No. 16-841

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

RESPONDENT ROCKTENN CP, LLC'S BRIEF IN SUPPORT OF CERTIORARI

JAMES F. HERBISON
MICHAEL MAYER
KEVIN WOLFF
TYLER G. JOHANNES
WINSTON & STRAWN LLP
35 West Wacker Drive
Chicago, IL 60601
(312) 558-5600

ELIZABETH P. PAPEZ
Counsel of Record
STEFFEN N. JOHNSON
WINSTON & STRAWN LLP
1700 K Street, N.W.
Washington, DC 20006
(202) 282-5678
epapez@winston.com

Counsel for Respondent RockTenn CP, LLC

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).

RULE 29.6 STATEMENT

RockTenn CP, LLC, formerly known as Smurfit-Stone Container Corporation and now known as WestRock CP, LLC, states that it is wholly owned by WestRock RKT Company, which is wholly owned by WestRock Company, a publicly held company. No other publicly held corporation owns 10% or more of the stock of RockTenn CP, LLC or its parent companies.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

FEDERAL STATUTES

RULES

RESPONDENT ROCKTENN CP, LLC'S BRIEF IN SUPPORT OF CERTIORARI

Respondent RockTenn CP, LLC—one of the defendants-appellants in the courts below—respectfully submits this brief in support of the petition of International Paper Company, et al. for a writ of certiorari.[1]

INTRODUCTION

RockTenn is one of several containerboard manufacturers accused of conspiring to manipulate prices that a diverse group of purchasers paid for a vast array of containerboard and related products from February 2004 to November 2010. As outlined in the petition and Respondent Georgia-Pacific's brief in support, the Seventh Circuit's opinion affirming certification of this sweeping class—which seeks some $11 billion in antitrust damages—departs from this Court's precedents and deepens several entrenched circuit splits. Although review is warranted for these reasons alone, the opinion's treatment of the class claims against RockTenn makes this case a particularly strong vehicle for addressing the questions presented.

RockTenn was discharged from bankruptcy just four months before the end of the class period. Accordingly, plaintiffs and both lower courts agreed that the putative class claims in this case require proof of antitrust violations both before and after RockTenn's discharge from bankruptcy.

---

[1] Pursuant to Rule 12.6, RockTenn timely notified counsel of record for all other parties on January 23, 2017, of its intention to file a brief supporting the petition.

This undisputed fact is critical because it defines the liability claims that plaintiffs sought to certify, and thus the elements that must be capable of common proof for plaintiffs to proceed as a class. The reason Rule 23 proof must track plaintiffs' liability case is simple: class actions are a procedural expedient that can be used to streamline litigation of a liability claim, but not to alter its substance or scope. This principle is rooted in due process, embodied in the Rules Enabling Act, and reflected in this Court's observation in antitrust actions that "at the class-certification stage (as at trial), any model supporting a plaintiff's damages case must be consistent with its liability case, particularly with respect to the alleged anticompetitive effect of the violation." *Comcast Corp*. v. *Behrend*, 133 S. Ct. 1426, 1433 (2013). Review is warranted because the opinion below departs from these controlling principles at every turn, setting a dangerous precedent that threatens ruinous liability under Rule 23 that cannot be reconciled with this Court's precedents or defendants' procedural and substantive rights.

As the petition explains (at 12-20), this departure began when the Seventh Circuit presumed that certain price index changes and mill closures were caused by alleged collusion, and continued with the court's presumption that plaintiffs could identify a common method of proving that this supposed collusion caused antitrust injury and damages to all or most members of the highly diverse purchaser class. Pet. App. 16a-17a. But the grounds for review do not stop there.

The court's presumption that all elements of plaintiffs' claims were capable of classwide proof, *ibid*., rested on supposedly common proof of antitrust impact

that occurred *before* RockTenn's discharge from bankruptcy. This undisputed fact alone should have ended the certification inquiry, because Rule 23 requires a showing of classwide proof "consistent with [plaintiffs'] liability case," *Comcast*, 133 S. Ct. at 1433, which plaintiffs here concede requires common evidence of *post-discharge* antitrust offenses by RockTenn that plaintiffs' Rule 23 proffer did not purport to address.[2]

Instead of acknowledging this and vacating the certification, the Seventh Circuit cemented its departure from the body of precedent addressed in the petition by applying yet another presumption: namely, that a single post-discharge price announcement by RockTenn would allow plaintiffs to bootstrap their way out of proving antitrust impact and damages in the post-discharge portion of the class period. Pet. App. 21a. In so doing, the court affirmed certification of a class that is *not* "consistent with" plaintiffs' liability case, in contravention of *Comcast* and a host of other precedents. The consequences of this ruling are grave for all defendants, but particularly for RockTenn, which must now litigate in the aggregate antitrust impact and damages defenses that the Sherman Act *and* the Bankruptcy Code entitle it to assert against individual class members.

In short, the undisputed facts regarding the class claims against RockTenn show that, in affirming certification based on a cascade of presumptions rather

---

[2] This undisputed approach to liability balances bankruptcy protections with antitrust conspiracy law by respecting the Code's release of liability for *pre*-discharge conduct, while allowing liability for *post*-discharge conduct that satisfies all elements of an antitrust violation. See Part I *infra*.

than Rule 23 evidence "consistent with" plaintiffs' theory of liability, *Comcast*, 133 S. Ct. at 1433, the Seventh Circuit abridged defendants' substantive and procedural rights in precisely the manner prohibited by precedents from this Court and other circuits, as well as controlling due process principles and multiple federal statutes. This Court's review is urgently needed.

ARGUMENT

I. THE SEVENTH CIRCUIT'S ANALYSIS OF THE CLAIMS AGAINST ROCKTENN HIGHLIGHTS THE STARK CONFLICT WITH THIS COURT'S RULE 23 PRECEDENTS.

RockTenn's predecessor, Smurfit-Stone Container Corporation, emerged from Chapter 11 bankruptcy on June 30, 2010, just four months before the end of the certified class period. Pet. App. 69a. Plaintiffs conceded that the bankruptcy discharge relieved RockTenn of any liability arising from pre-discharge conduct, and sought to "recover damages from [RockTenn] for post-discharge conduct only." A.10.[3] The lower courts thus acknowledged that RockTenn "is in a different position from the other defendants," because if the "post-discharge conduct does not give rise to an antitrust violation, RockTenn will be absolved of all liability." Pet. App. 20a; see also Pet. App. 73a.

---

[3] This Brief cites documents contained in the Seventh Circuit Appendix ("A."). See *Kleen Products LLC, et al.* v. *International Paper Co., et al.*, Case No. 15-2385 (7th Cir.), Dkt. Nos. 19-3, 19-4, 19-5.

Although the court of appeals recognized that RockTenn "is in a different position from the other defendants," Pet. App. 20a, it disregarded the consequences of this difference in assessing whether plaintiffs' purported Rule 23 evidence was "consistent with [their] liability case." *Comcast*, 133 S. Ct. at 1433.[4]

Class "certification is proper only if 'the trial court is satisfied, after a rigorous analysis,'" that Rule 23's "prerequisites" have been met. *Wal-Mart Stores, Inc.* v. *Dukes*, 564 U.S. 338, 350-351 (2011) (citation omitted). In antitrust class actions, these prerequisites demand a showing that all three elements of a Section 1 violation—collusion, antitrust injury, and damages—are capable of common proof. See, *e.g.*, *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 311-312 (3d Cir. 2008) ("[T]he task for plaintiffs at class certification is to demonstrate that the element of antitrust impact is capable of proof at trial through evidence that is common to the class"); *Bell Atl. Corp.* v. *AT&T Corp.*, 339 F.3d 294, 302 (5th Cir. 2003) ("[W]here fact of damage cannot be established for every class member through proof common to the class, the need to establish antitrust liability for individual class members defeats Rule 23(b)(3) predominance."). And in antitrust actions involving discharged debtors, the rule requires a showing that each of these elements is capable of

---

[4] Contrary to the Seventh Circuit's suggestion, Pet. App. 17a, *Comcast* held that such a showing is necessary, but not sufficient, to satisfy Rule 23. See 133 S. Ct. at 1434 (holding that class plaintiffs must not only present a Rule 23 damages model that accords with their "theory of liability," but also a model that would allow them to prove damages using a method common to the class).

common proof in the period *following* the bankruptcy discharge. See, *e.g., In re Travel Agent Comm'n Antitrust Litig.*, 583 F.3d 896, 902 (6th Cir. 2009) (citing *In re WorldCom, Inc.*, 546 F.3d 211, 221 (2d Cir. 2008)).

The reason such a showing is required for liability (and thus class certification) is that actions against discharged debtors must balance bankruptcy protections with prospective law enforcement. The Bankruptcy Code gives a discharged debtor "a fresh start" by precluding liability for pre-discharge acts, but does not give the debtor "a free pass to continue violating the law." *In re Travel Agent Comm'n*, 583 F.3d at 902 (citing authorities). Accordingly, a "successfully reorganized debtor" may be held "liable for any independent conduct that arises after the confirmation of its bankruptcy plan" if—*but only if*—plaintiffs can prove *all* elements of liability in the post-discharge period. *Ibid.* A plaintiff cannot cheat by showing that the discharged entity committed only some elements of a legal violation post-discharge. *Ibid.* And joint and several liability principles do not change this because, as plaintiffs admit, it is only "*once liability is established*, [that] the general rule of joint and several liability applies." Pet. App. 73a (emphasis added).

The combination of this Court's Rule 23 precedents and these settled principles should have ended the certification inquiry. For the reasons set forth in the petition and Georgia Pacific's brief, the record contains no evidence sufficient to support class certification on plaintiffs' antitrust claims generally. Pet. 12-20. Further, and critically, it is *undisputed* that plaintiffs did not proffer the evidence of post-discharge antitrust impact necessitated by their decision to bring conspiracy claims involving RockTenn. A.145, A.166, A.327,

A.388, A.437. Plaintiffs' expert submissions relied entirely on purported evidence of allegedly collusive mill closures, production downtime, and index price increases that occurred *before* RockTenn's bankruptcy discharge, and contained no economic modeling for the post-discharge period at all. A.145, A.166, A.327, A.388, A.437. As the petition and supporting briefs explain, this evidence did not satisfy Rule 23 even for the pre-discharge period it purported to address. *E.g.,* Pet. 12-20. But the Seventh Circuit's decision to rely on it in the face of RockTenn's bankruptcy discharge is especially troubling, and highlights the need for review based on undisputed record evidence independent of the *Daubert* issues the court of appeals mistakenly invoked in support of its ruling. Pet. App. 3a; see Pet. 24-25.

The ruling below deepens an intractable circuit split over when, if ever, presumptions can take the place of Rule 23 evidence of impact and damages. Pet. 13-17 (antitrust injury), 26-33 (damages). But even the injury and damages presumptions on the Seventh Circuit's side of the split were not enough to affirm certification in the face of RockTenn's bankruptcy discharge. To do that, the court had to indulge yet *another* presumption: namely, that plaintiffs could prove post-discharge antitrust violations against RockTenn by holding it "jointly and severally liable for actions undertaken by its coconspirators before the discharge." Pet. App. 21a (noting that "RockTenn is free to argue at trial that it did not re-join the conspiracy" in order to avoid such liability).

This analysis puts the cart before the horse because, as noted, plaintiffs concede that it is only "*once liability is established*, [that] the general rule of joint

and several liability applies." Pet. App. 73a (emphasis added). This point is crucial, because it illustrates why the circuit court's presumption of joint and several liability amplifies, rather than mitigates, the certification flaws that make this case an exceptionally good vehicle for reviewing the questions presented.

The joint and several liability doctrine—like the Sherman Act and Bankruptcy Code—ties plaintiffs' liability case here to proof of collusion, antitrust impact, and damages in the portion of the class period *following* RockTenn's bankruptcy discharge. This Court's precedents in turn tie plaintiffs' Rule 23 burden to a showing of common proof "consistent with" their liability case. *Comcast*, 133 S. Ct. at 1433. Accordingly, the undisputed fact that plaintiffs did not proffer any evidence (much less classwide evidence) of antitrust impact in the portion of the class period following RockTenn's bankruptcy discharge renders the Seventh Circuit's certification ruling irreconcilable with this Court's holding in *Comcast*. See 133 S. Ct. at 1433 (rejecting certification where plaintiffs' purported Rule 23 evidence failed to "measure damages resulting from the *particular antitrust injury* on which [the defendant's alleged] liability in th[is] action is premised"). And the Seventh Circuit's attempt to avoid this conclusion by relying on a pile of presumptions simply underscores how far and dangerously its opinion departs from this Court's instruction that class plaintiffs must "affirmatively demonstrate compliance with" Rule 23, *Dukes*, 564 U.S. at 350, through "actual, not presumed, conformance" with the Rule's evidentiary requirements, *Gen. Tel. Co. of S.W.* v. *Falcon*, 457 U.S. 147, 160 (1982).

II. THE SEVENTH CIRCUIT'S APPROACH TO CLASS CERTIFICATION ABRIDGES SUBSTANTIVE RIGHTS AND DEFENSES UNDER THE BANKRUPTCY CODE AND OTHER LAWS IN VIOLATION OF THE RULES ENABLING ACT AND DUE PROCESS.

The undisputed facts concerning RockTenn's bankruptcy discharge also make this case an exceptionally strong vehicle for addressing the questions presented because these facts clearly illustrate how the certification "analysis strips defendants of their right to assert 'defenses to individual claims'" in violation of the Rules Enabling Act and due process. *Dukes*, 564 U.S. at 367; see also *Lindsey* v. *Normet*, 405 U.S. 56, 66 (1972) ("Due process requires that there be an opportunity to present every available defense"). The petition addresses these consequences of the Seventh Circuit's opinion with respect to antitrust defenses common to all defendants. Pet. 17-20. But they apply with equal force to RockTenn's rights and defenses under the Bankruptcy Code, which the certification ruling infringes in a manner that highlights the urgent need for this Court's review.

The Bankruptcy Code provides that "confirmation of a plan discharges the debtor from any debt that arose before the date of such confirmation," including antitrust liability. 11 U.S.C. § 1141(d)(1); see also 11 U.S.C. § 101(12); 11 U.S.C. § 101(5)(A) (defining a "debt" to include "any actual or potential liability on a claim").[5] Accordingly, the Seventh Circuit recognized

---

[5] A central concern of the Bankruptcy Code is that "once a debt is discharged, the debtor will not be pressured *in any way* to repay it." *In re Texaco, Inc.*, 182 B.R. 937, 949

that plaintiffs' liability case requires proof of an antitrust violation in the period following RockTenn's discharge from bankruptcy. Pet. App. 21a. But in seeking Rule 23 certification of multi-billion dollar antitrust claims on behalf of a vast and varied class of individual purchasers, the named plaintiffs did not even attempt to show how RockTenn could fully and fairly defend against claims by class members who were, for example, out of the market in the post-discharge period and thus could not have suffered any injury or damages as a result of RockTenn's post-discharge acts. Pet. App. 21a.

As noted, the Seventh Circuit's first response to this fatal flaw in plaintiffs' Rule 23 case was to presume (or more accurately speculate) that "RockTenn might be jointly and severally liable for actions undertaken by its coconspirators before the discharge based on [common evidence of] postdischarge participation" in a price-fixing conspiracy. Pet. App. 21a. There are a host of problems with this assertion, which relies on a single circuit precedent that (among other things) did not involve the antitrust and bankruptcy rights that define plaintiffs' liability and class certification inquires here. But the most important flaw for present purposes is that the Seventh Circuit's invocation of joint and several liability principles does nothing to

---

(Bankr. S.D.N.Y. 1995) (citing H.R. Rep. 595, 95th Cong., 1st Sess. 365-66 (1977); S. Rep. No. 989, 95th Cong., 2nd Sess. 80 (1978) (emphasis added)). In keeping with this principle, courts properly reject efforts to tie post-discharge liability to "past alleged anticompetitive conduct." *In re Travel Agent Comm'n*, 583 F.3d at 902.

address the effect of its certification ruling on RockTenn's statutory and procedural rights.

The Seventh Circuit concluded that its certification order posed "no conflict with bankruptcy law" because "RockTenn is free to argue at trial" that "it did not re-join the [alleged pricing] conspiracy." Pet. App. 21a. That is simply incorrect. Whether RockTenn engaged in conspiratorial pricing is only the first of several elements plaintiffs would have to prove to establish the post-discharge antitrust violation necessary to their liability claims here. *Ibid.*; Pet. App. 73a. Plaintiffs would also have to show that RockTenn's allegedly collusive post-discharge conduct caused post-discharge antitrust injury and damages. See *ibid.*

To be sure, plaintiffs were not required to prove these elements at the Rule 23 stage. But they were required to show that each element was capable of common proof at trial. And their undisputed failure to do so means there is no basis in the record for concluding that a class trial would allow RockTenn fully and fairly to litigate individual rights and defenses available to it under the antitrust and bankruptcy principles the Seventh Circuit purported to acknowledge, but in fact infringed.

In brushing past these concerns, the Seventh Circuit disregarded a fundamental alteration of statutory rights that in this case arises under the Bankruptcy Code and antitrust laws, but could impact any number of statutory or other defenses. By presuming application of the joint and several doctrine at the Rule 23 stage despite plaintiffs' admitted failure to present any evidence (much less classwide evidence) of post-discharge antitrust impact, the court of appeals left RockTenn to raise its bankruptcy and other liability

defenses at a merits trial against a class of tens of thousands of purchasers. Even assuming these defenses could be fairly litigated without individual questions "overwhelm[ing]" common ones, but see, *e.g., Comcast*, 133 S. Ct. at 1433, the certification order abridges RockTenn's defenses in violation of controlling law including the Rules Enabling Act. 28 U.S.C. § 2072(b); *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 613 (1997).

Faced with conspiracy claims by an individual purchaser, RockTenn could defeat liability at or before trial by showing, for example, that the plaintiff did not purchase any products in the post-discharge period, or that its purchases were not at prices inflated by (or causally related to) any purported conduct during that period. See*, e.g., Atl. Richfield Co.* v. *USA Petrol. Co.*, 495 U.S. 328, 344 (1990)*;* 15 U.S.C. § 15(a) (only a person "injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor").

As the petition explains, the court of appeal's certification approach impermissibly obstructs full and fair litigation of these critical individual rights and defenses for all defendants. Pet. 17-20. But the violation is especially egregious as to RockTenn, which has a discharge order that prevents plaintiffs from pursuing class claims against it unless they can show that all three elements of a *post*-discharge antitrust violation (collusion, antitrust impact and damages) are capable of common proof. Because it is undisputed that plaintiffs did not even try to present such proof at the Rule 23 stage, the Seventh Circuit's certification order is irreconcilable not only with this Court's Rule 23 prece-

dents, but also with RockTenn's rights under the antitrust and bankruptcy laws, the Rules Enabling Act, and due process.

As this Court reaffirmed in *Tyson Foods, Inc.* v. *Bouaphakeo*, allowing purportedly "representative proof" to determine claims of class members who are not "similarly situated"—here, for example, a purchaser who bought one containerboard product at an index price before RockTenn's discharge and a purchaser who bought a different containerboard product at a non-index price after discharge—would "violat[e] the Rules Enabling Act by giving plaintiffs and defendants different rights in a class proceeding than they could have asserted in an individual action." 136 S. Ct. 1036, 1045, 1048 (2016); see also *McLaughlin* v. *Am. Tobacco Co.*, 522 F.3d 215, 231 (2d Cir. 2008), abrogated on other grounds by *Bridge* v. *Phx. Bond & Indem. Co.*, 553 U.S. 639 (2008) ("Roughly estimating the gross damages to the class as a whole and only subsequently allowing for the processing of individual claims would inevitably alter defendants' substantive right to pay damages reflective of their actual liability."). Yet that is exactly what the Seventh Circuit did.[6]

---

[6] This concern has long been a focus of this Court's due process jurisprudence. *E.g.*, *Smith* v. *Swormstedt*, 57 U.S. (16 How.) 288, 303 (1853) (where "a few are permitted to sue and defend on behalf of the many," "care must be taken that persons are brought on the record fairly representing the interest or right involved, so that it may be fully and honestly tried," and "the interest of all will be properly protected").

The certification order infringes all of defendants' substantive and due process rights—including and especially RockTenn's rights under the Bankruptcy Code—because it forces class adjudication of liability elements (antirust injury and damages) subject to a host of individualized defenses. As a result of this ruling, RockTenn, which emerged from bankruptcy just four months before the end of the class period (a window during which plaintiffs could have, but did not, proffer Rule 23 evidence of antitrust impact), must either try to settle claims it vigorously disputes or face the "sprawling, costly, and hugely time-consuming" task of a Section 1 merits trial against tens of thousands of purchasers, some (and perhaps many) of whom might not have been entitled to a trial had they sued individually. *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544, 560 n.6 (2007). As this Court has recognized, the mere prospect of such proceedings "will push cost-conscious defendants to settle even anemic cases before reaching [merits] proceedings." *Id.* at 559; *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 350 (2011) ("when damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable"); *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 784 (3d Cir. 1995) ("[C]lass actions create the opportunity for a kind of legalized blackmail.").

Controlling law holds that neither RockTenn nor any other defendant should be put to this choice based on the paper thin "evidence," Pet. App. 20a-21a,[7] and

[7] The mere fact that RockTenn sold containerboard products at prevailing market prices after it emerged from

waterfall of unsupported presumptions (impact, damages, and joint and several liability) that underlie the certification order here.

CONCLUSION

For the foregoing reasons and those set forth in the petition and other briefs in support of certiorari, the petition should be granted.

Respectfully submitted,

JAMES F. HERBISON
MICHAEL MAYER
KEVIN WOLFF
TYLER G. JOHANNES
WINSTON & STRAWN LLP
35 West Wacker Drive
Chicago, IL 60601
(312) 558-5600

ELIZABETH P. PAPEZ
Counsel of Record
STEFFEN N. JOHNSON
WINSTON & STRAWN LLP
1700 K Street, N.W.
Washington, DC 20006
(202) 282-5678
epapez@winston.com

FEBRUARY 2017

---

bankruptcy is entirely consistent with lawful unilateral behavior in a concentrated industry, see, e.g., *In re Text Messaging Antitrust Litig.*, 782 F.3d 867, 874-877 (7th Cir. 2015), and would not support antitrust liability even if the prevailing prices were the result of a pre-discharge conspiracy unless plaintiffs could prove that RockTenn engaged in a post-discharge price conspiracy that resulted in post-discharge antitrust injury and damages. *E.g., In re Travel Agent Comm'n*, 583 F.3d at 902.