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, Presiding

RESPONSE TO MOTION TO FILE JOINT RULE 23(f) PETITION UNDER TEMPORARY SEAL AND CROSS-MOTION TO FILE RESPONSE IN OPPOSITION UNDER TEMPORARY SEAL

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In response to the motion filed by Defendants-Petitioners ("Defendants") seeking to file their joint Rule 23(f) petition under temporary seal in accordance with Seventh Circuit Internal Operating Procedure ("IOP") 10, Plaintiffs-Respondents ("Plaintiffs") do not object to the unsealing of Judge Leinenweber's March 26, 2015 class certification opinion or the unredacted version of Defendants' petition being filed on this Court's public docket. Because their response in opposition to the joint Rule 23(f) petition cites to and discusses various materials marked confidential under the protective order entered by the district court, Plaintiffs respectfully seek leave to file the response under temporary seal pursuant to IOP 10. Plaintiffs request that the unredacted version remain under seal for 14 days so that Defendants have an opportunity to review and move that the unredacted version (or portions thereof) remain under seal. Plaintiffs do not object to the unredacted version of their response in opposition to the joint Rule 23(f) petition being filed publicly after that 14 day period. In the event that the unredacted version (or portions thereof) remain under seal beyond the 14 day period, Plaintiffs will promptly file a public version with confidential material redacted.

Dated: April 27, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on April 27, 2015, an electronic copy of the foregoing Response to Motion to File Joint Rule 23(f) Petitions Under Temporary Seal and Cross-Motion to File Response in Opposition Under Temporary Seal was filed with the Clerk of Court for the United States Court of Appeals for the Seventh Circuit using the Clerk's electronic case filing system and was also served by electronic mail on the following:

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RESPONSE IN OPPOSITION TO JOINT PETITION FOR PERMISSION TO APPEAL FROM ORDER GRANTING CLASS CERTIFICATION
(Filed Under Seal)

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INTRODUCTION

The district court's decision certifying the class in this horizontal price-fixing case is, in a word, exemplary. It does not require interlocutory review and is entitled to the full deference usually given to class certification decisions. With complete fidelity to Supreme Court and Seventh Circuit precedents, Judge Leinenweber "rigorously analyzed" the large evidentiary record and "seven separate briefs that total more than 300 pages (not including the attached exhibits)." Opinion & Order (Dkt. 871) at 1 ("Op. 1"). Only after painstakingly scrutinizing this entire record, and noting that "the parties agree on the basic facts, and both parties' experts rely upon the same data," did the court determine that the elements for certifying a class under Rule 23(b)(3) had been met.

Defendants make scant reference to the factual record because it is inconvenient to their arguments, and the petition fails completely to meet the Seventh Circuit's guidelines for Rule 23(f) review. It fails on substantive grounds, and the record demonstrates that Plaintiffs' probability of success on the merits is substantial. After rigorously analyzing the factual and economic evidence, the district court properly determined that: (1) impact will be proved (or disproved) through common evidence; (2) Plaintiffs sufficiently estimated aggregate damages to the class based on common evidence; and (3) Plaintiffs satisfied the superiority prong of Rule 23 (b)(3). Defendants challenge Plaintiffs' experts' work but explicitly failed to raise *Daubert* or Rule 702 objections, and their claim that the district court declined to rule on their challenges is utterly baseless. Judge Leinenweber unambiguously recognized the critical nature of the expert testimony to class certification and performed a meticulous examination of the arguments presented by both sides.

In finding common impact, the court critically scrutinized all fact and expert evidence demonstrating Defendants' collusion - including Defendants' coordinated price increases, coordinated supply restrains, and other conduct inconsistent with Defendants' unilateral interest - and found all of the evidence is common to the class as were Defendants' explanations for their

conduct. Next, the court rigorously analyzed the Structure-Conduct-Performance ("SCP") analysis by Plaintiffs' economic expert, Dr. Michael Harris, including Defendants' critique of that methodology. Judge Leinenweber credits Dr. Harris' conclusions, that "'structural characteristics of the industry … are consistent with and would facilitate successful collusion among the Defendants,'" that Defendants' "conduct runs contrary to what independent firms would do when faced with similar market conditions and … is more consistent with collusive behavior than with normal, unilateral activity," and that Defendants' actual economic performance is consistent with collusion. Op. 28-29.

The court also considered the impact analysis by Plaintiffs' econometrician Dr. Mark Dwyer, finding that Defendants' lock-step price increases and announcements were highly correlated with the price index widely used to set prices for Containerboard Products transactions, and determined that "there does not appear to be any other reasonable explanation for that correlation." Op. 36. The court found this correlation to be "strong evidence that Defendants' price increase announcements caused the [price] index to increase," which "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 [price] index in setting prices." Op. 36-37. Like Dr. Harris, Dr. Dwyer's empirical analysis specifically controlled for non-collusive changes in supply as well as demand. Op. 26, 46. Based on this rigorous analysis of Drs. Dwyer's and Harris' opinions, and after considering Defendants' attacks of those opinions, the court concluded that antitrust impact was capable of proof through common evidence.

The district court endured the "pain" of rigorously examining the regression analyses supporting class-wide proof of damages. Judge Leinenweber gave careful consideration to the statistical and economic bases for Dr. Dwyer's choice of explanatory variables, ultimately finding the regression models to be "firmly rooted in sound economic and econometric principles." Op. 53. The court found that 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'" – a question it did not need to resolve in ruling on class certification. *Id.*

Regarding the superiority element of Rule 23(b)(3), the court examined the various settlement releases and contractual provisions cited by Defendants and determined that (1) the individual settlement releases were based on conduct that occurred in 1993-1995 and do not apply here, and (2) the other contractual provisions do not apply to class actions. The court further found that the contractual provisions, if applicable, were not fatal to certification, particularly in light of the court's authority to modify the class at a later point. Op. 55-60.

In sum, Judge Leinenweber conducted a "rigorous analysis" based on a meticulous examination of the entire record, including both parties' expert testimony. Defendants failed to make a *Daubert* challenge in the first instance, fail to appreciate that, as the highly detailed opinion makes clear, an evidentiary hearing would not have affected the outcome, and fail to raise an issue warranting interlocutory review. Because the opinion sufficiently scrutinizes each element of Rule 23 and the district court acted well within its discretion, Plaintiffs request that Defendants' Rule 23(f) petition be summarily denied.

BACKGROUND

I. Statement of Case.

Plaintiffs allege that Defendants conspired to inflate prices of Containerboard Products while simultaneously restraining supply in violation of Section 1 of the Sherman Act, 15 U.S.C. §1. Class Cert. Mem., Dkt. 658 at 16. "Containerboard Products" are linerboard, corrugated medium, containerboard sheets and corrugated containerboard products, including boxes and other containers. *Id*. at 6. They are interchangeable commodities with few (if any) substitutes.[1] *Id*. at 7. Containerboard transactions are pegged to the price of 42 lb. kraft liner as published in Pulp and Paper Week ("PPW"), and prices of corrugated products are in turn tied directly to the PPW price of containerboard. *Id*. at 8-9.

[1] Defendant's argument that Containerboard Products are not sufficiently homogenous has been rejected time and again by numerous courts, specifically in major-price fixing cases against this industry. *See* Class Cert. Reply, Dkt. 826 at 12-13 (listing cases).

The Containerboard Products industry has a lengthy history of antitrust scrutiny. Most recently, petitioning Defendants were alleged to have coordinated supply restrictions to support price increases from 1993-1995. *See In re Linerboard Antitrust Litig.*, MDL 1261, 2008 WL 4461914 (E.D. Pa. Oct. 3, 2008) ("*Linerboard*"). The *Linerboard* case resulted in payments of hundreds of millions of dollars to impacted purchasers, including a certified class. *See id.; In re Linerboard Antitrust Litig.*, 203 F.R.D. 197 (E.D. Pa. Sept. 4, 2001), *aff'd by Winoff Indus. v. Stone Container Corp.*, 305 F.3d 145 (3d Cir. 2002). Stone Container (predecessor of Smurfit-Stone Container Corp.) entered into a restrictive consent decree with the FTC.[2] Since then, Defendants implemented aggressive ESI destruction policies, received training on how to avoid getting caught colluding, and devised policies to methodically destroy records (or never create the records in the first instance) that could later be used against them in class action antitrust litigation. *See* Dkt. 826 at 33-35.

The Containerboard Products market has become increasingly concentrated, causing Defendants' collective market share to grow to approximately 81% during the class period. *See* Dkt. 658 at 11-12. This large collective market share, however, understates Defendants' actual market power because it does not account for numerous additional inter-Defendant linkages and the high degree of inter-Defendant transactions; indeed, Defendants are each other's largest customers, selling and trading high volumes of containerboard among themselves. *See* Dkt. 658 at 11-16; Dkt. 826 at 15-18.

Beginning in at least 2004, Defendants agreed to simultaneously announce and implement identical price increases while restraining containerboard supply by reducing capacity, slowing back production, taking downtime, idling plants, and restricting inventory. *See* Dkt. 658 at 16-17. The conspiracy was facilitated and monitored by direct inter-Defendant communications, in-person meetings under the guise of participating in trade association events,

[2] *See in the Matter of Stone Container Corp.*, FTC File No. 9510006, Agreement Containing Consent Order to Cease and Desist (available at https://www.ftc.gov/sites/default/files/documents/cases/1998/02/9510006.agr_.htm) (last viewed Apr. 20, 2015).

the use of third parties including financial analysts and outside consultants as conduits, inter-Defendant signaling in quarterly earnings calls and other public speeches, monitoring each other's metrics and various other activities. *See* Dkt. 658 at 16-42; Dkt. 826 at 13-35.

II. Procedural History.

Plaintiffs' Consolidated and Amended Complaint was filed on November 10, 2010. Defendants' motion to dismiss pursuant to Rule 12(b) was denied on April 8, 2011, answers were filed on May 2, 2011, and extensive discovery ensued.

After taking dozens of depositions, reviewing millions of pages of documents and analyzing vast amounts of Defendants' transactional data, on June 11, 2014, Plaintiffs moved the district court to certify the following class, subject to certain exclusions:

> 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.

Dkt. 658 at 44.[3] In support of their motion, Plaintiffs submitted a large amount of evidence of coordinated lock-step price increases, coordinated supply reductions, actions against unilateral interest, conspiratorial communications and monitoring. *See* Op. 24-25; Dkt. 658 at 16-43; Dkt. 826 at 15-35. They also submitted expert reports from economist Dr. Michael Harris and econometrician Dr. Mark Dwyer. *See* Dkt. 658. Dr. Harris opined that antitrust impact was capable of proof through common economic evidence, while Dr. Dwyer submitted empirical proof of common impact and an estimate of class-wide damages. *See id.* Defendants deposed Drs. Harris and Dwyer on July 22, 2014 and August 12, 2014, respectively, concerning their class certification opinions.

Defendants opposed the motion, attacking Plaintiffs' experts and submitting reports from their own economists Drs. Dennis Carlton and Janusz Ordover. *See* Dkts. 763, 758, 759. Plaintiffs submitted a reply in support of their motion for class certification with reply expert

[3] This class definition is identical to the settlement class certified by the district court in approving the settlements reached with Packaging Corporation of America ("PCA") and Cascades Canada ULC/Norampac Holdings U.S. Inc. ("Norampac"). *See* Dkts. 634, 734, 864.

reports prepared by Drs. Harris and Dwyer, and a separate rebuttal report from Dr. J. Douglas Zona confirming the reliability of Dr. Dwyer's opinions. Dkt. 826. Defendants moved to strike portions of Dr. Dwyer's reply report and Dr. Zona's report in its entirety on January 27, 2015, which Plaintiffs opposed. Dkts. 846, 853, 861. At no time did Defendants challenge Plaintiffs' experts under Rule 702 or *Daubert*, or otherwise raise admissibility issues, such as challenging the experts' education or qualifications. Rather, Defendants expressly reserved the right to move to exclude the experts under Rule 702 and *Daubert*. *See* Op. 4-5. Plaintiffs also submitted notices of supplemental authority in support of class certification on January 12, 2015, January 30, 2015, and February 18, 2015, to apprise the court of recent relevant legal developments. *See* Dkts. 832, 848, 863. "[T]he parties [] 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." Op. 6.

On March 26, 2015, the district court certified Plaintiffs' proposed class, finding that Plaintiffs had established the required elements for class treatment under Rules 23(a) and 23(b)(3). In that ruling, the court also denied Defendants' motion to strike portions of Dr. Dwyer's reply report, but granted their motion with respect to Dr. Zona's report solely because Plaintiffs did not need the additional report to satisfy Rule 23. Op. 7-13. On April 9, 2015, Defendants filed their joint petition ("JP") under Rule 23(f).

STANDARD OF REVIEW

Interlocutory appeals under Rule 23(f) are generally disfavored and "must be used sparingly lest interlocutory review increase the time and expense required for litigation." *Asher v. Baxter*, 505 F.3d 736, 740-41 (7th Cir. 2007). *See also Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 959 (9th Cir. 2005) (*quoting Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 294 (1st Cir. 2000)) (Rule 23(f) petitions are disfavored because they "are 'disruptive, time-consuming, and expensive,'" and should be granted sparingly). The Seventh Circuit has identified three categories of cases in which interlocutory review would be appropriate: (1) "the denial of class status sounds the death knell of the litigation, because the representative

plaintiff's claim is too small to justify the expense of the litigation"; (2) certifying the class puts "considerable pressure on the defendant to settle, even when the plaintiff's probability of success on the merits is slight"; or (3) the appeal facilitates the development of law. *Blair v. Equifax Check Servs.*, 181 F.3d 832, 834-35 (7th Cir. 1999).

Merely claiming that the "stakes are large," as Defendants have here, is not sufficient to grant a Rule 23(f) petition. "Even if Defendants could prove that they'll be forced to settle unless [the Court] reverse[s] the class certification order, they would have to demonstrate a *significant probability* that the order was erroneous. 'However dramatic the effect of the grant or denial of class status … [in] inducing the defendant to capitulate, if the ruling is impervious to revision there's no point to an interlocutory appeal.'" *Chapman v. Wegener Equities Inc.*, 747 F.3d 489, 491 (7th Cir. 2014) (*quoting Blair*, 181 F.3d at 835) (denying the defendants' Rule 23(f) petition) (emphasis added). *See also In re Johnson*, 760 F.3d 66, 71-76 (D.C. Cir. 2014) (denying defendant's Rule 23(f) petition because, *inter alia*, there was "no facial defect in the district court's reasoning" pertaining to class certification prerequisites, including predominance).

The district court is vested with "broad discretion to determine whether certification of a class action lawsuit is appropriate." *Arreola v. Godinez*, 546 F.3d 788, 794 (7th Cir. 2008). Appellate courts accord the lower court great deference, reversing only when it concludes that the lower court clearly abused its discretion in reaching its class certification decision. *Arreola*, 546 F.3d at 794 (*citing Harriston v. Chicago Tribune Co.*, 992 F.2d 697, 703 (7th Cir. 1993). *See also Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 811 (7th Cir. 2012).[4]

[4] Defendants cite to *Amchem Prods. v. Windsor*, 521 U.S. 591 (1997), for the proposition that the appellate court must "rigorously scrutinize" the district court's application of Rule 23. *See* JP at 7. *Amchem* does not stand for the extrapolated standard Defendants suggest; rather, the pages Defendants cite discuss the role settlement may play under Rule 23 in determining the propriety of class certification. *Amchem*, 521 U.S. at 612-619. Further, *Amchem* recognizes that horizontal price-fixing cases like this one are particularly well-suited for class certification. *Id*. at 625.

DEFENDANTS' PETITION SHOULD BE DENIED

I. Interlocutory Appeal is Not Warranted.

Defendants' Rule 23(f) petition does not demonstrate any probability – let alone a significant probability – that the district court erred in granting class certification. To the contrary, the district court's decision is an exemplary opinion and is well-supported in law and fact, certifying a class after conducting a rigorous analysis of the record before it.

Defendants fail to make the requisite showing under any of the categories applicable to Rule 23(f) petitions. They conflate the first and second categories for review, claiming that the stakes of this case are so high that certifying the class would "sound the death knell" of this litigation. JP at 7. The first category, however, applies to interlocutory reviews sought by *plaintiffs* when a district court *denies* – as opposed to grants – class certification, and is inapplicable here, particularly since, as the district court noted, summary judgment and trial await. *See Blair*, 181 F.3d at 834, *supra*.

Nor have Defendants demonstrated that the "high stakes" of this case would put considerable pressure on them to settle in the first instance and, second, they cannot surmount the copious evidence in the record demonstrating that Plaintiffs' probability of success on the merits is far from slight. The estimated damages in this case are not so large relative to Defendants' revenues and the amount of commerce at issue as to create any unreasonable "hydraulic pressure" to settle. *See* Op. 47. *See also Chapman*, 747 F.3d at 491 (denying Rule 23(f) petition and explaining that "the defendants haven't told us what their assets are – just that the corporate defendant is 'a small family owned business.' It is no doubt small in relation to such family owned business as Koch Industries or Walmart, but maybe not so small that a contingent liability of $15 million would force it to settle...."). Potential damages in this case are large only because Defendants' sales of Containerboard Products are large. Publicly available financial data indicates that the petitioning Defendants have combined annual revenues of almost $50 billion, whereas Plaintiffs' estimated damages are less than $4 billion (the total overcharges after paying approximately $123.31 billion for Containerboard Products during the class period).

See Op. 47. Further, the court based its opinion on a record that is replete with evidence of Defendants' collusion. *See* Dkt. 658 at Section II.E.; Dkt. 826 at Section II. The court recognized that 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." Op. 24-25.

The third category for interlocutory review is also inapplicable. The district court's opinion is far from controversial and the court did an exemplary job of rigorously analyzing the record, articulating the appropriate standards for class certification, and reaching the conclusion that Plaintiffs satisfied the elements for class certification. Judge Leinenweber carefully considered each element under Rules 23(a) and (b)(3), and articulated a well-reasoned ruling based upon the established law. Defendants do not identify an area of law in need of clarification, but rather seek to reargue the facts of an opinion that they simply do not like.

II. The Court Applied the Proper Legal Standard for Finding Common Impact.

Class certification under Rule 23(b)(3) is proper where questions of law or fact common to class members predominate over individual questions to class members. *Messner*, 669 F.3d at 814. Applying this standard, the district court concluded that Plaintiffs showed that antitrust impact and damages, two aspects of predominance, are capable of proof through common evidence. Op. 17-55.

Defendants now urge this Court to review the lower court's decision finding common impact, arguing that: (1) Plaintiffs did not conclusively prove antitrust impact and demonstrate that each class member was injured by the conspiracy and (2) Plaintiffs did not demonstrate antitrust impact through a "but for" analysis. JP at 8-13. In reality, Defendants are asking the Court to review the district court's ruling because it granted class certification without an evidentiary hearing. *Id*. 13-15. These arguments ignore the fact that the district court's well-reasoned decision is based upon evidence in the record demonstrating that antitrust impact is common to the class, that Defendants' proposed standard "sets the hurdle too high," and that holding an evidentiary hearing would not aid the Court in its analysis.

With respect to Defendants' first attack on common impact, although framed as a legal question, Defendants are in truth asking this Court to review the facts supporting antitrust impact in hopes that it will reach a different conclusion. *See id*. at 9. In doing so, Defendants ignore the district court's detailed findings on antitrust impact and its careful review of evidence common to the class, including (1) Defendants' many statements that supply restrictions caused higher prices; (2) market structure evidence; (3) pricing data; and (4) econometric evidence. *See* Dkt. 826 at 36; Op. 24-25. Plaintiffs submitted a "large amount" of evidence supporting common impact, such as coordinated lock-step price increases, coordinated supply reductions, and memoranda, phone calls, and trade association meetings where Defendants' communicated and monitored the conspiracy, much of which went undisputed. *See* Op. 24-25; Dkt. 658 at 16-42; Dkt. 826 at 15-35.

Plaintiffs' economic evidence came from Dr. Harris' expert written opinion and related deposition testimony, explaining that the structure of Defendants' industry renders it susceptible to collusion, that their conduct is explained economically only by collusion, and that the economic performance of the industry is indicative of collusion. *See* Op. 24-29; Dkt. 658 at 52-57; Dkt. 826 at 40-43. The SCP analysis conducted by Dr. Harris has been relied on by several courts in certifying a class. *See* Op. 32. Plaintiffs also submitted expert testimony from both Dr. Harris and Dr. Dwyer establishing that all or nearly all class members were impacted by Defendants' lock-step price increases. *See* Op. 24; Dkt. 658 at 52-57; Dkt. 826 at 40-46. Dr. Dwyer compared containerboard prices paid by class members both before and after Defendants' price increases, using both the PPW Index as well as actual sales transaction data. Dkt. 658 at 55-56. He employed a number of empirical studies, all of which support his opinion that if Plaintiffs can prove collusion, then all or nearly all class members were impacted by Defendants' price increases. Op. 33-37; Dkt. 658 at 54-57; Dkt. 826 at 43-46.

Only after considering all of this evidence, and Defendants' responses, did the district court conclude that Plaintiffs had satisfied their burden for impact. Judge Leinenweber reasoned that each class member, if forced to proceed on an individualized basis, would be relying on this

same evidence at trial to prove antitrust impact, concluding that "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." Op. 38. With respect to the statistically significant linkage between Defendants' price increases and movement in the PPW, the district court found that "there does not appear to be any other reasonable explanation" for that strong correlation since "the source of the PPW index is known; the index represents actual prices purchasers paid following Defendants' price increase announcements" *(id.* at 36); the "evidence indicat[es] 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." *Id.* at 34; Dkt. 658 at 54-57; Dkt. 826 at 43-46. Defendants' price increase announcements caused the PPW index to increase, which 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."[5] Op. 36-37. It did not need to "decide at this stage which evidence to believe [] because regardless of [the parties'] 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." *Id.* at 25.

The district court's findings are well-supported by Supreme Court and Seventh Circuit authority. Citing *Messner*, the district court explained that demonstrating common impact at this stage of the proceedings does not require Plaintiffs to conclusively prove antitrust impact for

[5] Defendants repeatedly claim that Dr. Harris conceded that price increases were attributable at least in part to "supply and demand factors" rather than collusion. JP at 9-10. But they fail to acknowledge that Dr. Dwyer's regression models – on which Dr. Harris relies – control for supply and demand factors and still show that prices were statistically significantly and systematically elevated above competitive levels during the class period. *See* Op. 26, 46; Dkt. 826 at 42. Defendants' arguments further suggest that, to show impact, Plaintiffs must show that *all* transactions were impacted. Rather, Plaintiffs need only demonstrate that all or nearly class members were impacted with respect to at least *one* transaction during the class period. *See In re Chocolate Confectionary Antitrust Litig.*, 289 F.R.D. 200, 221-22 (M.D. Pa. Dec. 7, 2012).

each and every class member. Rather "Plaintiffs need 'only to demonstrate that … antirust impact is *capable of proof at trial* through evidence that is common to the class rather than individual to its members." *Id.* at 23 (*quoting Messner*, 669 F.3d at 818) (emphasis in original). The focus is therefore "on the evidence necessary to establish antitrust impact, not on whether Plaintiffs have actually proven it." *Id.* As the Supreme Court explained, "Rule 23(b)(3) requires a showing that questions common to the class predominate, not that those questions will be answered, on the merits, in favor of the class opinion." *Amgen Inc. v. Connecticut Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1191 (2013). *See also In re Urethane Antitrust Litig.*, 768 F.3d 1245, 1255-56 (10th Cir. 2014) (the plaintiffs' burden at class certification is to establish that evidence common to the class is capable of proving antitrust impact).[6]

Defendants' second attack on common impact – that Plaintiffs failed to include a "but for" analysis in support of antitrust injury – is also a factual dispute, focusing on the district court's conclusion that the relationship between Defendants' price increases and increases in the PPW Index demonstrates antitrust impact. JP at 11. Defendants ignore the multitude of evidence in the record demonstrating that they rely on the PPW Index to set transaction prices for Containerboard Products and negotiate prices in individual contracts. As shown above, Defendants' own documents and deposition testimony confirm the pervasive use of the PPW Index in determining Containerboard Prices.

The district court, however, did not turn a blind eye to Defendants' attacks on Plaintiffs' proof, but rather carefully scrutinized each aspect. Indeed, 14 pages of the opinion dissect the economic and econometric evidence presented by Plaintiffs' experts and Defendants' related criticisms. Op. 25-39. With respect to the linkage between price increases and the PPW Index, the district court explained that "there is more to the relationship between Defendants' price

[6] Defendants' reliance on *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244 (D.C. Cir. 2013), is misplaced. Aside from the case being factually distinguishable, the *Rail Freight* court recognized that, although plaintiffs must demonstrate the ability to prove that class members were injured through common evidence, "[t]hat is not to say that the plaintiffs must be prepared at the certification stage to demonstrate through common evidence the precise amount of damages incurred by each class member." *Id.* at 252.

increase announcements and the PPW index [sic] than, say, the relationship between a Chicagoan jumping on one foot and not being eaten by a wild lion." *Id*. at 36. As noted above, it then found no "other reasonable explanation" for that correlation, and "strong evidence" that the Defendants' price increase announcements in turn caused the PPW Index to increase constituted "strong evidence" that all or nearly all class members were impacted. *Id*. Defendants' arguments to the contrary "miss the mark" because, *inter alia*, Plaintiffs' evidence is sufficient to allow a fact-finder to infer that, even for negotiated prices, the starting point for 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." *Id*. at 37 (*quoting In re Urethane Antitrust Litig*., 768 F.3d at 1254). Only after considering *all* of this evidence – the documents, the testimony, and the analytical – did the district court determine that "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." Op. 38.

The district court's conclusion that Plaintiffs were not required to also include a "but for" analysis is well-grounded. Citing *In re EPDM Antitrust Litig*., 256 F.R.D. 82, 88-89 (D. Conn 2009) ("*EPDM*"), Judge Leinenweber explained that a "but-for" comparison was not necessary here because Plaintiffs do not rely solely on their econometric damages model for their impact proof. Op. 23. Rather, "'where other methods of common proof exists 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 [sic] motion for class certification.'" *Id.* at 21 (*quoting EPDM*, 256 F.R.D. at 88). Relying again on *EPDM* (and quoting *In re NASDAQ Market-Makers Antitrust Litig*., 169 F.R.D. 493, 523 (S.D.N.Y. 1996), the district court continued:

> 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.

Op. 21. Moreover, Defendants ignore that, in his damages analysis, Dr. Dwyer did in fact specify regression models that were predicated on a but-for analysis, all of which showed that the prices actually charged by Defendants for Containerboard Products were systematically higher than what prices would have been *but for* their collusion. Op. 44-47. These multiple regression damages models, together with Dr. Dwyer's other statistical pricing analyses, provide strong support for his opinion that all or nearly all class members were impacted by Defendants' collusion.

Defendants' last attack on common impact – that the district court could not have rigorously scrutinized the record without an evidentiary hearing – is without merit. *See* JP at 13-15. As the district court stated, "the parties have submitted an avalanche of briefing and opposing expert reports that set forth the parties' positions on the issues" [Op. 6], and Defendants deposed Plaintiffs' experts (even before submitting their own expert reports), all of which begs the question – what more could be accomplished at an evidentiary hearing? In considering Defendants' motion to strike, Judge Leinenweber even rigorously analyzed what constituted proper expert rebuttal testimony responsive to Defendants' experts' criticisms (as opposed to new and alternative expert testimony) and found that Dr. Dwyer "does not abandon his prior methods or conclusions; rather, he conducted 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," citing *Sloan Valve Co. v. Zurn Indus., Inc.*, No. 10 C 204, 2013 WL 314349 (N.D. Ill. June 19, 2013).[7] Op. 11-12. Relying on Seventh Circuit law, the district court explained:

> 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

[7] Defendants also complain that they were unable to cross-examine Dr. Dwyer on his rebuttal report. They neglect to inform this Court that their objections were raised in their motion to strike portions of his reply report, which were duly considered and rejected by the district court. *See* Op. 7-12.

> whether Plaintiffs have proven each of Rule 23's elements by a preponderance of the evidence.

Id. at 4.

There is no requirement that evidentiary hearings must be held to rule on class certification. *See id*. at 6. Although Defendants argue that the district court could not have determined the reliability of Plaintiffs' experts' methodologies without a full-blown hearing, they neglect to inform this Court that (1) the district court conducted a lengthy and in-depth analysis of both Plaintiffs' experts' methodologies before finding that each supports the predominance element; (2) they did not challenge either expert under Rule 702 or *Daubert* [*see id.* at 5]; and (3) they failed to define the requested hearing as being focused on experts – as they do now. In other words, Defendants did not bring a *Daubert* or Rule 702 motion but now complain that the district court did not conduct an evidentiary hearing – in other words, a *Daubert*/702 hearing. Moreover, Defendants' claim that the district court declined to rule on their challenges is a gross misstatement. *See* JP at 5. As the opinion reveals, the district court rigorously scrutinized Plaintiffs' experts' opinions and carefully considered – and rejected – Defendants' challenges. The court refrained from ruling on *admissibility* issues because Defendants did not raise any of those objections, reserving for themselves the right to do so at a later point. Op. 5. Indeed, Defendants are complaining of self-inflicted wounds based on their own failure to raise *Daubert* or Rule 702. In the district court's own words, "an evidentiary hearing would not add much to the Court's analysis." Op. 6. *See also In re Electronic Books Antitrust Litig.*, No. 11 MD 2293, 2014 U.S. Dist. LEXIS 42537, at *95-96 (S.D.N.Y. Mar. 28, 2014) (determining the reliability of experts' methodology at the class certification stage "does not necessarily require that a separate hearing be held in order to do so.") Nothing that the district court did and none of the conclusions that it reached constitute an abuse of discretion to necessitate interlocutory review of its opinion.

III. The Court Applied the Proper Legal Standard in Determining that Plaintiffs Sufficiently Demonstrated Class-Wide Damages.

Defendants' attack on class-wide damages, arguing that Plaintiffs did not provide a reliable, common method to prove damages, again largely ignores the record. *See* JP at 15-18. Plaintiffs relied on Dr. Dwyer's expert opinion to demonstrate that damages could be estimated on a class-wide basis, using evidence common to the class, and the district court carefully scrutinized each aspect of that opinion. *See* Dkt. 826 at 49; Op. 39-55. More precisely, Dr. Dwyer:

- Specified several reduced form multiple regression models to estimate aggregate damages on a class-wide basis using evidence common to the class, including Defendants' transactional data and estimated but-for prices during the class period for both intermediate and final containerboard products;
- Explained that all of his regression models showed substantial positive and statistically significant overcharges during the class period;
- Calculated aggregate damages by summing up the differences between the estimated but-for prices and the actual prices paid by class members, estimating aggregate damages to the class of approximately $3.8 billion; and
- Carefully considered and responded to each of Defendants' criticisms of his findings, explaining why his model is reliable, showing that Defendants' experts' characterization of economic literature discrediting his technique is incorrect, and explaining that Defendants' experts' proffered models are unspecified, incorrect and ultimately unreliable.

Dkt. 826 at 49.

In an opinion that defines what "rigorous analysis" means, the district court conducted a step-by-step inquiry into each aspect of Dr. Dwyer's damages model and the several attacks levied by Defendants. *See* Op. 39-55. It certainly did not "simply accept Dr. Dwyer's report simply because it appears to do a multiple regression analysis. Rather, 'as painful as it may be' [citations] the Court … rigorously screen[ed] expert evidence … to ensure that the damages model only seeks to prove damages that flow from the harm alleged." *Id.* at 43 (*citing Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1435 (2013)). The district court then proceeded to closely examine Dr. Dwyer's regression analyses, examining the variables he selected, his reasoning for selecting those variables, and the statistical techniques used for model selection– all of which

Defendants completely disregard – until finally concluding that the methodology "appears to be firmly rooted in sound economic and econometric principles." Op. 53. Accepting Dr. Dwyer's methodology for purposes of class certification, the district court found that Plaintiffs had produced a reliable method for measuring class-wide damages based on common proof, and that individual damages issues do not threaten to overwhelm the litigation. Op. 53-55. The court further found that Defendants' experts' criticisms were really attacking "the merits of whether the price of Containerboard Products 'increased disproportionately to the cost of inputs as a result of a conspiracy to raise/maintain prices, or instead resulted from a non-collusive behavior.' … This is a merits question that the Court does not need to resolve in order to decide whether to certify the class." Op. 53 (*quoting EPDM*, 256 F.R.D. at 98).

Ever unsatisfied, Defendants contend that the district court erred in finding that (1) Plaintiffs demonstrated damages on a class-wide basis and (2) Plaintiffs' damages model is linked to the theory of liability. JP at 15. Defendants argue that Plaintiffs' use of averages to demonstrate class-wide damages would create individualized issues and defeat predominance. *Id*. at 15-16. The district court considered and rejected this argument, based on the law of this Circuit. Citing *Loeb Indus., Inc. v. Sumitomo Corp.*, 306 F.3d 469, 493 (7th Cir. 2002), the court explained that "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.'" Op. 53-54. This reasoning is supported by Section 4 of the Clayton Act [15 U.S.C. §15d] and a long line of cases;[8] Defendants' contention that using averages to approximate damages would impede on their substantive rights is incorrect.[9]

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[8] *See, e.g., J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 565-66 (1981); *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 264 (1946) (injury can be shown with proof of price change not attributable to competitive forces); *In re Scrap Metal Antitrust Litig.*, 527 F.3d 517, 532-34 (6th Cir. 2008) (approving aggregate proof of class overcharge); *see generally BCS Servs.v. Heartwood 88 LLC*, 637 F.3d 750, 760 (7th Cir. 2011) (crediting statistical evidence).

[9] *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215 (2d Cir. 2008), cited by Defendants, is inapposite here. The distribution method in *McLaughlin* first required an initial estimate of the percentage of class

Defendants ignore that, under Seventh Circuit law, individualized damages issues alone would not defeat class certification particularly where, as here, common issues predominate the liability and impact elements of class certification. Op. 54 (*citing Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 801 (7th Cir. 2013)). The Supreme Court's decision in *Comcast* did not change this well-established rule. *See* Op. 40. As the First Circuit recently explained, the presence of individual damages is "rarely determinative" at class certification, and where "'common questions predominate regarding liability, then courts generally find the predominance requirement to be satisfied even if individual damages issues remain.'" *In re Nexium Antitrust Litig.*, 777 F.3d 9, 21 (1st Cir. 2015) (*quoting Smilow*, 323 F.3d at 40, and *citing* Newberg on Class Actions §4:54 (5th ed. 2013) ("It is a 'black letter rule … that individual damage calculations generally do not defeat a finding that common issues predominate…'")).

Seeking to expand *Comcast* well beyond its holding, Defendants next claim that the damages model in this case is not properly linked to Plaintiffs' theory of liability. JP at 17-18. The district court properly applied *Comcast* as interpreted by the Seventh Circuit, rejecting Defendants' expansive interpretation. *Comcast* was concerned with a damages methodology that measured the harm resulting from four theories of liability, three of which had been rejected. Op. 40-41. Because the remaining damages model did not "even attempt" to measure only those damages attributable to the remaining liability theory, the class "could not get anywhere." *Id.* at 41. *Comcast* is inapplicable here since Plaintiffs have presented a single measure of damages that directly correlates to their single theory of liability and harm. *See id.* at 47. *See also Butler*, 727 F.3d at 799; *In re VHS of Michigan, Inc.*, No 14-0107, 2015 WL 424486, *2 (6th Cir. Feb. 3, 2015) (where there is no chance of aggregated damages being attributed to rejected theories of liability, *Comcast* does not serve to preclude class certification). Defendants also urge this Court

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members defrauded, which did not accurately reflect the number of plaintiffs actually injured, resulting in a damages figure that bore little relationship to the amount of economic harm the defendants caused. *Id.* at 231. In contrast, and as discussed above, the damages estimate here is directly linked to Defendants' price fixing, the actual prices paid by class members, and the substantial amount of commerce impacted.

to review Dr. Dwyer's model and variable choice – factual issues which, as discussed above, the district court carefully considered and found to be reliable. *See* Op. 39-55. Indeed, the court concluded that Defendants' attacks on Dr. Dwyer's methodology – criticizing him for using a regression to select independent variables for his damages model on the one hand, and then criticizing him for using economic judgment to select the conspiracy and inflation variables on the other – are not only inconsistent, but are jury questions concerning the weight and probative value of his testimony. *See id.* at 52-53. The district court was well within its discretion to accept the damages model proposed by Plaintiffs.

IV. The District Court Applied the Proper Legal Standard in Determining Superiority.

Defendants erroneously claim that the lower court "brushed aside" issues raised by certain settlement releases and contractual provisions that they assert defeats superiority. JP at 18. To the contrary, the district court considered Defendants' arguments and properly dismissed them. *See* Op. 55-60. Citing the Seventh Circuit's opinion in *Butler*, the court explained that a class action is the superior method for adjudicating the class's claims where, as here, the plaintiffs have demonstrated that "overarching liability and impact issues are common to the class and can 'be resolved in one stroke.'" *Id.* at 55 (*quoting Butler*, 727 F.3d at 801).

With respect to the purported settlement releases, Defendants in essence claim that certain releases entered into in conjunction with the *Linerboard* settlements[10] preclude class members from asserting their claims here. *Linerboard* concerned the 1993-95 time period; but "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). As the district court explained, "[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." Op. 57. Plaintiffs' claims here are not based on Defendants' prior conduct in

[10] *See supra*, p. 4.

Linerboard, but rather are based on the newly formed conspiracy developed in the wake of *Linerboard* using the knowledge gained in that case. To grant any credence to Defendants' theory would be to hold that "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." *Id.* at 57.

Defendants further claim that the existence of certain contractual provisions will create individualized issues that render the class "utterly unmanageable." JP at 19-20. This argument ignores the district court's express determination that none of the contractual provisions cited by Defendants preclude or otherwise pertain to class actions. Op. 58. Further, and the district court explained, including members who may not have valid claims in a class is not fatal to class certification. *Id*. at 59. According to Judge Posner, "[h]ow many (if any) class members have a valid claim is the issue to be determined *after* the class is certified." *Parko v. Shell Oil Co.*, 739 F.3d 1083, 1085 (7th Cir. 2013). Finally, Defendants' petition disregards the district court's authority under Rule 23(c)(1)(c) to modify the class and determine the enforceability of the contractual provisions at a later point in the litigation. *See* Op. 59. At the very least, forcing Defendants to determine which specific class members are subject to potentially disqualifying contractual provisions at a later point in the proceedings does not constitute an abuse of discretion.

CONCLUSION

Based on the forgoing, Plaintiffs respectfully request that the Court summarily deny Defendants' petition for interlocutory review of the district court's Order granting class certification.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on April 27, 2015, an electronic copy of the foregoing Response in Opposition to Joint 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 electronic case filing system and was also served by electronic mail on the following:

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