No. _____

IN THE

Supreme Court of the United States

_____

SPEEDYPC SOFTWARE,

Petitioner,

v.

ARCHIE BEATON,

Respondent.

_____

On Petition For A Writ of Certiorari
To The United States Court of Appeals
For The Seventh Circuit

_____

PETITION FOR A WRIT OF CERTIORARI

_____

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QUESTIONS PRESENTED

The Seventh Circuit affirmed the district court's granting class certification of a nationwide class for breaches of the implied warranties of fitness for a particular purpose and merchantability, and a subclass of Illinois purchasers under the Illinois consumer fraud statute, arising from Plaintiff's dissatisfaction with Defendant's software. The district court acknowledged that there were numerous issues that had to be decided on an individual basis, but nevertheless held that class certification was appropriate, suggesting that those individual issues can be decided by each class member submitting affidavits and that class members' credibility on those issues can be determined by sampling.

Two questions are presented:

1. Is it proper for a court to certify a class by suggesting that individual issues can be resolved by the submission of affidavits from each individual class member?

2. Does the lower court's suggestion Defendant can challenge the class members' credibility by obtaining the testimony of a representative sample of the class members, and present evidence contradicting statements found in particular affidavits comport with due process?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner, who was Defendant-Appellant below, is SpeedyPC Software ("SpeedyPC"), a trade name for a Canadian corporation, ParetoLogic, Inc. ("ParetoLogic"). No publicly held company has any ownership interest in ParetoLogic.

Respondent, who was Plaintiff-Appellee below, is Archie Beaton ("Beaton"), an individual who resides in Illinois.

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PETITION FOR A WRIT OF CERTIORARI

SpeedyPC respectfully submits this Petition for a Writ of Certiorari.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit (Pet. App. 2a-26a) is reported at 907 F.3d 1018. The opinion of the District Court for the Northern District of Illinois (Pet. App. 27a-51a) is not reported.

STATEMENT OF JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The Seventh Circuit entered its judgment on October 31, 2018. Petitioner timely filed a petition for rehearing and suggestion for rehearing *en banc* on November 14, 2018, which was denied on November 28, 2018.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment to the United States Constitution

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any

person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Rules Enabling Act, 28 U.S.C. § 2072

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

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

Federal Rule of Civil Procedure 23

Rule 23. Class Actions

(a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

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

(1) prosecuting separate actions by or against individual class members would create a risk of:

(A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

(B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members

not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;

(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or

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

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

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

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

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

STATEMENT OF THE CASE

SpeedyPC is in the business of developing and selling innovative computer software to help computer users combat common problems. SpeedyPC has been an accredited business with the Better Business Bureau since 2005, a Microsoft Certified Partner since 2009 and achieved Gold Certified Partner status in September 2012. (ECF 135 p. 8).

The product at issue in this case, "SpeedyPC Pro" ("the Software"), is utility software developed and sold by SpeedyPC that helps diagnose and solve common problems that diminish a computer's performance. The terms and conditions for purchasing and using the Software are set forth in SpeedyPC's End User License Agreement ("EULA"). The EULA expressly provided that the Software was provided "AS IS", and disclaimed any express or implied warranties. The Software was also sold with an unconditional 30-day money back guarantee.

The Software was introduced in 2011 and was well received in the market. There were numerous independent third-party reviews of the Software, all

of which were favorable. (ECF 135 p.9). Speedy also received numerous favorable testimonials from purchasers. (ECF 135 p.10).

Plaintiff Archie Beaton ("Beaton") is an individual who resides in Algonquin, Illinois. After a laptop Beaton used for both business and personal purposes began displaying error codes, Beaton began searching for utility software to fix the problem. He went to a few utility software websites, each of which had him run a scan on the laptop, which he did. Each scan revealed that the laptop had issues. (ECF 135 p.11). With his company's credit card Beaton purchased and downloaded the Software on August 24, 2012. (ECF 135 p.11).

Beaton was unhappy with how the Software performed on the laptop. However, Beaton did not contact SpeedyPC until February 2013 to seek a refund. His request was denied pursuant to the EULA because it was made more than 30 days after the purchase. (ECF 135 p.11).

Beaton later did an Internet search on the Software and was directed to the law firm Edelson PC's ("Edelson") website. That website had been specifically created by Edelson to generate business for the firm by soliciting individuals to contact it for purposes of filing claims against SpeedyPC. Beaton later called Edelson and they encouraged him to file suit. (ECF 114 p.4). Beaton entered into a retainer

agreement with Edelson to pursue claims against SpeedyPC relating to the Software.

Beaton, through Edelson, filed this lawsuit in the United States District Court for the Northern District of Illinois on November 20, 2013 asserting claims for violation of the Illinois Consumer Fraud Act ("ICFA"), fraudulent inducement, breach of contract and unjust enrichment. (ECF 1).[1] Beaton alleged that all of these claims arose under Illinois law. (ECF 1 ¶¶ 59, 86).

Beaton filed a motion for class certification on January 27, 2017 for the approximately 574,000 purchasers of the Software in the United States during the time period between October 2011 and November 2014. (ECF 124-125). For the first time, and despite not being pled in his Complaint, Beaton sought to assert implied warranty claims, and claims under British Columbia law. As for damages, Beaton claimed the difference between the value of the Software as advertised and the value of the Software as actually delivered for each class member. (ECF 125 p.14). SpeedyPC opposed the motion on numerous grounds.

On October 20, 2017 the district court granted Beaton's motion to certify a nationwide class for breaches of the implied warranties of fitness for a

[1] No other lawsuit or claim involving the Software has been filed, other than a previous lawsuit filed by Edelson in California that was dismissed.

particular purpose and merchantability under British Columbia law, and a subclass under the ICFA restricted to Illinois residents. (ECF 201). In its opinion, the district court acknowledged that there were numerous issues that had to be decided on an individual basis, but nevertheless held that certification was appropriate, suggesting that those individual issues can be decided by each class member submitting affidavits. (Pet. App. 21a-24a).

SpeedyPC filed a petition for leave to appeal the certification order. The Seventh Circuit granted that petition on December 15, 2017.

On October 31, 2018, the Seventh Circuit affirmed the district court's ruling. SpeedyPC timely filed a petition for rehearing and suggestion for rehearing en banc on November 14, 2018, which was denied on November 28, 2018. The Seventh Circuit agreed with SpeedyPC that there were numerous substantive individual issues, but nevertheless upheld the district court's ruling, finding that these individual issues could be handled through "streamlined mechanisms" such as affidavits, and that class members' credibility could be determined by the testimony of a representative sample of the class members and, SpeedyPC could present evidence contradicting statements found in particular affidavits.

SpeedyPC now seeks review of the Seventh Circuit's ruling in this Court. The holding involves questions of exceptional importance, specifically to

resolve a conflict in the Circuits as to whether the resolution of individual issues related to liability and damages in class actions may be determined using affidavits and sampling from individual class members. This Court should also utilize this valuable opportunity to determine whether due process permits courts to facilitate class wide adjudication by adopting procedures that relieve individual class members of their burden of proof or those that restrict the rights of defendants to raise and litigate individual defenses to each class member's claim.

REASONS FOR GRANTING THE PETITION

A. The Court Should Resolve a Split in the Circuits as to Whether Individual Issues May be Resolved by Affidavits Submitted by Each Class Member

Class action lawsuits, particularly lawyer-driven suits such as this case, have recently come under increased scrutiny and calls for change due to their abuse and to ensure that legitimate interests of absent class members and defendants are placed ahead of class counsel's interests in securing attorneys' fee awards. *See, e.g.,* H.R. 985 – Fairness in Class Action Litigation Act of 2017. The class action device was designed as an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only. *General Tel. Co. v. Falcon*, 457 U.S. 147, 155 (1982). There is a presumption against class litigation because it is the exception to the constitutional tradition of individual litigation and general rule that lawsuits should be decided on an individual basis. *Comcast v. Behrend*, 569 U.S. 27, 34 (2013); *Brown v. Electrolux Home Products*, 817 F.3d 1225, 1233 (Fed. Cir. 2016).

Rule 23(b)(3) permits class certification only where "questions of law or fact common to the members of the class *predominate over any questions affecting only individual members*" and "a class action is *superior* to other available methods for the fair and efficient adjudication of the controversy."

Fed.R.Civ.P. 23(b)(3) (emphasis added). The predominance element is demanding and requires a court to consider how a trial on the merits would be conducted if a class were certified. *Comcast*, 569 U.S. at 33; *Bell Atl. v. AT&T*, 339 F.3d 294, 302 (5th Cir. 2003). Predominance is not determined by counting the number of common and individual issues, but by weighing their significance. *Mullen v. Treasure Chest Casino*, 186 F.3d 620, 627 (5th Cir. 1999). The aim of the predominance inquiry is to test whether any dissimilarity among the claims of class members can be dealt with in a manner that is not "inefficient or unfair." *In re Asacol Antitrust Litigation*, 907 F.3d 42, 51 (1st Cir. 2018). "Inefficiency can be pictured as a line of thousands of class members waiting their turn to offer testimony and evidence on individual issues." *Id.* "Unfairness is equally well pictured as an attempt to eliminate inefficiency by presuming to do away with the rights a party would customarily have to raise plausible individual challenges on those issues." *Id.* at 52. In assessing such efficiency and fairness, courts have recognized that a class can only be certified when there exist individual issues if the proposed adjudication will be both "administratively feasible" and "protective of defendants' Seventh Amendment and due process rights." *Id.* Predominance is not satisfied where liability and defense determinations are individual and fact-intensive. *Kartman v. State Farm Mut. Ins.*, 634 F.3d 883, 891 (7th Cir. 2011). Even a single individual issue of fact will defeat class certification if it will

predominate at trial. *Brown,* 817 F.3d at 1240. Where "[t]he evaluation of the class members' claims will require individual hearings," class certification is inappropriate. *Thorogood v. Sears, Roebuck & Co.,* 547 F.3d 742, 747 (7th Cir. 2008); *O'Sullivan v. Countrywide Home Loans*, 319 F.3d 732, 738 (5th Cir. 2003).

"Considering whether 'questions of law or fact common to class members predominate' begins... with the elements of the underlying cause of action." *Erica P. John Fund v. Halliburton*, 563 U.S. 804, 809 (2011). When considering predominance courts must also consider potential defenses to those claims, including affirmative defenses. *Myers v. Hertz*, 624 F.3d 537, 551 (2d Cir. 2010); *Clark v. Experian Information*, 233 F.R.D. 508, 512 (N.D. Ill. 2005). In making this determination, practical considerations underlying the presentation of a case at trial should be considered by the court. *Maloney v. Microsoft*, 2012 WL 715856 (D.N.J. Mar. 5, 2012).

The claims certified by the district court in this case contain the following elements:

1. Breach of Implied Warranty of Merchantability (British Columbia Law):

> (1) that a merchant sold goods; (2) which were not "merchantable" at the time of the sale; (3) injury and damages to the plaintiff; (4) which

> were caused proximately or in fact by the defective nature of the goods.

Gordon Campbell v. Metro Operating, 1983 Carswell BC 816. Goods are merchantable when they are fit for use in the manner in which goods of the same quality and general character are ordinarily used. Merchantable quality means the goods must be "of such quality, in such state or condition as it is reasonable to expect, and […] fit for the purpose for which it is *normally purchased* within the market in which it is sold". *Kobelt Mfg. v. Pacific Rim Engineered Products,* 2011 Carswell BC 345, 2011 BCSC 224, ¶ 57. However, personal preferences and sensitivities by the buyer are not determinative. *Id.* Further, the buyer must exclude its own fault as a possible cause of a defect in the goods. *Villeseche v. Total North Communication*, 1997 Carswell Yukon 53. The implied warranty will not be breached by computer products that are saleable in the market and fit for the general purposes that such products serve. *Id.* ¶ 8. The issue of whether a product purchased by a buyer is merchantable is fact intensive. *Id.*

2. Breach of Implied Warranty of Fitness for a Particular Purpose (British Columbia Law):

> (1) the contract for the sale was in the course of the seller's business; (2) the seller had knowledge of the buyer's specific purpose for

> purchasing the goods; (3) the buyer in fact had relied on seller's judgment; and (4) the goods were not fit for the particular purpose for which they were purchased.

Kobelt Mfg., 2011 BCSC 224, ¶¶ 52-60. Whether there was an implied warranty of fitness for purpose is a fact question, and the plaintiff has the burden to show that it made known to the seller the particular purpose it had in mind before it purchased the product. *Id.*

3. Illinois Consumer Fraud Act:

> (1) a deceptive act or unfair practice occurred; (2) the defendant intended for plaintiff to rely on the deception; (3) the deception occurred in the course of conduct involving trade or commerce; (4) the plaintiff sustained actual damages; and (5) the damages were proximately caused by the defendant's deception.

Able Home Health v. Onsite Healthcare, 2017 WL 2152429, *4 (N.D.Ill. May 17, 2017).

The Individual Issues

Beaton sought class certification under Rule 23 (b)(3). In opposing Beaton's motion for class certification, SpeedyPC raised the following individual issues:

(1) Who did the class member purchase the software from?

(2) Was the software purchased primarily for business or personal use?

(3) Did the software work for the class member?

(4) Was the class member deceived into purchasing the software?

(5) What was the value of the software as promised to the class member?

(6) What was the value of the software as delivered to the class member?

(7) Did the class member provide notice of its claim to SpeedyPC?

(8) Is the class member's claim time barred?

(9) Did the class member request a refund?

(10) Was a refund issued to the class member?

(ECF 135 p.21). Further, SpeedyPC raised the fact that all of the certified claims require proof that each class member was injured in fact. The district court acknowledged that many of these issues were in fact individual issues, but found that they do not predominate over the common questions, reasoning that:

> there are streamlined mechanisms available to determine which of the Class members has a viable claim. For example, as all of these questions have straightforward binary answers, the parties could utilize a form affidavit, with accompanying audit procedures, to address these questions.

(ECF 201 p.17).

The Seventh Circuit also acknowledged these individual issues, but nevertheless affirmed this ruling:

> The district court recognized that individualized inquiries could be handled through "streamlined mechanisms" such as affidavits and proper auditing procedures. We agree. Defendants' (sic) due process rights are not harmed by such case management tools. *Mullins v. Direct Digital,* 795 F.3d 654, 667-72 (7th Cir. 2015). SpeedyPC's attempts to distinguish *Mullins* as merely about proving class membership, and not liability, are unavailing. The company makes the obvious point that it can neither cross-examine an affidavit nor depose every class member. But SpeedyPC will still have the opportunity to challenge the class members' credibility. *See Mullins*, 795 F.3d at 671. It can obtain the testimony of a representative sample of the class members and, if necessary, present

> evidence contradicting statements found in particular affidavits.

(Pet. App. 23a).

While no court before the lower courts here have decided that affidavits can be used to determine *substantive* issues on liability or damages in class actions, courts are split on whether class member affidavits may be used to resolve procedural individual issues in class actions, such as identifying class members, which is known as the ascertainability requirement in class actions. Some Circuits have rejected such attempts, finding them to be improper. *See, e.g., Asacol*, 907 F.3d at 42-57 (rejecting use of affidavits and discussing split in the Circuits on the issue); *Karhu v. Vital Pharmaceuticals*, 621 Fed.Appx. 945 (11th Cir. 2015) (court rejected affidavit-based method for class members to identify themselves); *Carrera v. Bayer,* 727 F.3d 300, 304-307 (3d Cir. 2013) (remanding an order certifying a class of all purchasers of a weight-loss supplement where documentary proof of purchase was "unlikely" and noting that the method of ascertaining whether someone is in the class must be "administratively feasible" and that affidavits of purchase are not sufficient); *Marcus v. BMW of North America*, 687 F.3d 583, 594 (3d Cir. 2012) (remanding a class certification order on the grounds that a class of original purchasers of BMWs with run-flat tires during the class period was not readily ascertainable via a "reliable, administratively feasible" method, and

cautioning against including class members based on mere affidavits that their tires had gone flat); *Newton v. Merrill Lynch, Pierce, Fenner & Smith,* 259 F.3d 154, 192 (3d Cir. 2001) (defendants possess a due process right "to raise individual defenses against each class member"); *Xavier v. Philip Morris USA*, 787 F.Supp.2d 1075, 1090 (N.D. Cal. 2011) ("[t]o accept [affidavits] without the benefit of cross examination" would "not be proper or just."); *Perez v. Metabolife Int'l.,* 218 F.R.D. 262 (S.D. Fla. 2003) (holding class membership could not be determined through affidavits because allowing such uncorroborated and self-serving evidence without giving defendant an opportunity to challenge the class member's evidentiary submissions would implicate defendant's due process rights); *see also* Joseph M. McLaughlin, *McLaughlin on Class Actions* § 8:6 (11th ed. 2014) ("Courts have rejected proposals to employ class member affidavits and sworn questionnaires as substitutes for traditional individualized proofs" because such submissions "are, most importantly, not subject to cross-examination.").

Those courts that have rejected this method have done so on several grounds, including (1) if affidavits were accepted without verification it would deprive the defendant of its due process rights to challenge the claims of each putative class member; (2) requiring or allowing the defendant to contest each affidavit would require a series of mini-trials to determine class membership, which would not be administratively feasible; and (3) such affidavits

violate the Fifth Amendment because under these circumstances the defendant must be allowed the opportunity to cross-examine each individual class member and other witnesses on the class member's behalf, and offer expert testimony about each class member's specific circumstances. *See, e.g., Barnes v. American Tobacco*, 161 F.3d 127, 145-46 (3d Cir. 1998) (by acknowledging the need for individual cross-examination of each plaintiff, plaintiffs were proposing an impossible litigation plan); *Guillory v. Am. Tobacco*, 2001 WL 290603,*9 (N.D.Ill. Mar. 20, 2001) ("if defendants were not able to individually probe into the peculiarities of each class member's case, the result would be that they would be denied the opportunity to prepare a defense."); *Thompson v. Am. Tobacco*, 189 F.R.D. 544, 554 (D. Minn. 1999) ("Plaintiffs assume that the affidavits would constitute conclusive proof of injury. In reality, even if a questionnaire could be used to establish a prima facie evidence of injury, Defendants would be permitted to cross-examine each class members [sic] regarding that alleged injury."); *Hoyte v. Stauffer Chemical*, 2002 WL 31892830, *57 (Fla.App. Nov. 6, 2002) (in personal injury action where former employees were alleging past exposure to dangerous chemicals, defendant would have the right to question each claimant on "his employment and exposure history, his own medical history, and the other personal risk factors.").

Conversely, other Circuits have allowed such affidavits to be used to identify class members. *See,*

e.g., Briseno v. ConAgra Foods, 844 F.3d 1121, 1132 (9th Cir. 2017); *In re Nexium Antitrust Litigation*, 777 F.3d 9 (1st Cir. 2015); *Mullins,* 795 F.3d at 654. Those courts allowing such affidavits have reasoned that there is no due process right to a cost-effective procedure for challenging every individual claim to class membership and that identification of class members will not affect a defendant's liability in every case. *Id.*

SpeedyPC's Petition should be granted to allow this Court to resolve this split in the Circuits.

B. The Decision Below Suggesting Class Member Sampling Creates Additional Conflicts Implicating Rule 23, the Rules Enabling Act and the Due Process Clause

The lower courts' further suggestion that credibility determinations for each class member can be solved through sampling techniques also merits review in this Court. Courts have held that class certification cannot jettison the rules of evidence and procedure, the Fifth or Seventh Amendment, or the dictates of the Rules Enabling Act. *Asacol*, 907 F.3d at 53, *citing* 28 U.S.C. § 2072(b); *Tyson Foods v. Bouaphakeo*, 136 S.Ct. 1036, 1048 (2016) (evidence may not be used in a class action to give "plaintiffs and defendants different rights in a class proceeding than they could have asserted in an individual action"), and a defendant's "right to litigate the issues raised," *U.S. v. Armour & Co.,* 402 U.S. 673, 682

(1971) which is "guaranteed by the Due Process Clause," and includes the right "to present every available defense." *Lindsey v. Normet,* 405 U.S. 56, 66 (1972). The Rules Enabling Act provides that procedural rules may not "abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b). The Rules Enabling Act prohibits courts from eliminating defenses to accommodate the Rule 23 procedure. *See Amchem Products v. Windsor*, 521 U.S. 591, 612-13 (1997). A "class cannot be certified on the premise that [the defendant] will not be entitled to litigate its statutory defenses to individual claims." *Wal-Mart Stores v. Dukes,* 564 U.S. 338, 367 (2011). In this case we have more than a statutory defense at issue; rather, we have challenges to each class member's ability to prove numerous elements of both liability and damages on the certified claims. By certifying the class, this Court should determine if the lower courts improperly subordinated SpeedyPC's due process rights to challenge each class member's claims on an individual basis to Beaton and Edelson's desire to aggregate these claims for their own self interests.

The lower courts' presumption that Beaton can rely on unrebutted testimony in class members' affidavits to prove their case sets up another related conflict in the Circuits, and is directly contrary to the First Circuit's decision in *Asacol*, 907 F.3d at 53. Testimony that is genuinely challenged, certainly on an element of a party's affirmative case, cannot dispose of the issue. Further, these affidavits would be inadmissible hearsay at trial, *Ty v. GMA*

Accessories, 132 F.3d 1167, 1171 (7th Cir. 1997), leaving a gap in the evidence for all but any class members who testify in person. Nor did Beaton provide any basis from which the court could conclude that the number of affidavits to which SpeedyPC will be able to mount a genuine challenge is so small that it will be administratively feasible to require those challenged affiants to testify at trial. *Id.* This is a case in which many class members may be uninjured. Beaton submitted no evidence that would support a finding that all class members suffered injury. In fact, Beaton only submitted evidence that *he* was injured. SpeedyPC countered with evidence that class members were satisfied with, and not injured by, their purchase of the Software, not only with evidence from class members themselves who provided testimonials on their approval of the Software but also with independent third-party reviews lauding the Software's efficacy and value. Indeed, despite the fact that SpeedyPC offered an unconditional money back guarantee, only 5.7% of class members took SpeedyPC up on that offer. (ECF 135 p.10). Moreover, the certification order includes those class members who were refunded their purchase price. Some courts have found that the need to identify those harmed and unharmed individuals will predominate and render such a class adjudication unmanageable:

> no case cited above, nor in any case to which plaintiffs have directed our attention, has a federal court affirmed a damages judgment in a class action against a defendant who was

> precluded from raising genuine challenges at trial to the assertion of liability by individual members of a class that was known to have members who could not be presumed to be injured. Nor has either party drawn to our attention any federal court allowing, under Rule 23, a trial in which thousands of class members testify. We see no reason to think this case should be the first such case.

Asacol, 907 F.3d at 57-58. The First Circuit's ruling in *Asacol* is directly contrary to the Seventh Circuit's ruling in this case, amply demonstrating the conflict in the Circuits that this Court should resolve. The lower courts' opinions here simply assume that the question of how uninjured consumers can be identified and excluded can be answered with affidavits and sample testimony to challenge the class members' credibility. Untested by the adversary system, unexamined by any trial judge, and fashioned without awareness of its fit to the parties' needs and goals, this method raises more questions than it answers. What happens to those consumers who do not return an affidavit (of whom there may be many, given the low dollar amount of any potential recovery)? *See Mullins*, 795 F.3d at 667 ("In most cases, the expected recovery is so small that we question whether many people would be willing to sign affidavits under penalty of perjury saying that they purchased the good or service."). Will they be deemed to have opted out of the class? Or will they be deemed to have remained in, but lost their claims due

to lack of participation? Even more daunting, what happens if tens, hundreds, thousands, or hundreds of thousand class members submit affidavits? How exactly will SpeedyPC exercise its acknowledged right to challenge individual damage claims at trial? Will SpeedyPC seek to depose everyone who has returned an affidavit, as is its right? The Seventh Circuit hedges on these questions and concludes that SpeedyPC will have the right to challenge the class members' credibility by obtaining a representative sample of class members' testimony and presenting evidence contradicting statements found in particular affidavits. This Court should determine whether this vague procedure complies with SpeedyPC's due process rights to challenge each class member's claims. There is no indication how SpeedyPC is to present evidence contradicting statements found in class members' affidavits without obtaining evidence relating to each of them, including taking their depositions, again requiring litigation of these claims on an individual basis. This radical approach to class wide adjudication also seemingly contradicts this Court's decision in *Wal-Mart,* 564 U.S. at 367, where this Court unanimously "disapprove[d]" the "novel project" of "Trial by Formula," in which evidence pertaining only to a subset of class members is extrapolated to resolve the claims of the entire class without "further individualized proceedings," because this procedure would impermissibly alter substantive law and preclude the litigation of "defenses to individual claims."

Courts have rejected the Seventh Circuit's suggestion of using sampling to establish individual issues, further showing the conflict in the Circuits that this Court should resolve. *See, e.g., In re Wells Fargo Home Mortg. Overtime Pay Litigation*, 268 F.R.D. 604 (N.D. Cal. 2010) (in putative class action seeking overtime pay, random statistical sampling was inadequate as a form of common proof to satisfy predominance requirement and avoid individual inquiries). This Court has cautioned against "judicial inventiveness" in class action procedure, warning that "the rulemakers' prescriptions for class actions may be endangered by those who embrace Rule 23 too enthusiastically just as they are by those who approach the Rule with distaste. *Amchem,* 521 U.S. at 620-629. This Court has therefore "call[ed] for caution" where, as here, "individual stakes are high and disparities among class members great." *Id.* at 625. The Seventh Circuit's decision does not follow this Court's "counsel of caution." As noted by the First Circuit:

> Throwing up an idea to see if it might stick is just not what courts of appeals do best. Rather, it is only after the adversaries have gone to the mat and the dust has settled that the court can fairly review a district court's assessment of whether a proposed method would be feasible. For this reason, if the lower courts do not identify a culling method to ensure that the class, by judgment, includes only members who were actually injured, they have no business

> simply hoping that one will work. *Falcon,* 457 U.S. at 160 (noting that "actual, not presumed, conformance" with the rule is "indispensable"); *In re New Motor Vehicles Can. Exp. Antitrust Litig.,* 522 F.3d 6, 28 (1st Cir. 2008) (requiring the district court to evaluate a proposed model for proving fact of injury prior to certification).

Nexium, 777 F3d at 35.

Finally, review is warranted for the Seventh Circuit suggestion that those defending class actions should not fight class certification so hard because they may defeat certified claims on their merits. (Pet. App. 25a-26a). This liberal and radical view of class actions is directly contrary to the rigorous analysis demanded by this Court before a class may be certified. *Comcast,* 569 U.S. at 34; *Wal-Mart,* 564 U.S. at 351. This comment also demonstrates a naïve view of the daunting task of defending these types of claims. Certification frequently, as in this case brought against a small company like SpeedyPC, leads to a "bet the company" proposition, even if the defendant believes the claim lacks merit. *Coopers & Lybrand v. Livesay,* 437 U.S. 463, 476 (1978); *In re Rhone-Poulenc Rorer,* 51 F.3d 1293, 1299 (7th Cir. 1995). Courts have expressed a serious concern with forcing "defendants to stake their companies on the outcome of a single jury trial or be forced by fear of the risk of bankruptcy to settle even if they have no legal liability." *Id.* Indeed, "[t]he risk of facing an all-or-nothing verdict presents too high a risk, even when

the probability of an adverse judgment is low." *Castano v. Am. Tobacco,* 84 F.3d 734, 746 (5th Cir. 1996). Courts have also long recognized that there is a danger that certification may be used primarily as a device to extort a large settlement considering the onerous nature and practical realities of class certification. *AT&T Mobility v. Concepcion,* 563 U.S. 333, 350 (2011) (recognizing that class actions create the "risk of 'in terrorem' settlements"; "[f]aced with even a small chance of a devastating loss, defendants [are] pressured into settling questionable claims"); *Shady Grove Orthopedic Assocs. v. Allstate Ins.,* 559 U.S. 393, 445 n.3 (2010) (Ginsburg, J., dissenting) ("A court's decision to certify a class … places pressure on the defendant to settle even unmeritorious claims."); *Thorogood v. Sears Roebuck & Co.,* 627 F.3d 289, 293-294 (7th Cir. 2010); *Rhone-Poulenc Rorer,* 51 F.3d at 1298 (recognizing that class certification results in "settlements induced by a small probability of an immense judgment"). Undoubtedly judges would not be willing to risk their own economic livelihood on convincing a jury of strangers that their view on a claim is the correct one, or as courts have aptly phrased jury trials a "roll of the dice". *Thorogood,* 547 F.3d at 745. And nor should they. That is why defendants such as SpeedyPC, who choose to fight back and not give into extortionate and outrageous settlement demands by class counsel such as Edelson, have every incentive to, and should aggressively contest class certification, particularly here where there is nothing wrong with the product at issue and

there are no other claims alleged or likely to be filed against it.

CONCLUSION

SpeedyPC's Petition for a Writ of Certiorari should be granted to allow this Court to weigh in on all of these important issues. This case exposes important, recurring and widespread conflicts and uncertainty regarding the appropriate standards for certifying class actions. This uncertainty is unfair and unjust for all involved, including class representatives, absent class members, defendants and the courts. This Court's review here is necessary to provide much needed clarity on these issues and to ensure that the ends of justice and the principles of our Constitution and our laws are served.

Accordingly, SpeedyPC's Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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