiffs cite (Resp. 8) for the estimated damages they seek would easily satisfy *Blair*'s substantial-risk standard. But that is only a fraction of the sum plaintiffs actually seek: Plaintiffs fail to mention that the damages sought, if trebled, would exceed *$11 billion*—more than 700 times greater than the exposure in the single case on which plaintiffs rely. *Id.* (citing *Arnold Chapman & Paldo Sign & Display Co.* v. *Wagener Equities Inc.*, 747 F.3d 489, 491 (7th Cir. 2014) ($15 *million* in exposure)). That immense potential liability creates precisely the kind of risk that this Court has held justifies granting permission to appeal.

Plaintiffs also claim that the massive "estimated damages" they seek are insufficiently large "relative to Defendants' revenues." Resp. 8. Apart from ignoring the effect of potential trebling, this misstates the standard. The question is not whether the damages sought, if awarded, would *bankrupt* defendants. It is whether a ruling granting class certification—a purely procedural device that by law cannot "'abridge'" or "'modify any substantive right,'" *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541, 2561 (2011) (quoting 28 U.S.C. § 2072(b))—creates a substantial risk that, simply because of the scale of potential exposure, defendants will forfeit their constitutional right to litigate the claims and will instead accede to a settlement that does not reflect the claims' merits. There can be no serious question that the scale of plaintiffs' demands here—wholly apart from their claims' lack of merit—creates exactly that type of risk and thus warrants review.[1]

II. The District Court Failed To Require Plaintiffs To Show That Antitrust Impact And Damages Are Capable Of Common Proof.

Plaintiffs defend the decision below based largely on its length and its rote incantation of precedent for abstract principles, and assert that the petition complained only of "factual" issues. Resp. 1, 11, 12, 19. As the Supreme Court noted in *Comcast Corp.* v. *Behrend*, 133 S. Ct. 1426 (2013), however, "while the data contained within an econometric model may well be 'questions of fact' … what those data prove is no more a question of fact than what our opinions hold." *Id.* at 1434 n.5.

[1] *In re Linerboard Antitrust Litigation*, MDL No. 1261, 2008 WL 4461914 (E.D. Pa. Oct. 3, 2008), on which plaintiffs rely (Resp. 4), well illustrates both (1) how this industry is serially victimized by antitrust litigation based in part on parallel behavior that is consistent with its oligopolistic structure, *cf. In re Text Messaging Antitrust Litig.*, __ F.3d __, 2015 WL 1567837 (7th Cir. Apr. 9, 2015), and (2) how class certification can "result[] in payments of hundreds of millions of dollars," Resp. 4.

In any event, the district court committed clear legal errors. Rule 23 and the applicable antitrust law required plaintiffs to proffer (1) class-wide evidence that class members were injured *because of* the alleged conspiracy, rather than something else, *and* (2) that individual damages either can be proved by class-wide evidence or do not overwhelm the truly common issues in the case. Plaintiffs' expert evidence does neither, and for good measure fails to satisfy the reliability standard that this Court has held must be applied to experts before a class is certified. Because the district court based its decision on "an erroneous view of the law," it "necessarily abused its discretion." *Messner* v. *Northshore Univ. Healthsystem*, 669 F.3d 802, 811 (7th Cir. 2012).

A. Plaintiffs Have No Method To Prove Common Antitrust Impact.

Like the court below, plaintiffs blur antitrust law's critical distinction between evidence that class members paid higher prices for *some* reason and proof that they paid higher prices *because of the alleged antitrust violations*. Resp. 9-15. As defendants explained, Joint Rule 23(f) Pet. ("Pet.") 4, 9-10, 12, and plaintiffs do not deny, plaintiffs' own expert admitted that factors *other* than the alleged conspiracy contributed to price increases. It was thus plaintiffs' burden to show a common method of proving that class members suffered *antitrust* impact—*i.e.*, that the class was injured by the supposed collusion *as opposed* to such other causes. *Id.* at 8-9. Plaintiffs presented no such method. The district court's ruling on impact was therefore erroneous as a matter of law.

Plaintiffs reprise the district court's survey of their experts' analysis of the market structure, which supposedly makes this industry "susceptible to collusion," and statements they attribute to defendants. Resp. 10. But none of that impressionistic, anecdotal evidence is even arguably capable of proving *that* class members paid more, let alone *why*. Plaintiffs also mention Dwyer's before-and-after analysis, *id.*, which compared the price a buyer paid before a price-increase announcement with prices paid afterward, but Dwyer admittedly did not *try* in that analysis to isolate the effects of the alleged conspiracy. Defs.' Opp. to Pls.' Mot. for Class Certification ("Opp."), Ex. 3 ("Dwyer Dep.") at 252-54. Increasing prices is not illegal—even in concentrated industries. *See*, *e.g.*, *In re Text Messaging*, 2015 WL 1567837, at *11. And even if *some portion* of price increases were the result of collusion, plaintiffs' experts admittedly did nothing to quantify how much, if any, of the price increases class members paid were not.

Plaintiffs claim that Dwyer's *damages* regression properly controlled for non-collusive factors. Resp. 11 n.5, 14. That is incorrect, Pet. 17-18, but even if true it makes no difference, because even Dwyer conceded that the regression shows only an *average* overcharge, not whether any *given* class member paid a higher price. Pet. 10. Indeed, when applied on a disaggregated basis to subsets of the class, Dwyer's own regression shows that many class members paid *no* overcharge. *Id.* at 10 & n.5.

Like the district court, plaintiffs lean heavily on a purported correlation Dwyer found between price-increase announcements and increases in the PPW in-

dex. *See* Resp. 10-13. But that crude analysis—which showed an increase in the index after just 60% (9 out of 15) of the announcements examined—likewise *undisputedly* made no effort to control for causes other than the alleged conspiracy. Dwyer Dep. 64-67, 200-01, 203. Plaintiffs echo the district court's unfounded speculation that collusive price announcements must have been the cause. Resp. 11. Plaintiffs' burden, however, was to show that antitrust impact is capable of common *proof*, not common *conjecture*. In this connection, plaintiffs repeat the district court's mistaken conclusion that the "'prevailing view'" in cases involving supposedly standard market prices is that a court may *presume* that every class member was affected. Resp. 13 (quoting Addendum to Joint Rule 23(f) Pet. ("A") 37). Like the district court, plaintiffs cite a Tenth Circuit decision for this proposition, but wholly ignore contrary decisions, which the petition cited, from the First and Fifth Circuits.[2]

In any event, plaintiffs also have no answer to the fact that the PPW index—a complex, normalized metric for a single type of containerboard liner that is subject to an array of exclusions and limitations—is incapable of demonstrating the prices individual class members actually paid. Pet. 12-13. Plaintiffs quote the district court's conclusion that the PPW index is used as the starting point in negotiating prices. Resp. 11. But plaintiffs provide no evidence that all or nearly all purchasers of corrugated products (such as boxes, which comprise more than 80% of the class

[2] Resp. 13 (quoting *In re Urethane Antitrust Litig.*, 768 F.3d 1245, 1254 (10th Cir. 2014)); *but see In re New Motor Vehicles Canadian Export Antitrust Litig.*, 522 F.3d 6, 29 (1st Cir. 2008); *Robinson* v. *Tex. Auto. Dealers Ass'n*, 387 F.3d 416, 423-24 (5th Cir. 2004).

purchases in this case) negotiate prices off of the PPW index; to the contrary, plaintiffs do not respond at all to the fact that the prices many purchasers of corrugated products pay are unaffected by changes in the PPW index, due to contracts that lock in prices for a season or set price caps. Pet. 13. And they ignore that the PPW index concerns only one input (linerboard)—not *finished* products (corrugated boxes and displays), of which defendants make tens of thousands to meet a wide variety of needs. *Id.* at 3, 13. Plaintiffs' expert admitted that the PPW index measures only "an input into much corrugated containerboard" products, that there are "[a]dditional variable costs" that must be considered, Reply Report of Mark J. Dwyer, Ph.D. ¶ 133, and that determining the extent to which increases in an input's price affect prices of finished products requires a complex, multi-factor analysis—which none of plaintiffs' experts ever performed, Pet. 4-5.

In the end, plaintiffs admit—as they must—that the district court did not even *try* to separate prices that increased "as the result of a conspiracy to raise/maintain prices" from those that "'instead resulted from a non-collusive cause.'" Resp. 2-3 (quoting A53). Plaintiffs think this was appropriate, and heartily endorse the district court's view that "'[t]his is a merits question that the Court does not need resolve in order to decide whether to certify the class.'" Resp. 17 (quoting A53); *see id.* at 2-3 ("Defendants' experts' criticisms go to the merits"). This, however, is precisely the error for which the Third Circuit was reversed in *Comcast*, 133 S. Ct. 1426. Like the district court here, the Third Circuit had concluded that an expert's model need not separate lawful from unlawful price increas-

es, because this was a "'merits'" question. *Id.* at 1431. But the Supreme Court rejected that view. As the Supreme Court put it, "[p]rices whose level above what an expert deems 'competitive' has been caused by factors unrelated to an accepted theory of antitrust harm are not 'anticompetitve' in any sense relevant here." *Id.* at 1435. Thus, if (as here) a "model does not even attempt" to measure *only* injuries attributable to the purported antitrust violation, it cannot satisfy Rule 23(b)(3). *Id.* at 1433; *see also In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244, 252-53 (D.C. Cir. 2013); *Blue Cross & Blue Shield United of Wis.* v. *Marshfield Clinic*, 152 F.3d 588, 593 (7th Cir. 1998) (rejecting a model that failed "to make a responsible estimate of the prices that [plaintiff] would have paid had it not been for the conspiracy" and explaining that "[s]tatistical studies that fail to correct for salient factors, not attributable to the defendant's misconduct, that may have caused the harm of which the plaintiff is complaining do not provide a rational basis for a judgment").

B. Plaintiffs Have No Method To Prove Class Members' Damages.

Plaintiffs similarly offer no persuasive defense of the district court's refusal to require plaintiffs to show that they can prove with a common method the amount of damages for *each* class member. This, too, is not merely an issue of critiques of empirical methodology, but of the court's basic misunderstanding of the legal standard that class plaintiffs must meet. The district court did not find that plaintiffs had presented any common methodology for proving *each* class member's damages, and plaintiffs do not deny that they failed to do so. Indeed, it is undisputed that the

methodology plaintiffs proffered estimates only the *total* damages for the entire class.

As the petition explains, the Second Circuit rejected this precise approach in *McLaughlin* v. *American Tobacco Co.*, 522 F.3d 215 (2d Cir. 2008), *abrogated on other grounds by Bridge* v. *Phx. Bond & Indem. Co.*, 553 U.S. 639 (2008). Plaintiffs confine *McLaughlin* to a footnote, but their attempt to distinguish it comes up short. *McLaughlin* addressed not just the propriety of estimating the number of claimants, but also of estimating each individual claimant's damages; the court was concerned both with the risk of "overcompensating *individual* plaintiffs" and with requiring defendants to "overpa[y] in the aggregate." *Id.* at 232. Due process requires that defendants retain "the right to raise individual defenses against each class member," *id.* (citation omitted), but plaintiffs' theory eliminates that right. In fact, plaintiffs do not even bother to address (much less explain) how their damages theory can be implemented consistent with due-process rights, the Seventh Amendment, and the Rules Enabling Act. *See* Pet. 16-17.

Plaintiffs instead offer a handful of pre-*Wal-Mart* decisions, Resp. 17 & n.8, but none bolsters their theory. Their lead case, *Loeb Industries, Inc.* v. *Sumitomo Corp.*, 306 F.3d 469 (7th Cir. 2002), held only that *individual* plaintiffs may approximate their actual damages, *not* that class members may recover an average overcharge across the entire class. *See id.* at 493. Plaintiffs' pre-*Wal-Mart* Supreme Court cases stand only for the unremarkable principle that individual plaintiffs need not always prove damages with mathematical exactitude; and those cases reaf-

firm that juries may not award damages "based on speculation or guesswork." *Bigelow* v. *RKO Radio Pictures*, 327 U.S. 251, 264 (1946); *see also J. Truett Payne Co.* v. *Chrysler Motors Corp.*, 451 U.S. 557, 565-66 (1981). And the only class-action case plaintiffs offer held that aggregate damages are permitted in an antitrust case only where the expert evidence provides "a means to distribute damages to injured class members in the amount of their respective damages." *In re Scrap Metal Antitrust Litig.*, 527 F.3d 517, 534 (6th Cir. 2008) (citation omitted).[3]

Plaintiffs retreat finally to the platitude that individual damages do not *necessarily* defeat certification, Resp. 18, but plaintiffs misstate even that principle. *Comcast* makes clear that certification is improper where there is no class-wide method of determining damages and "individual damage calculations will inevitably overwhelm questions common to the class." 133 S. Ct. at 1433. Plaintiffs distort the corollary stated in *Butler* v. *Sears, Roebuck & Co.*, 727 F.3d 796 (7th Cir. 2013): "*If* the issues of liability are genuinely common issues, *and* the damages of individual class members *can be readily determined*," *then* "the fact that damages are not identical across all class members should not preclude class certification." *Id.* at 801 (emphases added). Plaintiffs have never shown, or even asserted, that individual damages are readily determinable.

Even if an estimate of total class-wide damages were sufficient to support certification, Dwyer's model was deeply flawed. Far from employing proper controls to avoid incorrectly attributing price increases to collusion, Dwyer's regression did

[3] *BCS Services* v. *Heartwood 88, LLC*, 637 F.3d 750, 760 (7th Cir. 2011), did not involve a class action and said nothing about determining class members' average damages.

the opposite: He jerry-rigged the regression to *bias* the model in favor of assigning variability in price to the conspiracy dummy variable instead of other, non-conspiratorial variables that the computer program (left to its own devices) deemed a better fit for the data. Pet. 18.

That distortion sends Dwyer's regression into a head-on collision with *Comcast* because it caused the model to measure damages totally disconnected from plaintiffs' theory of unlawful conduct. Without Dwyer's manipulation, his program would have *rejected* his conspiracy variable as an explanation for price increases of finished products. Pet. 18. Thus, in stark contrast to *In re VHS of Michigan, Inc.*, __ F. App'x __, 2015 WL 424486 (6th Cir. Feb. 3, 2015)—where there was "no chance" that the expert's model would mistakenly count as damages effects that did not stem from the alleged antitrust violations, *id.* at *2—here it is certain that Dwyer *did* count as damages price increases his own methodology shows did not result from the supposed conspiracy. That is precisely the kind of mismatch between liability and damages theories that *Comcast* squarely forbids. 133 S. Ct. at 1433-35.

C. The District Court Erred By Certifying A Class Based On Expert Evidence Without Scrutinizing That Evidence At A Hearing.

Plaintiffs' heavy reliance on the district court's uncritical acceptance of their purported expert evidence is especially misplaced because the court below failed to scrutinize that evidence and make a definitive determination of its reliability, in direct contravention of this Court's case law. Pet. 13-15, 18. Plaintiffs do not dispute that a district court must "conclusively rule on any challenge to the expert's … submissions prior to ruling on a class certification motion" whenever "an

expert's report or testimony is critical to class certification." *Am. Honda Motor Co.* v. *Allen*, 600 F.3d 813, 815-16 (7th Cir. 2010). The district court here acknowledged that "[e]xpert reports in this case are indeed critical to class certification." A5. Yet it failed to rule conclusively on the reliability of plaintiffs' experts' submissions. Indeed, it refused even to conduct an evidentiary hearing, A5-7, which this Court has recognized is frequently necessary to test the reliability of expert evidence. *See West* v. *Prudential Sec., Inc.*, 282 F.3d 935, 938 (7th Cir. 2002).[4]

Plaintiffs respond that "Defendants are complaining of self-inflicted wounds based on their own failure to raise *Daubert* or Rule 702." Resp. 15. But, as *Comcast* shows, a formal motion to exclude the expert under *Daubert* is not necessary for a defendant to attack the purported expertise as it pertains to class certification. *Comcast*, 133 S. Ct. at 1431 n.4. Plaintiffs also disregard the Third Circuit's recent decision in *In re Blood Reagents Antitrust Litigation*, __ F.3d __, 2015 WL 1543101 (3d Cir. Apr. 8, 2015), cited in defendants' petition, which directly contradicts their position. *See id.* at *4 & n.9. Relying on (*inter alia*) *this* Court's decision in *American Honda*, *Blood Reagents* held that a court may not certify a class based on the expert's methodologies and testimony "unless the plaintiff also demonstrates, and the trial court finds, that the expert testimony satisfies the standard set out in *Daubert*." *Id.* at *3-*4 & n.8. The Third Circuit flatly rejected the plaintiffs' claim

[4] This Court has made clear that "[a] district judge may not duck hard questions by observing that each side has some support, or that considerations relevant to class certification also may affect the decision on the merits." *West*, 282 F.3d at 938. Instead, "[t]ough questions must be faced and squarely decided, if necessary by holding evidentiary hearings and choosing between competing perspectives." *Id.*

that such an inquiry was unnecessary because the defendant had "waived the opportunity to bring a *Daubert* challenge": The defendant there "consistently challenged the reliability of plaintiffs' expert's methodologies and the sufficiency of his testimony to satisfy Rule 23(b)(3)," which triggered the district court's independent duty to assess critically the reliability of that expert evidence before relying on it to certify a class. *Id.* at *4 & n.9. So, too, here, because defendants consistently challenged the reliability and sufficiency of the expert evidence plaintiffs tendered, Rule 23 required the district court to scrutinize that evidence closely, irrespective of how defendants' challenges were styled. *See* Opp. 3-7 & n.2.[5]

III. The District Court's Holding That Myriad Individualized Defenses Do Not Foreclose Superiority Rests On Erroneous Views Of The Law.

Plaintiffs offer no explanation of how a class action could be managed at all in this case—much less provide a superior vehicle—given the undisputed existence of numerous individualized defenses, including releases and other varying contractual provisions that bear directly on class members' claims. *See.* Pet. 18-20. Instead, as with impact and damages, plaintiffs' defense of the district court's conclusion that a class action would be superior amounts to mere recitation of the district court's stated reasons. Those reasons have not improved with repetition.

[5] Plaintiffs also claim that defendants "failed to define the requested hearing as being focused on experts—as they do now." Resp. 15. To the contrary, that is precisely why defendants repeatedly requested an evidentiary hearing: to test the opinions of plaintiffs' experts. *See* Defs' Request for Status Conf. 2 (Jan. 16, 2015) ("Conducting an evidentiary hearing is especially important here, where the analyses of the parties' experts are central to class certification."); Defs' Mem. in Support of Mot. to Strike 3 n.2 (Jan. 27, 2015) ("As Defendants previously explained, [holding an evidentiary hearing] is precisely what courts in this District have provided for, and what the Seventh Circuit expects, in large commercial cases where disputed expert testimony is at the heart of class certification.").

As defendants demonstrated, many claims against a number of defendants are cut off or limited by releases entered in the *Linerboard* opt-out litigation. Pet. 18-19. The district court discounted these releases based on an elementary error of law: It conflated the conduct that gave rise to the original complaints with the scope of the settlements that resolved that dispute. A56-58. Whatever occasions a settlement, it is the settlement *itself* that dictates what claims it covers. And here the settlements expressly released potential claims based on the pricing and sale of containerboard *until the effective dates of each of the settlements*. Opp. Ex. 39. Thus while *future* conspiracies would not be released (as the district court points out, A57-58), any conspiratorial conduct prior to the effective date of each settlement was in fact released. And those dates extend into 2008. Pet. 19. Plaintiffs repeat the district court's reasoning without addressing this fatal flaw. Resp. 19-20.

Plaintiffs' response to the plethora of other individualized contractual defenses that bar or limit putative class members' claims, and which a jury would have to attempt to untangle, is similarly insubstantial, and again cribbed from the court below. Plaintiffs parrot the district court's observation that the contractual provisions at issue do not specifically "preclude or otherwise pertain to class actions," Resp. 20, but that contention misses the point: The contractual provisions make a class-wide trial impossible as a practical matter because of the cleavages they cut through the class. Some would complicate the case procedurally—*e.g.*, mandatory arbitration and mediation provisions, jury waivers, and forum-selection clauses. And others would frustrate class adjudication substantively—*e.g.*, provisions that alter limita-

tions periods and default remedies. Opp. 68-69 & Ex. 46. In contrast to *Parko* v. *Shell Oil Co.*, 739 F.3d 1083, 1085 (7th Cir. 2014), where the Court concluded that there was no question liability could be sorted out in a single proceeding, plaintiffs have never explained how class-wide adjudication could possibly work in light of these highly heterogeneous restrictions on particular claims. The only proposal they offer, borrowed from the district court, is to cut affected claimants out of the class *later*. Resp. 20. A far superior solution—and what Rule 23 requires—is to avoid the problem entirely by declining to certify a class in the first place. *See* Fed. R. Civ. P. 23(c)(1), 2003 Advisory Committee's note ("A court that is not satisfied that the requirements of Rule 23 have been met should refuse certification until they have been met.").

CONCLUSION

This Court should grant permission to appeal, set the case for full briefing on the merits and oral argument, and reverse the certification order. At a minimum, the Court should vacate the order and remand for an evidentiary hearing.

Dated: May 1, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on May 1, 2015, an electronic copy of the foregoing Reply In Support of Petition for Permission to Appeal from Order Granting Class Certification was filed with the Clerk of Court for the United States Court of Appeals for the Seventh Circuit using the Clerk's CM/ECF system and was served by the Notice of Docket Activity upon the following registered CM/ECF users:

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