No.

IN THE

Supreme Court of the United States

THE DOW CHEMICAL COMPANY,
Petitioner,

v.

INDUSTRIAL POLYMERS, INC., QUABAUG CORP., AND SEEGOTT HOLDINGS, INC., INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, in certifying a class under Federal Rule of Civil Procedure 23(b)(3), courts may *presume* class-wide injury from an alleged price-fixing agreement, even when prices are individually negotiated and individual purchasers frequently succeed in negotiating away allegedly collusive overcharges.

2. Whether a class may be certified or a class-wide damages judgment affirmed where plaintiffs' common "proof" of damages is a model that (a) does not purport to determine the actual damages of most class members, but instead applies an "average" overcharge estimated from a sample of transactions of very different purchasers, or (b) assumes that defendants engaged in multiple antitrust violations, even though plaintiffs attempted to prove only one violation at trial.

PARTIES TO THE PROCEEDING

All parties to the proceeding are listed in the caption.

RULE 26.9 STATEMENT

The Dow Chemical Company ("Dow") is a publicly held corporation with no parent corporation. No publicly held corporation owns more than 10 percent of Dow's stock.

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PETITION FOR A WRIT OF CERTIORARI

The Dow Chemical Company respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The Tenth Circuit's opinion is reported at 768 F.3d 1245 and reproduced at Pet. App. 1a-45a. The Tenth Circuit's unpublished order denying rehearing is reproduced at Pet. App. 123a. The district court's opinion granting class certification is reported at 251 F.R.D. 629 and reproduced at Pet. App. 85a-122a. The district court's opinion denying Dow's motion to decertify the class and its post-trial motion for judgment as a matter of law is unpublished and reproduced at Pet. App. 46a-84a.

JURISDICTION

The court of appeals entered judgment on September 29, 2014, Pet. App. 1a, and denied rehearing on November 7, 2014, Pet. App. 123a. On December 22, 2014, Justice Sotomayor extended the time for filing a petition for a writ of certiorari to and including March 9, 2015. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTES AND RULES INVOLVED

This case involves Federal Rule of Civil Procedure 23(b)(3), the Rules Enabling Act, 28 U.S.C. §2072, and the Clayton Act provision authorizing a private cause of action to seek damages for antitrust violations, 15 U.S.C. §15(a), which are reproduced at Pet. App. 124a-126a.

INTRODUCTION

This case presents important and recurring questions of class action procedure that arise from the lower courts' widespread use of "shortcuts" that permit class certification and class-wide adjudication of complex antitrust damages actions by stripping defendants of the defenses they have against *individual* claims. Plaintiffs are a class of industrial purchasers of polyurethane chemicals who alleged that defendants colluded to issue coordinated price increase announcements, and then tried to make those proposed increases "stick." It is undisputed that actual prices were set through robust price negotiations, and that class members—many large corporations with unquestioned purchasing power—frequently negotiated away *any* increase. These market realities should have prevented class certification. The presence of one issue that could be proved using *common* evidence (*i.e.*, the existence of a conspiracy) did not predominate over issues requiring *individualized* evidence (*i.e.*, whether each plaintiff paid overcharges and the amount of each plaintiff's damages).

The court of appeals, however, upheld the use of two shortcuts that enabled the district court to certify a class—and to sustain a trebled-damages judgment in excess of $1 billion—in a case that the framers of Rule 23(b)(3) would never have imagined suitable for class treatment. In so ruling, the Tenth Circuit created one new circuit split, deepened another, and flouted recent pronouncements by this Court that were clearly intended to return the class action device to its original, more modest roots.

First, the Tenth Circuit endorsed the misguided "prevailing view" among lower courts that alleged price-fixing creates "an inference of class-wide impact

even when prices are individually negotiated"—an inference the court deemed "especially strong" in light of "evidence that the conspiracy artificially inflated the baseline for price negotiations." Pet. App. 13a. The court relied on this "inference"—which it applied as a "presumption"—to find that injury was a common issue that could be tried on class-wide basis, rather than through inquiries into the fact-specific negotiations of individual plaintiffs. In so ruling, the Tenth Circuit created a clear circuit split. The First and Fifth Circuits have held that predominance cannot be based on a presumption of class-wide injury where prices are individually negotiated; in such circumstances, "proof of antitrust injury is bound to be individualized," 2A P.E. Areeda & H. Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* §398(c), at 423, n.14 (2013). The Eighth Circuit has likewise ruled that proof of a price-fixing conspiracy is not proof of common injury, and class-wide harm cannot be assumed where there is evidence that some purchasers avoid overcharges.

The Tenth Circuit is not unique in its zeal to resolve complex antitrust lawsuits on a class basis. District courts routinely presume class-wide harm even where prices are individually negotiated. Because interlocutory review of these decisions is rare and class certification usually coerces settlement, the presumption will continue to be used in the district courts of many circuits beyond the Tenth unless this Court intervenes now.

Use of that presumption, moreover, violates defendants' due process rights and the Rules Enabling Act. Petitioner's right "to litigate its statutory defenses to individual claims," *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541, 2561 (2011),

included the fundamental right to show that it was not liable to individual plaintiffs that suffered no injury because they experienced no price increases. But by presuming class-wide injury, the lower courts stripped Dow of that right: the nature of class adjudication, which precludes litigation focused on thousands of unnamed class members, prevented Dow from litigating its defense to a key element of antitrust liability—impact—for *individual* claims.

Second, the Tenth Circuit approved class certification based on a shortcut that relieved plaintiffs of establishing damages on a class-wide basis. Plaintiffs' expert developed models to estimate overcharges on sales to one-quarter of the class, and found no overcharges on 10% of these transactions. He then extrapolated from these data to calculate damages for the rest of the class. But he assumed that *every* extrapolated transaction involved an overcharge. His extrapolations thus purported to prove that named plaintiff Quabaug Corporation was entitled to damages, even though evidence showed that it successfully negotiated away price hikes. The extrapolations also purportedly "proved" damages during periods when the models themselves found prices were competitive. In approving an aggregate damages award based on such extrapolations, the Tenth Circuit deepened an existing split between the Sixth Circuit and the Second, Fourth, Seventh and Ninth Circuits, which have rejected use of such methodologies because they clearly abridge defendants' rights, in violation of due process principles and the Rules Enabling Act.

Finally, the Tenth Circuit excused yet another defect in plaintiffs' damages methodology. Their damages model was designed on the assumption that defendants violated the antitrust laws in two distinct

ways—price fixing and market allocation. At trial, however, plaintiffs eschewed the "customer and market allocation" part of their original case. Notwithstanding the much more limited theory of liability plaintiffs tried to prove, their expert made no adjustment to his model. This is the same fatal flaw, *by the same expert*, condemned in *Comcast Corp.* v. *Behrend*, 133 S. Ct. 1426 (2013).

This Court should grant the petition to resolve the conflicts among the circuits and continue the course it set in *Wal-Mart* and *Comcast* of returning Rule 23 to the limited procedural device it was intended to be when it was adopted in 1966.

STATEMENT OF THE CASE

1. This case involves an alleged conspiracy affecting four categories of chemicals used to make polyurethane products: polyether polyols, TDI, MDI, and systems products. Pet. App. 3a. The plaintiff class is composed of approximately 2,400 businesses that purchase those chemicals to make polyurethanes for a wide variety of consumer and industrial products, including seat cushions, mattresses, insulation, building materials, coatings, adhesives, and sealants.

As the district court observed, the four categories of chemicals each contains "myriad" chemicals with different "pricing structures." Pet. App. 107a. Actual prices and terms of sale vary from customer to customer, because they are determined in "individual[ized] negotiations" between the customer and manufacturer. *Id.* Indeed, the fact of individualized price negotiation is an integral component of the alleged conspiracy. According to plaintiffs, this was not a conspiracy to set actual prices, but "to issue announcements of price increases

by an amount within some range and to try to match those price increases and then to stick to them as best they could" in negotiations with individual customers. AA0862.

In opposing plaintiffs' motion to certify the class, defendants showed that there are compelling reasons why such an alleged conspiracy, even if it occurred, would not have harmed all customers. Some customers were protected by contractual provisions that prohibited price hikes for the duration of the contract. AA2007, 2012-14, 2018-19; AA2050-52, 2056-57, 2059-62. Some had bargaining leverage because they could purchase chemicals from alternative suppliers, not alleged to be part of the conspiracy (AA0402-03; AA1833-37, 1875-76, 1879-80), or could use non-polyurethane substitutes (AA0402-03; AA1838; AA2010, 2016, 2019-20; AA2049, 2055-56, 2058). And some were sophisticated corporations that used the volume of their purchases—and the threat of taking business to another manufacturer—to obtain lower prices. See, *e.g.*, AA2007, AA2008, AA2014, AA2054. As the district court found, that is what named plaintiff Quabaug did when it "refused to take the price increase" from Huntsman in January 2001 and began "purchasing its system from Bayer at five cents per pound less." Pet. App. 11a.

2. Despite the individualized negotiations and variance in actual prices, the district court certified a class of industrial purchasers of polyurethane products. Pet. App. 122a. The court acknowledged that sales of "basic chemicals" (*i.e.*, MDI, TDI, and polyols) "were characterized by individual negotiations, variations in contractual relationships and the like." *Id.* at 104a. It ruled, however, that class-wide impact could be shown through common

evidence that defendants "coordinated price increase announcements," which "presumably establishes an artificially inflated baseline from which any individualized negotiations would proceed." *Id.* In the case of systems (which are unique packages of chemicals and additives that are custom-designed to meet the needs of particular customers), the court thought class-wide impact could be shown with common evidence because systems prices are based "to some extent" on the "costs of the basic chemicals that make up the systems." *Id.* at 106a.

The court was "not nearly as persuaded that the issue of damages is amenable to class-wide proof," given "the myriad of products, pricing structures, individual[ized] negotiations and contracts at issue." Pet. App. 107a. Indeed, as noted, the court found that named plaintiff Quabaug—a "typical" class member—had been able to negotiate a substantial price *decrease*. *Id*. at 119a. But the "possibility that individual issues may predominate the issue of damages," the court concluded, could be addressed by bifurcating the damages phase or decertifying the class as to individualized damages. *Id.* at 108a.

3. Defendants sought interlocutory review under Rule 23(f), which the Tenth Circuit denied. *In re Urethane Antitrust Litig.*, No. 08-602 (10th Cir. Sept. 2, 2008). All the defendants except Dow settled. Pet. App. 4a.

Plaintiffs then retained a new statistical expert, Dr. James McClave, who developed regression models and extrapolations purporting to show class-wide injury and to quantify damages to the class. See Pet. App. 17a. After moving unsuccessfully to exclude McClave's testimony, Dow moved to decertify the class, arguing that his models did not show injury and damages on a class-wide basis, and that

certification was improper under *Wal-Mart*, a decision issued after the class was certified. The court deferred consideration of the decertification motion until after trial. AA0716.

4. At trial, Dr. McClave testified that his statistical analysis showed "'that nearly all class members had been impacted or overcharged'" during the conspiracy. Pet. App. 22a. McClave's analysis included regression modeling that purported to predict the prices of TDI, MDI, and polyols (but not systems) in the absence of collusion. AA0970, 0992-94. He explicitly assumed that prices were distorted by two antitrust violations—(1) price-fixing and (2) allocation of customers and markets. Using his models and data from the purchases of approximately 25% of the class, McClave estimated but-for "competitive prices," and deemed the differences between them and actual prices "overcharge[s]." AA0968.

For the 25% of the class whose transactions he modeled, McClave totaled the "overcharges" he observed. To calculate damages for the remaining 75% of class members, however, he relied solely on "extrapolations." AA0879-80; AA1033-34. Although he had found *no* overcharges on 10% of the transactions he modeled (AA2416), he assumed that *every* extrapolated transaction involved an overcharge (AA0879-80; AA1420-23; AA2415-16). He thus calculated damages for 75% of the class by applying his contrived average percentage overcharge to *every* transaction. AA1033-36. Adding the damages calculated by the two methods, McClave testified that total damages for the class were $1,125,608,094 between January 1, 1999 and December 31, 2003. Between November 24, 2000 and December 31, 2003,

McClave said damages were $496,680,046.[1] AA1007; AA1587-88.

5. Dow's economic expert, Dr. Keith Ugone, testified that several fundamental errors rendered McClave's models wholly unreliable. AA1393-419. Ugone also criticized McClave's extrapolations because they assumed damages for every transaction regardless of whether the customer actually was overcharged. AA1419-28.

Dow also showed that McClave's assumption of a uniform overcharge on every transaction is contradicted by evidence of the actual transactions themselves. Dow provided numerous examples of a broad array of customers that refused to accept announced price increases and used their bargaining power to force manufacturers to make price concessions to retain their business. Foamex repeatedly played the defendants off each other to get better prices. AA1330-36; AA1768-70. Great Dane benefited from a "price war" between Dow and BASF, AA1703, while Woodbridge received price protections and offers of "lower prices almost weekly in an attempt to secure" its business, AA1735-37. Leggett and Platt even sent Dow an email saying that it was throwing Dow's price increase announcement in the "circle file" and that Dow "should check out who is sending this B S and terminate them immediately—before someone reminds us of announced recent price increases that deteriorate below the existing price." AA1743; *see also, e.g.*, AA1228-30 (GE Appliances

[1] McClave provided the latter calculation because the statute of limitations barred recovery of damages prior to November 24, 2000, absent a finding of fraudulent concealment. Because the jury found no overpayment by the class plaintiffs prior to November 24, 2000, the question of fraudulent concealment was not addressed by the jury.

"play[ed] Bayer and Dow off each other"); AA1672 (Dow offered GE Appliances $3 million to switch business from Bayer); AA1445; AA1703-06 (Whirlpool switched its business from Bayer to BASF because Bayer announced a price increase, and BASF countered with a lower price); AA1686 (Bayer email stating that Huber "is not changing the price in their system" and Bayer "will not be able to get a higher price ... no matter what we invoice them!"); AA1635-38 (Bayer secured purchases from JM Huber "at $0.005/lb less at the expense of Huntsman"); AA1733 (Bayer reduced prices to FFP to meet a "very aggressive offer" from Dow); AA1683-85 (customers switching to Huntsman to avoid Bayer price increase).

These are not isolated examples. As summarized at trial by Dow's economist, Professor Kenneth Elzinga, defendants' internal documents revealed hundreds of instances in which one manufacturer offered to reduce prices to obtain new business or to retain existing business. AA1330-37, 1341-43.

Plaintiffs did not dispute that this competition occurred. Instead, their economist (Dr. Solow) claimed it was just evidence of "cheating" or a temporary "break[] down" of the cartel. SA2723-24. However labeled, the undisputed trial evidence confirmed that manufacturers were not able uniformly to make the announced price increases "stick" in individual negotiations. AA1527; AA1279-92, 1303. In addition, prices fluctuated, moved in different directions, and often *declined* after price increase announcements. AA1275-305; AA1756; AA1761-67. There were thus always lower-priced alternatives to the "price leader." *Id.* These wildly varying circumstances made it impossible to prove class-wide injury in one stroke.

6. Nonetheless, the jury found a conspiracy, but no overpayment before November 24, 2000, and damages of $400,049,039 thereafter. AA0513-15. In conjunction with briefing on Dow's motion for judgment as a matter of law, the district court allowed the parties to supplement the outstanding motion to decertify. Pet. App. 56a. The district court then denied both motions.

Because the decertification motion was filed on the "eve of trial," the court deemed it untimely except as to "issues based on events occurring at trial or based on the Supreme Court's recent *Comcast* opinion." *Id.* at 56a-57a. It then ruled that the arguments "failed on their merits." *Id.* at 58a.

The court acknowledged that McClave's models showed that some class members "did not suffer any damages." Pet. App. 58a. The court "agree[d] with plaintiffs," however, that "all members of the class may be shown to have been impacted by a conspiracy that elevates prices above the competitive level, even if some members may have mitigated their damages or otherwise did not suffer damages that may be quantified." *Id.*

The court rejected Dow's challenge to McClave's extrapolations, saying Dow did not seek to exclude his testimony on this basis, no expert opinion showed the "method was unreliable," and no "relevant precedent" supported Dow's argument. Pet. App. 59a. The court also rejected Dow's argument that, because McClave assumed defendants engaged in two antitrust violations and his models were not adjusted when plaintiffs chose to pursue only one violation at trial, those models were invalid under *Comcast*. *Id.* at 62a.

The district court also rejected Dow's argument that the jury verdict establishes that McClave's models were wholly unreliable. The jury found *no* overcharges before November 2000—a 23-month period during which McClave's models predicted over *$620 million* in "overcharges." Because the models were identical for both periods, the jury had no basis for concluding that the models accurately predicted overcharges after November 2000, but not before. Nevertheless, the court affirmed the jury's award of damages for the latter period. Pet. App. 67a-68a.

After trebling the verdict and subtracting amounts paid by the settling defendants, the court entered judgment of $1,060,847,117, plus interest. Pet. App. 46a-48a.

7. The Tenth Circuit affirmed. Acknowledging "that some of the plaintiffs may have successfully avoided damages" through negotiations, the court held that the district court had discretion to treat impact as a common question because, under "the prevailing view, price-fixing affects all market participants, creating an inference of class-wide impact even when prices are individually negotiated. Pet. App. 13a. That inference "is especially strong" where there is "evidence that the conspiracy artificially inflated the baseline for price negotiations." *Id.* The "presence of individualized damages issues," the court added, "would not change this result." *Id.* 15a.

The Tenth Circuit rejected Dow's argument that plaintiffs' use of extrapolation violated *Wal-Mart*'s prohibition against "Trial by Formula." 131 S. Ct. at 2561. The court deemed *Wal-Mart* inapplicable because plaintiffs used extrapolation "only to approximate damages," not "to prove Dow's liability." Pet. App. 18a.

The Tenth Circuit also excused McClave's failure to adjust his damages models to correspond with plaintiffs' theory of liability at trial. It reasoned that, "unlike the claimants in *Comcast*, our plaintiffs did not concede that class certification required a method to prove class-wide damages through a common methodology." Pet. App. 20a. The court also reasoned that, because McClave testified that "'nearly all class members had been impacted or overcharged,'" his testimony allowed the district court "to find a 'fit' between plaintiffs' theory of liability (a nationwide conspiracy to fix prices) and the theory of class-wide damages." *Id.* at 22a. The "'disconnect'" between the antitrust violations McClave assumed in constructing his models and the violation plaintiffs pursued at trial was irrelevant because McClave's "report was never introduced into evidence," and the "district court could see that the common issues of liability had predominated over individualized issues" at trial. *Id.* at 24a.

The Tenth Circuit also saw no significance to the fact that McClave's models found over $620 million in overcharges before November 24, 2000, but the jury found none. The court speculated that the "jury might have limited the conspiracy period while agreeing with Dr. McClave's analysis of pricing after November 24, 2000." Pet. App. 41a.

REASONS FOR GRANTING THE PETITION

I. WHETHER CLASS-WIDE HARM CAN BE PRESUMED IN ANTITRUST CASES IS A RECURRING AND IMPORTANT ISSUE THAT DIVIDES THE LOWER COURTS.

The propriety of presuming class-wide harm to satisfy Rule 23(b)(3)'s predominance requirement in antitrust cases is a recurring and critically important

issue that has divided the lower courts. Plaintiffs' ability to prove injury to all class members is critical to meeting the predominance requirement because the one issue that can be established through common proof (*i.e.*, collusion) "does not establish civil liability under §4 of the Clayton Act." *Alabama* v. *Blue Bird Body Co.,* 573 F.2d 309, 317 (5th Cir. 1978). Even "in a case involving horizontal price fixing, … plaintiffs [a]re still required to 'show that the conspiracy caused *them* an injury for which the antitrust laws provide relief.'" *Atl. Richfield Co.* v. *USA Petroleum Co.*, 495 U.S. 328, 344 (1990).[2] Predominance therefore requires a showing, "through common evidence, that all class members were in fact injured." *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244, 252 (D.C. Cir. 2013); see also *Blades* v. *Monsanto Co.*, 400 F.3d 562, 566 (8th Cir. 2005) ("plaintiffs need to demonstrate that common issues prevail as to the existence of a conspiracy *and* the fact of injury") (emphasis added).

Here, plaintiffs alleged that the conspiracy injured purchasers by making them pay supra-competitive prices. That should have precluded class certification because, as the leading antitrust treatise explains, "[w]hen transaction prices are negotiated," "proof of antitrust injury is bound to be individualized." 2A Areeda & Hovenkamp, *supra*, §398c, n.14. The Tenth Circuit, however, affirmed class certification by embracing the presumption of class-wide harm,[3]

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[2] *See also In re New Motor Vehicles Canadian Export Antitrust Litig.*, 522 F.3d 6, 28 (1st Cir. 2008) ("liability ... requires showing that class members were injured"); *Windham* v. *Am. Brands, Inc.*, 565 F.2d 59, 65 (4th Cir. 1977) (en banc) ("a mere finding of violation does not result in liability").

[3] Although called an "inference," the device the Tenth Circuit actually used to justify the finding of predominance was a

commonly used by district courts to facilitate class certification in complex antitrust cases. That decision creates a clear circuit conflict and is wrong. Presuming class-wide harm violates the original understanding of Rule 23(b)(3). Worse, it strips defendants of their defenses to individual claims, in violation of the Rules Enabling Act and due process.

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

In contrast to the Tenth Circuit, the First, Fifth and Eighth Circuits do not permit use of a presumption of class-wide harm where, as here, actual prices vary as a result of individual negotiations or other factors. In *Robinson* v. *Texas Automobile Dealers Ass'n*, plaintiffs alleged car dealers conspired to charge a separate vehicle tax in addition to the regular sales price. 387 F.3d 416, 419 (5th Cir. 2004). In certifying the class, the district court presumed that the separate charge—which plainly increased the starting point for negotiations—"increase[d] the final purchase price for every consumer." *Id.* at 423. The Fifth Circuit rejected this presumption, stating that it "defie[d] the realities of haggling that ensues in the American [automobile] market." *Id.* Because purchasers could negotiate away the additional charge, proof of impact required

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"presumption"—a conclusion that defendants had the burden of rebutting. Indeed, it was an irrebuttable presumption, since the court applied it despite the substantial evidence that individual class members were able to avoid the announced price increases through individual negotiations. *See* 21B C.A. Wright & K.W. Graham, Jr., *Federal Practice and Procedure: Evidence* §5122.1, at 419-23 (2d ed. 2005) (distinguishing inference and presumption); *see also infra* §I.B. (showing presumption is effectively irrebuttable).

"evidence regarding *each purported class member and his transaction*," which "would destroy any alleged predominance." *Id.* at 423-24; see also *Blue Bird Body*, 573 F.3d at 327-28 (reversing class certification in case of alleged conspiracy among school bus manufacturers because "impact" is a question unique to each purchaser and, "given the diverse nature of the school bus market," the Fifth Circuit had "difficulty envisioning how the plaintiffs can prove in a manageable manner that the conspiracy … did in fact cause damage").

Similarly, in *In re New Motor Vehicles Canadian Export Antitrust Litigation*, the First Circuit reversed class certification in a case involving an alleged conspiracy to increase car prices by preventing importation of lower-priced Canadian cars. Noting plaintiffs' obligation to show "that each member of the class was in fact injured," the court rejected plaintiffs' reliance "on an inference that any upward pressure on national pricing would necessarily raise the prices actually paid by individual consumers." 522 F.3d 6, 28-29 (1st Cir. 2008). "There is an intuitive appeal to this theory," the First Circuit stated, "but intuitive appeal is not enough." *Id.* at 29.

Finally, the Eighth Circuit has recognized that evidence that a conspiracy raised average prices, or prices for some class members, does not provide a basis for presuming that all class members have been injured. In *Blades*, farmers alleged a conspiracy to charge supra-competitive list price premiums on genetically modified (GM) seeds. Although plaintiffs produced "evidence suggesting that appellees adhered to a price-fixing agreement that raised the average price of GM seeds," 400 F.3d at 573, the Eighth Circuit affirmed denial of class certification. Noting that prices for the seeds "varied widely, and [that]

some farmers paid negligible premiums or no premiums at all," *id.* at 572, the court explained that "[t]he undisputed presence of negligible and zero list premiums indicates that if appellees performed their agreement, their performance was not across the board," *id.* at 573. To show injury from price inflation, therefore, *each* plaintiff would need to present evidence that the price of the seeds *he or she purchased* was inflated. *Id.* at 573-74.

The class in this case could not and would not have been certified in the First, Fifth, or Eighth Circuits. Evidence that a conspiracy raised the starting point for negotiations, or raised prices for some buyers, would not remotely permit a court to presume that *all* buyers were harmed, given "the diverse nature of the [polyurethane] market," *Blue Bird Body*, 573 F.3d 327-28, "the realities of the haggling that ensues in th[at] market," *Robinson*, 387 F.3d at 423, and "[t]he undisputed presence of negligible and zero [damage transactions]," *Blades*, 400 F.3d at 573. Evidence that creates an inference that prices paid by all buyers increased "is not enough." *New Motor Vehicles*, 522 F.3d at 29. Thus, if instead of proceeding in Kansas, by the luck of the MDL draw, the case had been assigned to a court in Nebraska, Massachusetts, or Texas, there would be no $1 billion plus judgment. Outcome by geography is unacceptable and only this Court can correct it.

Moreover, the presumption of class-wide harm is routinely (and improperly) used to certify classes in price-fixing cases. The district court decision on which the Tenth Circuit relied, see Pet. App.13a & n.7, explained that a "*litany* of antitrust price-fixing cases ... have ... rejected the argument that diverse purchasing practices prevent a showing of common impact." *In re Foundry Resins Antitrust Litig.*, 242

F.R.D. 393, 410 (S.D. Ohio 2007) (emphasis added). See also, *e.g.*, *In re Cardizem CD Antitrust Litig.*, 200 F.R.D. 326, 345 (E.D. Mich. 2001) ("courts have *routinely* rejected ... [defendants'] arguments" based on "differences in prices paid by class members, where the plaintiffs show that the 'minimum baseline for beginning negotiations, or the range of prices which resulted from negotiations, was artificially raised'") (emphasis added); *In re Commercial Tissue Prods.*, 183 F.R.D. 589, 595 (N.D. Fla. 1998) (same); J. Davis & E. Cramer, *Antitrust Class Certification and The Politics of Procedure*, 17 Geo. Mason L. Rev. 969, 986 (2010) (plaintiffs seeking certification on the theory that "the baseline from which prices were set is higher" "win this battle *the vast majority of the time*") (emphasis added).

Despite its widespread nature, the practice of presuming class-wide injury even where prices are individually negotiated typically escapes appellate review. It is difficult to obtain interlocutory review, 2 J.M. McLaughlin, *McLaughlin on Class Actions: Law and Practice* §7.2 (10th ed. 2013) (circuits agree that interlocutory "review of class certification decisions should not be routine"), and class certification frequently forces settlement, see *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 476 (1978); Fed. R. Civ. P. 23, advisory committee's 1998 note on subd. (f). There is accordingly no reason to allow the issue to "percolate." This case presents a rare opportunity for this Court to address this profoundly important question of class-action procedure in antitrust litigation.

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

By using a presumption of class-wide harm, the Tenth Circuit effectively eviscerated the exacting requirements of Rule 23, and violated the Rules Enabling Act and Dow's due process rights.

As noted earlier, under the antitrust laws, proof of individual injury is a liability prerequisite, not a question of damages. *Atl. Richfield*, 495 U.S. at 344 (even in price-fixing cases, plaintiffs are required to show "'that the conspiracy caused *them* an injury'"); *J. Truett Payne Co.* v. *Chrysler*, 451 U.S. 557, 570 (1981) (Powell, Brennan, Marshall & Blackmun, J.J., concurring) ("plaintiff has the burden of proving the fact of antirust injury.... Only when this fact has been proved may a court properly be lenient in the evidence it requires to prove the amount of damages."). If the plaintiffs here had brought individual actions, each would have had to prove it paid an overcharge. Rule 23 does not lessen that burden. *Wal-Mart*, 131 S. Ct. at 2561 (rules of procedure may not "'abridge … any substantive right'").

The Tenth Circuit lost sight of the fact that class certification is extraordinary, not a procedure to be routinely deployed whenever there is numerosity. *Am. Express Co.* v. *Italian Colors Rest.*, 133 S. Ct. 2304, 2310 (2013) (Rule 23 "imposes stringent requirements for certification that in practice exclude most claims," a principle that applies even where plaintiffs are attempting to "'vindicate the policies underlying the antitrust' laws"). Under Rule 23's stringent requirements, the existence of widespread

negotiations by industrial customers who played manufacturers off each other to avoid overcharges should have precluded certification. See *supra* at 6, 9-10.

In addition, use of a presumption of class-wide harm to certify a class strips defendants like Dow of their right to assert "defenses to individual claims," *Wal-Mart*, 131 S. Ct. at 2561, because certification precludes the assertion of those defenses. In a class action, defendants can obtain discovery from named plaintiffs to determine if they were injured and will adequately represent the class. But defendants cannot seek discovery on the merits of the claims of each absent class member. A "defendant seeking discovery from absent class members bears the burden of demonstrating that the discovery concerns common, rather than individualized, issues." 3 W.B. Rubenstein, *Newberg on Class Actions* §9:16 (5th ed. 2013). Indeed, defendants cannot "propound discovery on each class member's individualized issues, [as] such discovery would frustrate the rationale behind Rule 23's representative approach to litigation." *Id.*

Thus, class certification effectively extinguishes a defendant's ability and right to litigate impact/liability defenses to individual claims. Without discovery, a defendant cannot mount those defenses at trial, and any effort to do so would be inconsistent with—indeed, in defiance of—the class certification order itself.

Accordingly, Dow introduced evidence at trial of some individual negotiations (which it obtained from defendants' own files or from third-parties) to defend against the claim that there was a conspiracy. But Dow could not introduce the individualized (and voluminous) evidence needed to show that it was not

liable to hundreds of individual class members who avoided injury-causing overcharges through negotiations. Submission of such evidence would have defeated the purpose of certification—*i.e.*, promoting "efficiency and economy." *Am. Pipe & Constr. Co.* v. *Utah*, 414 U.S. 538, 553 (1974). Respondents were thus wrong in claiming that "Dow had the opportunity to introduce evidence at trial" that individual class members suffered no impact, and instead elected "to pursue a preclusive class-wide defense verdict on all issues." Opp. to Petn. for Reh'g 10. Dow had no choice given the certification order but to litigate on a class-wide basis. As a 2010 law review article co-authored by an antitrust class action practitioner explains, "the reality is that" antitrust class-action trials "*rarely, if ever*" address "common impact." Davis & Cramer, *supra*, at 973 (emphasis added).

In cases like this, therefore, the presumption of class-wide harm operates as a Catch 22: the presumption permits use of procedures that effectively preclude rebuttal of the presumption for individual claims. And there is no realistic way to escape this Catch 22. Interlocutory review of certification rulings is exceedingly rare, *supra* at 18, as are decisions to reconsider class certification rulings. 3 *Newberg*, *supra*, §7:35 at 181.

Where prices are individually negotiated, therefore, class certification based on a presumption of harm deprives a defendant of its right under the antitrust laws to challenge an individual plaintiff's proof of injury. This alteration of a defendant's substantive rights violates the Rules Enabling Act, which provides that the rules of procedure "shall not abridge, enlarge or modify any substantive right." 28 U.S.C. §2072(b). It also violates due process. *Lindsey*

v. *Normet*, 405 U.S. 56, 66 (1972) ("'Due process requires that there be an opportunity to present every available defense'"). Using the presumption to find predominance is thus tantamount to certifying a class on the impermissible "premise that [the defendant] will not be entitled to litigate its statutory defenses to individual claims." *Wal-Mart*, 131 S. Ct. 2561.

These improprieties are the product of a belief that every alleged antitrust violation must have a class action damages remedy. That was not the intent of Rule 23(b)(3), which was intended to "achieve economies of time, effort, and expense, ... *without sacrificing procedural fairness or bringing about other undesirable results*." Fed. R. Civ. P. 23 advisory committee's 1966 note on subd. (b)(3) (emphasis added). In fact, the drafters of Rule 23 made clear that not all antitrust cases are suitable for class treatment. *Id.* ("[p]rivate damage claims by numerous individuals arising out of concerted antitrust violations may *or may not* involve predominating common questions" warranting certification under subsection (b)(3)) (emphasis added). Yet, "for at least two decades courts have *routinely* certified classes in antitrust cases in which direct purchasers seek damages—perhaps more regularly *than in any other field of substantive law*." Davis & Cramer, *supra*, at 983-84 (emphases added).

To be sure, class-wide harm may properly be presumed in a consumer class action, where prices are not negotiated, so proof of a collusive price increase necessarily proves injury to all purchasers. See *Blue Bird Body*, 573 F.2d at 324. No such proof was or could have been offered here. And what makes the lower courts' rights-abridging presumption particularly illegitimate is that many plaintiffs have

the financial wherewithal and economic motivation to file suit individually. Indeed, some class members opted out and filed their own trebled damages suits.[4]

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

Respondents argued below (and presumably will do so again here) that the presumption of injury fell out of the case because there was ample evidence at trial—including, most significantly, statistical evidence—to prove that nearly all class members paid injury-causing overcharges. Opp. to Petn. for Reh'g 4-8. In fact, the Tenth Circuit squarely held that Dr. McClave's extrapolations—which were the *only* statistical evidence of the overcharges supposedly paid by three-fourths of the class—did *not* establish class-wide harm, but were used only to calculate damages. More fundamentally, the practice of using statistical models to prove class-wide injury where prices are negotiated is itself an impermissible alteration of defendants' substantive rights, and thus underscores—rather than renders moot—the impropriety of using a presumption to justify certification.

1. In this case, the presumption was dispositive of the issue of class-wide harm. Beyond approving the district court's reliance on that presumption, Pet. App. 13a, the Tenth Circuit cited evidence proving *only* the prerequisites for invoking the presumption, *not* evidence that each plaintiff was injured. See *id.* at 14a (Dow witnesses "acknowledged that price-increase announcements had affected the *starting*

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[4] *See In re Urethane Antitrust Litig.*, 2013 WL 6587972 (D. Kan., Dec. 16, 2013) (rejecting summary judgment motion of three plaintiffs that opted out of this case).

point for price negotiations") (emphasis added); *id.* (district judge "could reasonably weigh the evidence and conclude that price-fixing would have affected the entire market, *raising the baseline prices* for all buyers") (emphasis added); *id.* at 37a ("*some* of the announcements were partially or fully accepted") (emphasis added). And plaintiffs themselves repeatedly argued that their evidence supported a presumption of class-wide harm.[5]

Moreover, while both Dr. McClave and Dr. Solow testified about class-wide impact, their opinions were based on McClave's statistical analysis, which used regression models to calculate overcharges for 25% of the class and extrapolations to calculate overcharges for the other 75%. The Tenth Circuit squarely held that Dr. McClave's extrapolations did *not* establish class-wide impact. Pet. App. 18a. It stressed this point because class-wide impact plainly cannot be *proven* on the basis of extrapolations that simply *assumed* an overcharge on every transaction in the face of regression models and other evidence demonstrating that many transactions had no overcharge. It is thus indisputable that testimony predicated on those extrapolations did not and cannot support a finding of class-wide injury.

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[5] *See* Pls. Response Br. 32 (an "*inference* of class-wide impact is 'particularly strong' where, as here, there is a top-down conspiracy involving senior executives") (emphasis added); *id.* ("[t]he industry's economic structure ... further supports that *inference*") (emphasis added); *id.* at 33 ("the new prices provided 'an *artificially inflated baseline* from which any individualized negotiations would proceed'") (emphasis added); *id.* at 34 ("*certain* increases had been 'full[y]' ... or at least 'partially' successful in inflating prices") (citations omitted) (emphasis added).

2. More fundamentally, where prices are the product of individualized negotiations, forcing defendants to litigate the issue of class-wide injury based on statistical models alters defendants' right to challenge each individual's claims. In a suit brought by an individual customer, a defendant can show that the customer threw price increase announcements in the "circle file" and dismissed them as "B S," AA1743, because it could play sellers off one another or rely on substitute products, AA1228-30; AA1672; AA1445; AA1703-06; AA1686; AA1635-38; AA1658; AA1683-85. This evidence is readily understood by jurors and can readily refute claims that an individual customer paid overcharges.

In the class setting, however, a defendant can discover such evidence only from named (usually cherry-picked) plaintiffs, cannot discover such evidence from absent members (the overwhelming majority of the class), and, in any event, cannot introduce such individualized evidence at trial as to hundreds of class members. See *supra* §I.B. Instead, defendants are forced into a "battle of experts" in which they must ask lay jurors to reject the opinion of plaintiffs' credentialed witnesses on technical matters of econometric modeling, such as whether the models are the product of statistical "overfitting," improperly used exports instead of domestic sales as a proxy for demand, or were validated using the proper statistical tests. The ability to challenge an expert's opinion is a defense, but it is manifestly not the same defense that is available to contest an *individual's* proof of damages. Thus, presuming class-wide injury inevitably "modif[ies]" a defendant's substantive rights, which the Rules Enabling Act prohibits.

II. THE TENTH CIRCUIT'S DECISION ON CLASS-WIDE DAMAGES CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS.

A. The Lower Courts Are Divided Over Whether Class-Wide Damages Can Be Based On Estimated Averages.

This Court should also review the decision below to resolve the separate conflict among the circuits over the propriety of calculating class-wide damages based on estimated "averages." As noted, plaintiffs' witness, James McClave, found no overcharges on 10% of the transactions he modeled, and there was evidence that individual class members avoided many price increases through negotiations. But, in extrapolating from the transactions he modeled, McClave assumed that *every* transaction involved an overcharge—even during months when his "sample" showed negotiations had produced competitive market prices. See AA1097; AA1575-78. For example, McClave found that named plaintiff Quabaug was entitled to damages on transactions where the district court itself found that Quabaug successfully avoided price hikes. Pet. App. 119a (documenting Quabaug's avoidance of announced price increase).

The Tenth Circuit held that this use of averages was proper—and escaped *Wal-Mart*'s condemnation of "Trial by Formula," 131 S. Ct. at 2561—because extrapolation was used "only to approximate damages," not to prove liability. Pet. App. 18a. This ruling deepens a conflict between the Second, Fourth, Seventh and Ninth Circuits, on the one hand, and the Sixth Circuit, on the other hand. See *In re Scrap Metal Antitrust Litig.*, 527 F.3d 517, 534-35 (6th Cir. 2008) ("'[d]amages in an antitrust class action may be determined on a classwide, or aggregate, basis'"). Use

of such techniques to determine damages, moreover, violates the Rules Enabling Act and due process by denying defendants the right to contest the fact or extent of damages.

In *McLaughlin* v. *American Tobacco Co.*, 522 F.3d 215 (2d Cir. 2008), the Second Circuit rejected a methodology that estimated the percentage of class members who had valid claims, then based total damages "on an estimate of the average loss for each plaintiff." *Id.* at 231. "[S]uch an aggregate determination," the Second Circuit explained, would likely result in a "damages figure that does not accurately reflect the number of plaintiffs actually injured" or "the amount of economic harm actually caused by defendants." *Id.* When damages are calculated based on a "mass aggregation of claims, the right of defendants to challenge the allegations of individual plaintiffs is lost, resulting in a due process violation." *Id.* at 232. Precisely what happened here.

Similarly, in *Broussard* v. *Meineke Discount Muffler Shops, Inc.*, the Fourth Circuit rejected a damages calculation based "on abstract analysis of 'averages.'" 155 F.3d 331, 343 (4th Cir. 1998). In attempting to measure damages caused by an allegedly improper failure to spend advertising funds, the plaintiffs relied on "an average profit margin" and "an estimate of 'on average how many additional cars would have come in per week in the typical Meineke dealers' shop had the additional advertising dollars been spent.'" This focus on a "fictional" "'typical franchisee operation'" was an invalid "shortcut" that should have alerted the district court "that class-wide proof of damages was impermissible." *Id.*

In a suit involving an alleged conspiracy to add telephone surcharges to hotel room rates, the Ninth Circuit similarly explained that a proper damages

calculation would require individualized proof from each plaintiff "that he patronized the hotel while the surcharge was in effect and that he absorbed the cost of the surcharge." *In re Hotel Tel. Charges*, 500 F.2d 86, 89 (9th Cir. 1974). The proposed alternative—"allowing gross damages by treating unsubstantiated claims … collectively"—was improper, because it "significantly alters substantive rights under the antitrust statutes." *Id.* at 90.[6]

The Seventh Circuit likewise agrees that, while calculating class-wide damages is permissible if the task is a "'mechanical'" or "'formulaic'" task "'for a computer program,'" it is improper where there is variation in the degree or fact of harm. *Espenscheid* v. *DirectSat USA, LLC*, 705 F.3d 770, 773 (7th Cir. 2013). In *Espenscheid*, a class of over 2,000 alleged that defendant had failed to pay minimum wages, and plaintiffs sought to establish class-wide damages from a sample of 42 class members. The court explained that, even if the sample was truly "representative,"

> this would not enable the damages of any members of the class other than the 42 to be calculated. To extrapolate from the experience of the 42 to that of the 2341 [other class members]

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[6] Contrary to the Tenth Circuit's mistaken view, the Ninth Circuit has not recently held that extrapolations may be used to calculate class-wide damages. Pet. App. 18a. In *Jimenez* v. *Allstate Ins. Co.*, 765 F.3d 1161 (9th Cir. 2014), the Ninth Circuit affirmed a district court's decision rejecting plaintiffs' motion to use representative testimony and sampling at the damages phase. *Id.* at 1167. The Ninth Circuit did, however, allow use of sampling to establish liability in that overtime-pay case, and the defendant has sought this Court's review of that distinct issue. *See* 83 U.S.L.W. 3638 (Jan. 27, 2015) (No. 14-910) (petition for cert. filed on other grounds).

> would require that all 2341 have done roughly the same amount of work, including the same amount of overtime work, and had been paid the same wage.

Id. at 774. Because there was no such uniformity, extrapolations based on samples would inevitably "confer a windfall" on some class members. *Id.*

Under the reasoning of those decisions, the lack of uniformity in the experiences of the 2,400 industrial class members would have precluded use of sampling and extrapolations to determine damages in this case. Plaintiffs did not all purchase the same products or all pay the same price. By assuming that every "extrapolated" transaction involved the same average overcharge, when the evidence and their own models showed they did not, McClave calculated damages for a fictional "typical" purchaser, and thereby conferred windfalls on many who suffered no harm or significantly less harm, thereby infringing Dow's substantive rights.

The Tenth Circuit's decision deepening the conflict with these circuits is surprising—and particularly deserving of review—because it is so at odds with *Wal-Mart*. There, this Court condemned a procedure whereby liability and damages were to be determined for a sample of class members, and "[t]he percentage of claims determined to be valid would then be applied to the entire remaining class, and the number of (presumptively) valid claims thus derived would be multiplied by the average backpay award in the sample set to arrive at the entire class recovery—without further individualized proceedings." 131 S. Ct. at 2561. Such a "Trial by Formula," this Court unanimously concluded, impermissibly abridged the defendant's rights. *Id.*

The Tenth Circuit believed *Wal-Mart* "does not prohibit certification based on the use of extrapolation to calculate damages." Pet. App. 18a. But this crabbed reading is untenable and should be corrected before it gets more traction among the lower courts. This Court disapproved a methodology that used sampling, averages and extrapolation to determine *both* liability *and* damages (*i.e.*, an "entire class recovery," 131 S. Ct. at 2561). It nowhere suggested, much less stated, that the procedure was impermissible only to the extent it was used to determine liability. To the contrary, the procedure was improper because it altered the defendant's substantive rights. *Id.* And, as the Second, Fourth, Seventh, and Ninth Circuits have all recognized, extrapolating from averages to determine damages on an aggregate basis fundamentally alters a defendant's substantive right to contest the fact or extent of damages of any individual plaintiff.

Nor does waiver, see Pet. App. 17a, pose an obstacle to review of this issue. Although the panel held the motion to decertify was waived because it was filed too close to trial, the district court recognized that Dow's motion was timely "with respect to issues based on events occurring *at trial*." *Id.* at 57a (emphasis added). At trial, Dow directly challenged the propriety of McClave's extrapolation. Dow's expert testified at trial that McClave's extrapolation techniques were statistically inappropriate and improperly assumed overcharges for every transaction regardless of whether the customer was actually injured. See AA1419-33, 1436-40.

Thus, the Tenth Circuit's "waiver" finding is yet another legally invalid use of Rule 23 to abridge defendants' rights (and expand plaintiffs'). Plaintiffs have the burden of proving "at trial" all elements of

their claim for every class member entitled to damages under the judgment. *Wal-Mart,* 131 S. Ct. at 2552 n.6. When plaintiffs fail to meet their burden, the defendant has a right to ask the court to decertify the class or enter judgment for the defendant as a matter of law. See, *e.g.*, Fed. R. Civ. P. 23(c)(1)(C) (order granting class certification "may be altered or amended before final judgment"); *Boucher* v. *Syracuse Univ.*, 164 F.3d 113, 118 (2d Cir. 1999) ("courts are 'required to reassess their class rulings as the case develops'"); *Stastny* v. *S. Bell Tel. & Tel. Co.*, 628 F.2d 267, 276 & n.13 (4th Cir. 1980) (concluding that, when "a full trial has revealed an underlying failure of proof on the merits of the class claim," decertification rather than class-wide judgment for defendants is the better course).

Dow sought both forms of relief. After trial, it filed a motion for judgment as a matter of law, arguing that testimony that relied on estimated averages and extrapolation did not discharge plaintiffs' burden of proof, and Dow renewed its motion to decertify on that same ground. *Compare* Pet. App. 56a, *with id.* at 66a. Dow's right to contest the sufficiency of plaintiffs' proof of damages could not be forfeited based on its "untimely" filing of a motion to decertify before trial—a motion it was not obligated to file at all.

As the Fourth Circuit recognized in *Broussard*, a judgment "cannot stand" when the class action device expands the substantive rights of individual plaintiffs by allowing them to litigate "on behalf of a 'perfect plaintiff,'" and thus to satisfy the elements of their claim "with no proof" as to any actual plaintiffs before the court. 155 F.3d at 344-45. That describes precisely what use of McClave's extrapolations permitted here. Accordingly, the Tenth Circuit's

contrived waiver ruling provides no barrier to review of its erroneous interpretation of *Wal-Mart* or to resolution of the circuit split over use of estimated averages to determine class-wide damages.

B. Plaintiffs' Models Violated *Comcast*'s Requirements.

Finally, this Court should grant review because the Tenth Circuit refused to decertify the class despite plaintiffs' use of damages models infected by the same error, committed by the same putative expert, that this Court condemned in *Comcast*. Plaintiffs' models assumed violations of the antitrust laws under two theories, but when plaintiffs disavowed one theory prior to trial, McClave did not adjust the models. Plaintiffs' damages case thus was not "'consistent with [their] liability case.'" 133 S. Ct. at 1433. The Tenth Circuit's unwillingness to apply a directly applicable precedent of this Court reflects the same mindset that gives rise to the shortcuts that so infect this case: once committed to providing a Rule 23(b)(3) class action remedy, courts are unwilling to correct the error following a jury verdict.

These dynamics explain the strained distinctions the Tenth Circuit relied on to forgive plaintiffs' failure to ensure that their damages models conformed to their liability theory. First, the Tenth Circuit deemed it significant that plaintiffs here (unlike in *Comcast*) "did not concede that class certification required a method to prove class-wide damages through a common methodology." Pet App. 20a; see also *id.* at 23a. Under this facile reasoning, damages can be calculated using "*any* method of measurement ... no matter how arbitrary," *Comcast*, 133 S. Ct. at 1433, as long as a claim of predominance is based on issues other than damages.

Alternatively, the Tenth Circuit believed that the pre-trial posture of *Comcast* made that case materially different. Here, the Tenth Circuit stated, "by the time Dow presented its [*Comcast*] argument, Dr. McClave had already testified ... 'that nearly all class members had been impacted or overcharged.'" Pet. App. 22a. As a result, the Tenth Circuit concluded, "the district court had the discretion to find a 'fit' between the plaintiffs' theory of liability and the theory of class-wide damages"—a "'fit'" that "had been missing" in *Comcast*. *Id.* The obvious flaw in this reasoning is that McClave's trial testimony was predicated on his uncorrected models. Just like the conclusions in his pre-trial reports, therefore, McClave's trial testimony is based on a "methodology that identifies damages that are not the result of the wrong" plaintiffs prosecuted at trial. *Comcast*, 133 S. Ct. at 1434.

The idea that the district court could retroactively "fix" the flaw in the damages model based on McClave's trial testimony about the scope of injury is particularly improper given the jury's verdict. McClave's methodology predicted over $620 million in damages during a 23-month period when the jury found *zero* damages. The jury thus did not agree that nearly all class members were injured during the period of the alleged conspiracy.

In all events, district courts have no "discretion" to accept invalid conclusions from a flawed damages study merely because a witness repeats those mistakes at trial. And neither the district court nor the court of appeals has discretion to ignore the holdings of this Court.

* * *

Class certification frequently compels defendants to settle. In massive cases such as this one, moreover, the pressures to do so are even greater, given the specter of treble damages and joint and several liability for the last non-settling defendant. Use of shortcut presumptions and averaging to facilitate certification (and to uphold resulting damage awards) significantly exacerbates these pressures. So too does the unwillingness of lower courts to correct erroneous class certification decisions once a trial is held. This case starkly illustrates the problems that arise when lower courts shoehorn complex cases into the Rule 23(b)(3) mechanism, which was never intended to play that role. This case is a natural follow-on to *Wal-Mart* and *Comcast*. Just as in those cases, the Court here can resolve the conflicts among the lower courts, and ensure that the "'adventuresome innovation'" of Rule 23(b)(3), *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 614 (1997), is applied, as originally intended, to "achieve economies of time, effort, and expense, ... *without sacrificing procedural fairness or bringing about other undesirable results*." Fed. Rule Civ. Proc. 23 advisory committee's 1966 note on subd. (b)(3) (emphasis added).

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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March 9, 2015

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS,
TENTH CIRCUIT

No. 13-3215

IN RE URETHANE ANTITRUST LITIGATION
DOW CHEMICAL COMPANY,
Appellant,
v.
SEEGOTT HOLDINGS, INC.; INDUSTRIAL POLYMERS, INC.; QUABAUG CORPORATION,
(Class Plaintiffs), Appellees,
and
CHAMBER OF COMMERCE OF THE UNITED STATES AND AMERICAN INDEPENDENT BUSINESS ALLIANCE,
Amici Curiae.

Sept. 29, 2014

Opinion

Before LUCERO, MURPHY, and BACHARACH, *Circuit Judges*.

BACHARACH, *Circuit Judge*.

This antitrust class action stems from an allegation that Dow Chemical Company conspired with competitors to fix prices for polyurethane chemical products. Over Dow's objection, the district court certified a plaintiff class including all industrial purchasers of polyurethane products during the alleged conspiracy period. The action went to trial, and the jury returned a verdict against Dow. The district

court entered judgment for the plaintiffs, denying Dow's motions for decertification of the class and judgment as a matter of law.

Dow appeals, raising four arguments:

- First, Dow contends that class certification was improper because common questions did not predominate over individualized questions. We reject this contention. The district court decided that common questions predominated because: (1) the existence of a conspiracy and impact raised common questions, and (2) these common liability-related questions predominated over individualized questions regarding the extent of each class member's damages. This decision fell within the district court's discretion. Thus, we reject Dow's challenge to class certification.
- Second, Dow argues that the district court should have excluded the testimony of the plaintiffs' expert witness on statistics. According to Dow, the impact and damages models were unreliable because the expert witness inappropriately selected variables and benchmark years based on what would yield the greatest damages. We disagree. The district court acted within its discretion in allowing the testimony, and Dow's arguments relate to the weight of the expert's testimony, not admissibility.
- Third, Dow challenges the sufficiency of the evidence regarding liability. Viewing the evidence in the light most favorable to the plaintiffs, as we must, we conclude that the evidence sufficed on liability.

- Fourth, Dow asserts that the damages award lacked an evidentiary basis and that the resulting judgment violated the Seventh Amendment. These arguments are invalid.

  The award of $400,049,039 was supported by the evidence. Dr. McClave calculated even greater damages ($496,680,486), and the jury had an evidentiary basis for reducing this figure to $400,049,039.

  In allocating this award, the court did not violate the Seventh Amendment; and Dow has no interest in the method of distributing the aggregate damages award among the class members.

I. The Polyurethane Market

This appeal involves four categories of urethane chemical products: (1) polyether polyols; (2) toluene diisocyanate (TDI); (3) methylene diphenyl diisocyanate (MDI); and (4) polyurethane systems.[1] These products—collectively, "polyurethanes"—are used in various consumer and industrial components such as mattress foams, insulation, sealants, and footwear.

The polyurethane market comprises a "myriad of products, pricing structures, individualized negotiations, and contracts." AA 413. Buyers negotiate individually with manufacturers regarding price and other terms, sometimes entering into long-term contracts and other times purchasing on a "spot" basis. The price depends on multiple factors, including supply and demand, the balance of bargaining power

[1] The litigation initially involved another category of urethane products—polyester polyols—but those defendants settled.

between the buyer and manufacturer, and the availability of a substitute product to meet the buyer's needs. Apart from price, buyers can negotiate on other terms, such as rebates, most-favored-nation clauses, early payment discounts, and protection from future price hikes.

Prices are set in some of the contracts, but not in others. When there is no set price, a contract typically requires the manufacturer to give the buyer advance notice of price increases. Accordingly, price increases are announced by letter 30 to 45 days in advance. But these announcements did not always result in actual price increases. For example, buyers sometimes avoided price hikes by negotiating with the supplier.

II. The Price-Fixing Claim

The plaintiffs are industrial purchasers of polyurethane products who sued under the Sherman Antitrust Act, 15 U.S.C. § 1, and the Clayton Antitrust Act, 15 U.S.C. § 15(a), alleging that a group of polyurethane manufacturers—Bayer AG, Bayer Corporation, Bayer Material Science, BASF Corporation, Huntsman International LLC, Lyondell Chemical Company, and Dow Chemical Company—conspired to fix prices and allocate customers and markets from January 1, 1999, to December 31, 2004. AA 369. As the case progressed, it underwent three significant changes. First, the plaintiffs settled with all defendants except for Dow. Second, the plaintiffs dropped their allocation theory, leaving the price-fixing theory as the sole basis of the lawsuit. Third, the plaintiffs chose to pursue a shorter conspiracy—one lasting from January 1, 1999, to December 31, 2003—than was initially alleged.

The price-fixing claim arises under § 1 of the Sherman Act, which "prohibits contracts and conspiracies that restrain trade." *Smalley & Co. v. Emerson & Cuming, Inc.*, 13 F.3d 366, 367 (10th Cir.1993). For a § 1 violation, the class had to prove:

- the existence of an agreement or conspiracy
- among actual competitors
- that had the purpose or effect of raising, depressing, fixing, pegging, or stabilizing prices
- in interstate commerce.[2]

Cayman Exploration Corp. v. United Gas Pipe Line Co., 873 F.2d 1357, 1360 (10th Cir.1989). Because the plaintiffs sought damages under § 4 of the Clayton Act, 15 U.S.C. § 15(a), they also had to prove antitrust injury, or "impact," which is "'an injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendant's acts unlawful.'" *Elliott Indus. Ltd. v. BP Am. Prod. Co.*, 407 F.3d 1091, 1124 (10th Cir.2005) (quoting *Reazin v. Blue Cross & Blue Shield of Kan., Inc.*, 899 F.2d 951, 962 n. 15 (10th Cir.1990)).

III. Certification of the Class

The plaintiffs moved for class certification under Rule 23(b)(3) of the Federal Rules of Civil Procedure. Dow opposed the motion, arguing that certification was improper because common questions did not predominate over individualized questions. The district court disagreed, holding that common questions predominated because the key elements of the price-

[2] Dow stipulated to the interstate commerce element; accordingly, that issue was not submitted to the jury.

fixing claim—the existence of a conspiracy and impact—involved common questions that were capable of class-wide proof.

The court rejected Dow's argument that the impact element caused individualized questions to predominate, relying in part on a report prepared by the plaintiffs' expert, Dr. John Beyer. Dr. Beyer examined the polyurethane industry and concluded that a price-fixing conspiracy for polyurethane products would affect all buyers. Crediting Dr. Beyer's report and his supporting models, the court determined that impact involved a common question susceptible to class-wide proof.

This determination was unaffected by the fact that prices were individually negotiated. The court reasoned that the industry's standardized pricing structure—reflected in product price lists and parallel price-increase announcements—"presumably establishe[d] an artificially inflated baseline" for negotiations. AA 410. Consequently, any impact resulting from a price-fixing conspiracy would have permeated all polyurethane transactions, causing market-wide impact despite individualized negotiations.

The court acknowledged that the determination of damages might be individualized. But the court concluded that:

- class certification was appropriate for resolution of "the more difficult, threshold liability issues," and
- if individualized questions were to overwhelm the damages issue, "'the more appropriate course of action would be to bifurcate a

> damages phase and/or decertify the class as to individualized damages determinations.'"

Id. at 413-14 (quoting *In re Urethane Antitrust Litig*., 237 F.R.D. 440, 452 (D.Kan.2006)).

IV. Dow's Motion to Exclude Expert Testimony

Before trial, Dow moved to exclude the testimony of Dr. James McClave, the plaintiffs' statistical expert. Dr. McClave used a multiple-regression analysis to develop models predicting prices that would have existed in a competitive market. He then compared these prices to the actual prices during the conspiracy period, estimating overcharges of 15.6% for MDI, 14% for TDI, and 14.9% for polyether polyols. SA 6297. Using these overcharge estimates and sample data from roughly 50% of class sales, Dr. McClave extrapolated damages for the entire class and distilled the calculations into a damages model.[3]

Dr. McClave proposed to testify about these models, and Dow objected on grounds that he picked variables and the time period to get the result that he wanted.

First, Dow accused Dr. McClave of selecting variables based on whether they would produce supra-competitive prices for the conspiracy period. The district court rejected this argument, holding that Dr. McClave had "a basis, beyond statistical fit, rooted in general economic theory and particular documents"

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[3] Dr. McClave did not create a regression model for systems. Instead, he assumed that prices for systems increased proportionately with increases in the price of MDI, the basic chemical comprising the system. AA 1036, 2087-88. Estimating that MDI constituted approximately 74% of a system, Dr. McClave assumed that all systems were subject to an overcharge equal to 74% of the average overcharge for MDI, resulting in a 7.2% average overcharge for systems. *Id*. at 1036-40.

for selecting the variables that he did. AA 504. Thus, the court concluded that Dow's argument affected the weight of the testimony rather than its admissibility. *Id*.

Dow's second challenge involved Dr. McClave's decision to move 2004 from the conspiracy period to the competitive/benchmark period. According to Dow, Dr. McClave manipulated the benchmark to generate supra-competitive prices for the conspiracy period. The district court was unpersuaded, reasoning that: (1) Dr. McClave could have had legitimate reasons to modify the benchmark, and (2) Dow's argument was untimely.

V. The Trial, the Verdict, & the Post-Trial Rulings

At trial, the plaintiffs attempted to prove that Dow had conspired with competitors to fix prices for polyurethane products. The plaintiffs' theory was that the conspiracy had begun in January 1999, when the polyurethane market was depressed. In an effort to turn the industry around, executives allegedly coordinated "lockstep" price-increase announcements and agreed to try to make the price increases stick in individual contract negotiations.

The plaintiffs supported their theory with testimony from industry insiders, evidence that the defendants behaved collusively, evidence that the industry was susceptible to collusion, and evidence that prices exceeded a competitive level.

On the day before the trial was to begin, Dow moved to decertify the class.[4] Nonetheless, the trial

[4] Dow did not include its motion in the appendix. Because the appeal involves the denial of the motion to decertify the class, Dow had an obligation to include the motion in the appendix. *See*

proceeded, and the jury ultimately found that: (1) Dow had participated in a price-fixing conspiracy, (2) the conspiracy caused the plaintiffs to pay more for polyurethane products than they would have paid in a competitive market, (3) the injury did not precede November 24, 2000, and (4) the plaintiffs suffered damages of $400,049,039. After trebling the damages and deducting the amounts paid by the settling defendants, the court entered judgment against Dow for $1,060,847,117.

The court then granted the plaintiffs' request to permit allocation of the award according to Dr. McClave's damages model, with a pro rata reduction to reflect the jury's award of a lesser amount. With this ruling, the court rejected the Seventh Amendment challenge, adding that Dow had no interest in the way damages were distributed among the class members.

Over a month after the trial ended, Dow renewed its motion to decertify the class. In its reply brief, Dow relied for the first time on the Supreme Court's then-recent opinion in *Comcast Corp. v. Behrend*, —— U.S. ——, 133 S.Ct. 1426, 185 L.Ed.2d 515 (2013). Invoking *Comcast*, Dow argued that Dr. McClave's models had failed to supply a nexus between:

- the liability theory and
- the impact on class members.[5]

10th Cir. R. 10.3(D)(2), 30.1(A)(1). But we exercise our discretion to take judicial notice of the motion. *See Guttman v. Khalsa*, 669 F.3d 1101, 1127 n. 5 (10th Cir.2012).

[5] Dow raised this argument for the first time in a post-trial brief. The court characterized the argument as "arguably untimely," but addressed the merits "in light of the intervening Supreme Court decision and the fact that plaintiffs were given an

The court held that *Comcast* did not apply and declined to decertify the class.

VI Dow's Arguments

Dow raises four challenges on appeal, which involve: (1) the certification of a class and refusal to order decertification, (2) the admission of Dr. McClave's testimony, (3) the sufficiency of the evidence, and (4) the damages award.

VII. Certification & the Motion for Decertification

Dow challenges the orders certifying a class and declining to decertify the class. In evaluating these challenges, we review de novo whether the district court applied the correct legal standard. *Carpenter v. Boeing Co*., 456 F.3d 1183, 1187 (10th Cir.2006). If the proper standard was applied, we will reverse only for abuse of discretion. *Id*. An abuse of discretion occurs "when the district court bases its decision on either a clearly erroneous finding of fact or conclusion of law or by manifesting a clear error of judgment." *DG ex rel. Stricklin v. Devaughn*, 594 F.3d 1188, 1194 (10th Cir.2010).

The class was certified under Rule 23(b)(3) of the Federal Rules of Civil Procedure, which requires "that the questions of law or fact common to class members predominate over any questions affecting only individual members." Fed.R.Civ.P. 23(b)(3). Dow maintains that common questions did not predominate and that the district court's contrary rulings run afoul of *Wal-Mart Stores, Inc. v. Dukes*, —— U.S. ——, 131 S.Ct. 2541, 180 L.Ed.2d 374 (2011), and *Comcast Corp.*

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opportunity to file a sur-reply addressing the *Comcast* opinion." AA 528.

v. Behrend, —— U.S. ——, 133 S.Ct. 1426, 185 L.Ed.2d 515 (2013).

A. Dow's *Wal-Mart* Arguments

Wal-Mart involved a gender-discrimination claim under Title VII. The plaintiffs, who were female employees, alleged that their supervisors had discriminated in decisions on pay and promotions. For the gender-discrimination claims, the district court certified a class of female employees. *See Wal-Mart*, 131 S.Ct. at 2549. The Ninth Circuit Court of Appeals upheld certification, reasoning that the evidence had raised a common question involving the reason for gender-based disparities on pay and promotion. *See id*.

The Supreme Court disagreed, concluding that the evidence did not show a company-wide policy of discrimination or "a common mode of exercising discretion that pervade[d] the entire company." *Id*. at 2553-55. Thus, there was no "glue" holding together the reasons for the alleged injury, and the district court could not resolve the individual claims "in one stroke." *Id*. at 2551-52. The Court emphasized that "[w]hat matters to class certification . . . is not the raising of common 'questions'—even in droves—but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation." *Id*. at 2551 (quoting Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L.Rev. 97, 132 (2009)). The problem for the plaintiffs was that the common question (the reason for the pay and promotion disparities) was incapable of yielding a common answer. Therefore, individual trials were needed to resolve the claims.

The district court held that class-wide liability could be decided based on a sample of class members. *See id*.

at 2560-61. This procedure was invalidated by the Supreme Court. *Id*. at 2561. Calling the procedure a "trial by formula," the Supreme Court reasoned that the determination of liability would violate Wal-Mart's right "to litigate its statutory defenses to individual claims." *Id*.

Dow contends that the certification here violated *Wal-Mart* in two ways: (1) by denying Dow the right to show in individualized proceedings that certain class members suffered no injury, and (2) by allowing the class to proceed on the basis of extrapolated impact and damages. We reject both contentions.

1. The Need for Individualized Proceedings

Dow argues that it was entitled to show in individualized proceedings that certain class members could not have been injured by the alleged conspiracy. To support this argument, Dow points to ways that the plaintiffs could have avoided the announced price increases, such as negotiating for a lower price or switching to a substitute product.

It is true that some of the plaintiffs may have successfully avoided damages. But Dow has not shown that the district court abused its discretion in finding that class-wide issues predominated over individualized issues.

The district court determined that common questions predominated because the key elements of the price-fixing claim—the existence of a conspiracy and impact—raised common questions that were capable of class-wide proof. Dow disagrees, contending that impact involved individualized questions because the class members experienced varying degrees of injury, with some avoiding injury altogether.

The district court did not abuse its discretion in determining that impact involved a common question that would override other individualized issues. Under the prevailing view, price-fixing affects all market participants, creating an inference of class-wide impact even when prices are individually negotiated. *E.g.*, *In re Linerboard Antitrust Litig.*, 305 F.3d 145, 151-52 (3d Cir.2002);[6] *In re Foundry Resins Antitrust Litig.*, 242 F.R.D. 393, 409-10 (S.D.Ohio 2007).[7] The inference of class-wide impact is especially strong where, as here, there is evidence that the conspiracy artificially inflated the baseline for price negotiations. *See In re Rail Freight Fuel Surcharge Antitrust Litig.*, 287 F.R.D. 1, 61 (D.D.C.2012) (holding that common proof could be used to prove injury by raising the starting point for negotiations), *vacated in part on other grounds*, 725 F.3d 244 (D.C.Cir.2013); *In re Cardizem CD Antitrust Litig.*, 200 F.R.D. 326, 345-47 (E.D.Mich.2001) (holding that injury was provable through class-wide evidence involving inflation of the baseline for individual negotiations); *In re Commercial Tissue Prods.*, 183 F.R.D. 589, 595 (N.D.Fla.1998)

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[6] In *In re Linerboard Antitrust Litigation*, the Third Circuit Court of Appeals upheld class certification based in part on expert testimony by John Beyer, Ph.D. 305 F.3d at 153-54. There, Dr. Beyer testified that antitrust impact could be proven on a class-wide basis despite variations for particular products or customers. *See id*. This testimony was among the evidence relied on by the district court and the appeals court. *Id*. Here, the district court relied on similar testimony by Dr. Beyer.

[7] In *In re Foundry Resins Antitrust Litigation*, the district court relied on Dr. Beyer's testimony in holding that impact could be proven through class-wide evidence notwithstanding the defendants' reliance on "individualized pricing negotiations" and "market competition between the [d]efendants themselves." 242 F.R.D. at 409-10.

(holding that impact of price-fixing was provable through class-wide evidence notwithstanding individualized negotiations for every distributor); *see also In re Scrap Metal Antitrust Litig*., 527 F.3d 517, 535 (6th Cir.2008) ("[E]ven where there are individual variations in damages, the requirements of Rule 23(b)(3) are satisfied if the plaintiffs can establish that the defendants conspired to interfere with the free-market pricing structure.").

The district judge certified a class based on the plaintiffs' evidence of an artificially inflated baseline, including parallel issuance of similar product price lists and price-increase announcements.[8] When the district judge denied the motion for decertification, he had the benefit of the trial testimony. At trial, some of Dow's witnesses acknowledged that price-increase announcements had affected the starting point for price negotiations. *See* SA 4095-4103, 4156-57 (testimony of Richard Beitel); *id*. at 3885-86 (testimony of Robert Wood).

The district judge could reasonably weigh the evidence and conclude that price-fixing would have affected the entire market, raising the baseline prices for all buyers. Based on the reasonableness of this finding, the judge had the discretion to treat impact as a common question that was capable of class-wide proof. *See Blades v. Monsanto Co*., 400 F.3d 562, 566 (8th Cir.2005) ("If the same evidence will suffice for each [class] member to make a prima facie showing, then it becomes a common question.").

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[8] The appendices do not include the evidence submitted to the district court for or against class certification. But we exercise our discretion to take judicial notice of the evidence presented on the motion for certification. *See Guttman v. Khalsa*, 669 F.3d 1101, 1127 n. 5 (10th Cir.2012).

The presence of individualized damages issues would not change this result. Class-wide proof is not required for all issues. Instead, Rule 23(b)(3) simply requires a showing that the questions common to the class predominate over individualized questions. *Amgen v. Conn. Ret. Plans & Trust Funds*, ——U.S. ——, 133 S.Ct. 1184, 1196, 185 L.Ed.2d 308 (2013).

In price-fixing cases, courts have regarded the existence of a conspiracy as the overriding issue even when the market involves diversity in products, marketing, and prices. *In re Flat Glass Antitrust Litig.*, 191 F.R.D. 472, 484-85 (W.D.Penn.1999); *In re Alcoholic Beverages Litig.*, 95 F.R.D. 321, 327 (E.D.N.Y.1982); *In re Fine Paper Antitrust Litig.*, 82 F.R.D. 143, 151-53 (E.D.Penn.1979); *In re Carton Antitrust Litig.*, 75 F.R.D. 727, 734 (N.D.Ill.1977); *see also In re Scrap Metal Antitrust Litig.*, 527 F.3d 517, 535 (6th Cir.2008) (stating that "'[p]redominance is a test readily met in certain cases alleging . . . violations of the antitrust laws,' because proof of the *conspiracy* is a common question that is thought to predominate over the other issues of the case" (citation omitted) (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997))). Therefore, the district court acted within its discretion by treating common issues (involving the existence of a conspiracy) as predominant over individualized issues (involving negotiated prices). *See Gold Strike Stamp Co. v. Christensen*, 436 F.2d 791, 796 (10th Cir.1970) ("[W]here the question of basic liability [in antitrust cases] can be established readily by common issues, then it is apparent that the case is appropriate for class action [under Rule 23(b)(3)].").

With this determination, the district court acted within its discretion in certifying the class under Rule 23(b)(3), and nothing in *Wal-Mart* suggests an abuse of that discretion. In *Wal-Mart*, individualized proceedings were necessary because the common questions—the reasons for the pay and promotion disparities—could not yield a common answer "in one stroke." *Wal-Mart*, 131 S.Ct. at 2551-52.

Here, however, there were two common questions that could yield common answers at trial: the existence of a conspiracy and the existence of impact. The district court reasonably concluded that these questions drove the litigation and generated common answers that determined liability in a single "stroke." *Id*.

2. The Use of Extrapolation Techniques

Dow contends that the district court violated *Wal-Mart* by allowing the plaintiffs to use extrapolations to prove class-wide impact and damages. This contention is based on the plaintiffs' reliance on Dr. McClave's regression models (used to show impact) and his extrapolation models (used to estimate damages). Dow complains that: (1) the use of these models violated *Wal-Mart*'s prohibition against "trial by formula," and (2) the models were defective because Dr. McClave did not use representative sampling. We reject both complaints.

When certifying the class, the district court relied on:

- the report and supporting models of Dr. Beyer, which Dow has not challenged on appeal, and
- the evidence of a standardized pricing structure, including price lists and parallel announcements of price increases.

The court did not even have Dr. McClave's models or any other sort of extrapolation evidence. Thus, the court could not have erred by relying on Dr. McClave's models when the class was initially certified.

But the plaintiffs did present Dr. McClave's models before the district court ruled on Dow's motion to decertify the class. For two reasons, we conclude that the court acted within its discretion when it denied the motion to decertify: (1) the motion was filed late, and (2) liability was not proven through a sampling of class members.

First, the court acted reasonably in determining that the motion was late. Dow waited until the day before trial to seek decertification even though it had received Dr. McClave's report 21 months earlier. The court reasonably held that decertification at that juncture would have prejudiced the plaintiffs, who had "prepared for a long and complex trial at great expense" and who would have found it "much more difficult to assert individual claims at [that] time." AA 523-24; *see Davis v. Avco Fin. Servs., Inc.*, 739 F.2d 1057, 1062 (6th Cir.1984) ("Despite the fact that as the case developed individual questions became more prominent *vis a vis* common questions of law and fact, there still were and are significant common questions such that we would not be justified in decertifying the class at this late date."), *overruled on other grounds by Pinter v. Dahl*, 486 U.S. 622, 649-50 & n. 25, 108 S.Ct. 2063, 100 L.Ed.2d 658 (1988).

Second, reliance on Dr. McClave's models did not result in a "trial by formula." The *Wal-Mart* Court used this term to describe a novel method of calculating damages, where the district court determined the merits of individual claims by extrapolating from a sample set of class members. *Wal-Mart*, 131 S.Ct. at

2561. This method proved problematic because it displaced the "established . . . procedure for trying pattern-or-practice cases" under Title VII and, in doing so, deprived Wal-Mart of the right "to litigate its statutory defenses to individual claims." *Id*.

Our circumstances are different. The plaintiffs did not seek to prove Dow's liability through extrapolation. Rather, Dow's liability as to each class member was proven through common evidence; extrapolation was used only to approximate damages. *Wal-Mart* does not prohibit certification based on the use of extrapolation to calculate damages. *See Leyva v. Medline Indus., Inc*., 716 F.3d 510, 514 (9th Cir.2013).

Dow also complains that the models were defective because Dr. McClave did not use representative sampling. But Dow makes no attempt to:

- explain how the allegedly unrepresentative samples caused individualized questions to predominate, or
- tie its unrepresentative-sampling argument to an abuse of discretion by the district court.

We need not consider these issues, however, because Dow did not raise its present argument in the district court.[9] *See*, *e.g*., *Walker v. Mather (In re Walker)*, 959 F.2d 894, 896 (10th Cir.1992).

B. Dow's *Comcast* Argument

Comcast involved a class action based on the antitrust laws. The proposed class had alleged four

[9] In its brief opposing class certification, Dow argued that systems purchases should be excluded from the class definition. But that argument differs fundamentally from the one Dow is now asserting.

theories of antitrust impact, three of which were rejected by the district court as incapable of class-wide proof. *See Comcast Corp. v. Behrend*, —— U.S. ——, 133 S.Ct. 1426, 1430-31, 185 L.Ed.2d 515 (2013). The Supreme Court held that the class had not satisfied its burden of proving damages on a class-wide basis. *Id*. at 1434-35.

Class-wide damages were to be proven in *Comcast* solely through the testimony of Dr. McClave. The Court regarded Dr. McClave's model as defective because it had "assumed the validity of all four theories of antitrust impact initially advanced," including the three that had been rejected by the district court. *Id*. at 1434. Because the model measured aggregate damages for all of the initial theories, the plaintiffs had no way to prove class-wide damages. And without such proof, the Court concluded, individualized questions would "inevitably overwhelm questions common to the class." *Id*. at 1433.

Dow argues that Dr. McClave's model here suffers from the "precise flaw" that precluded certification in *Comcast*: a "failure to distinguish between the impact and damages attributable to the liability theory [that was] pursued at trial and another liability theory" that was not. Appellant's Opening Br. at 42 (emphasis removed). For the sake of argument, we can assume that Dow is correct.[10] But *Comcast* did not rest on the

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[10] This assumption is generous because Dr. McClave used different types of benchmarks in *Comcast* and the present action.

In *Comcast*, Dr. McClave created a benchmark by constructing a hypothetical market that would have existed in eighteen counties if the defendant had not engaged in four separate types of anticompetitive conduct. *See Comcast*, 133 S.Ct. at 1429 & n. 1, 1431, 1434-35; *Behrend v. Comcast Corp*., 655 F.3d 182, 205

ability to measure damages on a class-wide basis. Instead, the decision was premised on the majority's conclusion that without a way to measure damages on a class-wide basis, individualized questions would "inevitably overwhelm questions common to the class." *Comcast*, 133 S.Ct. at 1433. *Comcast* does not control because: (1) the decision turned on a concession that is absent here, and (2) we know from the actual trial that individualized issues did not predominate.

First, unlike the claimants in *Comcast*, our plaintiffs did not concede that class certification required a method to prove class-wide damages through a common methodology. This distinction was highlighted in the *Comcast* dissent, which explained that the plaintiffs' concession on this point—an "oddity" specific to that case—was outcome determinative. *Id*. at 1436-37 (Ginsburg & Breyer, JJ., dissenting).

(3d Cir.2011), *rev'd*, —— U.S. ——, 133 S.Ct. 1426, 185 L.Ed.2d 515 (2013); *Behrend*, 655 F.3d at 217-18 (Jordan, J., dissenting); *see infra* p. 1258. But before trial, the district court rejected the claims on three of the four types of anticompetitive conduct. *Comcast*, 133 S.Ct. at 1431; *see infra* p. 1258. Though the plaintiffs' claims changed, Dr. McClave's model did not. *Comcast*, 133 S.Ct. at 1431. Thus, Dr. McClave's benchmark in *Comcast* included thirteen counties no longer encompassed in the allegations of anticompetitive conduct. *Id*. at 1433-35; *Behrend*, 655 F.3d at 217-18 (Jordan, J., dissenting).

This defect does not exist in the benchmark that Dr. McClave used here because it was not based on any subsets of the market (such as counties where the alleged misconduct took place). Instead, the benchmark was based on the entire market, with Dr. McClave comparing actual prices to the prices that would have prevailed in a competitive market. Though one theory (customer allocation) dropped from the case, the market examined by Dr. McClave did not change. Thus, there was no need to adjust the benchmark (as there had been in *Comcast*).

Second, the procedural setting in *Comcast* was different. There, the issue was whether the district court could determine before trial that the plaintiffs could prove damages on a class-wide basis. In making that determination, the district court had only Dr. McClave's expert report, which based damages on a comparison between actual prices and a model addressing theories already rejected by the district court. These circumstances are absent here.

Comcast involved a class action against providers of cable television service. *See id*. at 1430. According to the suit, the cable television providers violated the antitrust laws by clustering services in a 16-county region. The class proposed 4 theories of damages from the clustering:

> 1. The clustering created an incentive for the cable operators to withhold sports programming from competitors.
>
> 2. The clustering reduced the level of competition from companies building cable networks in areas already being serviced.
>
> 3. The clustering reduced the "benchmark" competition that cable customers used to compare prices.
>
> 4. The clustering strengthened the cable operators' power to bargain with companies providing content.

See id. at 1430-31. Before trial, the district court rejected three of these theories, holding that the plaintiffs could prove class-wide damage through only a single theory: reduction of competition from companies building cable networks in areas already being serviced. *See id*.

This ruling created a problem of proof for the class. It relied on a pretrial model by Dr. McClave that compared actual prices in the 16-county region to the prices that would have existed if the cable operators had not gained an incentive to withhold sports programming from competitors, reduced competition from companies building rival networks in areas already serviced, reduced price competition from rival cable companies, and strengthened the defendants' bargaining power with companies providing content. *See id*. And the district court had already held that many of these alleged problems could not be used to prove class-wide damage. *See id*. With this ruling, Dr. McClave's benchmarks became useless. *Id*. at 1433-35. And without another way to prove class-wide damage, all class members would need to prove their own damages. *Id*. at 1433. The necessity of individual determinations on damages proved fatal to certification because the plaintiffs had not questioned the necessity of a methodology capable of measuring damages on a class-wide basis. *Id*. at 1430, 1434-35.

These problems do not exist here because Dow waited until after trial to raise the issue. Thus, by the time Dow presented its argument, Dr. McClave had already testified at trial.

In the trial, Dr. McClave testified "that nearly all class members had been impacted or overcharged" during the pertinent period. AA 940. In light of this testimony, the district court had the discretion to find a "fit" between the plaintiffs' theory of liability (a nationwide conspiracy to fix prices) and the theory of class-wide damages.

This "fit" had been missing in *Comcast*. Without any other evidence of class-wide damages, the Supreme Court predicted that "[q]uestions of individual damage

calculations [would] inevitably overwhelm questions common to the class." *Comcast*, 133 S.Ct. at 1433.

This problem was absent here. The district court did not need to predict what would predominate at trial because by the time Dow raised this issue, the trial had already taken place. And because Dow did not request individualized determinations on damages,[11] the plaintiffs presented only class-wide evidence of

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[11] At oral argument, counsel for Dow argued that it had sufficiently requested individualized damages calculations in its objection to class certification. Oral Arg. 15:34. But this objection did not constitute a *request* for individualized findings.

In the objection, Dow argued that the plaintiffs had failed to show that common evidence could be used to measure damages "for each putative class member." ASA 126. The district court overruled the objection, but suggested a willingness to bifurcate the trial and decertify the class to obtain individualized findings on damages. AA 413-14.

Even with this suggestion by the district court, Dow never asked for individualized findings on damages. Instead, Dow asked for a single finding on class-wide damages. *See*, *e.g.*, Dow's Proposed Verdict Form & Written Questions at 2 (Jan. 17, 2013) (Doc. 2696-1) ("The *total damages* sustained by the members of the Class caused by that conspiracy were $_____." (emphasis added)); Dow's Proposed Jury Instructions at 50-51 (Jan. 14, 2013) (Doc. 2690-2) ("Dow does not object to the proposed [damages] jury instruction with the proposed modifications."); Dow's Memorandum in Support of Dow's Proposed Verdict Form at 6-7 (Jan. 17, 2013) (Doc. 2696) ("If the jury answers "YES," then in response to Question 2(d) the jury must specify the total damages Class members sustained as a result of that conspiracy.").

When questioned about the failure to seek individualized findings on damages, Dow's counsel asserted that the district court had limited discovery to the named plaintiffs. Oral Arg. 16:00-16:08. We are not persuaded. Dow did not raise this excuse in its appellate briefs, and it has not pointed us to any such order limiting discovery.

damages. As a result, the district court knew from the actual trial that common issues of damages had predominated.

Dow complains that this approach masks a "disconnect" between Dr. McClave's expert report and his theory of damages. But the expert report was never introduced in evidence. In *Comcast*, the district court had to rely on Dr. McClave's expert report because the trial had not taken place. Here, the district court had the benefit of seeing what ultimately took place at trial. The court had no need to make a prediction based on the expert report. Instead, the district court could see that common issues of liability had predominated over individualized issues. In these circumstances, the court did not abuse its discretion by declining to decertify the class.

VIII. The Admissibility of Dr. McClave's Testimony

Dow also argues that the district court erroneously allowed Dr. McClave's expert testimony. We disagree.

A. Standard of Review

"We review de novo whether the district court applied the proper standard in determining whether to admit or exclude expert testimony." *Norris v. Baxter Healthcare Corp.*, 397 F.3d 878, 883 (10th Cir.2005). If the proper standard was applied, we will reverse only for abuse of discretion. *Id.* An abuse of discretion occurs when a ruling is "'arbitrary, capricious, whimsical or manifestly unreasonable or when we are convinced that the district court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances.'" *Id.* (quoting *Dodge v. Cotter Corp.*, 328 F.3d 1212, 1223 (10th Cir.2003)).

B. Admissibility Requirements

Expert testimony is admissible only if it is relevant and reliable. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999). To ensure reliability, district courts play an essential "gatekeeping" role. *Id*. at 141, 119 S.Ct. 1167. This role requires assessment of the expert witness's qualifications and the reliability of the opinions. *Ralston v. Smith & Nephew Richards, Inc*., 275 F.3d 965, 969 (10th Cir.2001).

C. Dow's Arguments

Dow argues that Dr. McClave's testimony was unreliable because of flaws in his multiple-regression analysis. Multiple-regression analysis is a statistical tool used to determine the relationship between an unknown variable (the "dependent" variable) and one or more "independent" variables that are thought to impact the dependent variable. Saks, Michael J., et al., *Reference Manual on Scientific Evidence* 179, 181 (2d ed.2000).

The dependent variable in Dr. McClave's models was market price. To identify the independent variables driving prices in a competitive market, Dr. McClave chose a benchmark period and tested various independent variables to find the combination that would accurately predict prices during the benchmark period. That combination of variables was then applied to the conspiracy period to calculate the prices that would have existed but for the conspiracy. Dr. McClave testified that when he compared the prices expected in a competitive market and the actual prices, he detected overcharges for the relevant products and attributed the overcharges to "something other than competition." AA 1072-73, 1119.

Dow argues that the testimony was inadmissible because Dr. McClave manufactured supra-competitive prices through "variable shopping" and "benchmark shopping." We disagree.

1. "Variable Shopping"

In Dow's view, Dr. McClave engaged in "variable shopping" by choosing variables based on whether they would generate supra-competitive prices. This argument bore on the weight of Dr. McClave's opinions, not their admissibility.

a. The Need to Include the Major Factors

The validity of a regression analysis depends on selection of the appropriate independent variables. *E.g.*, *Segar v. Smith*, 738 F.2d 1249, 1261 (D.C.Cir.1984). Consequently, the exclusion of major variables or the inclusion of improper variables may diminish the probative value of a regression model. *Bazemore v. Friday*, 478 U.S. 385, 400, 106 S.Ct. 3000, 92 L.Ed.2d 315 (1986). But such defects do not generally preclude admissibility, and courts allow use of a regression model as long as it includes the variables accounting for the major factors. *See id*. ("Normally, failure to include variables will affect the [regression] analysis' probativeness, not its admissibility."); *see also Koger v. Reno*, 98 F.3d 631, 637 (D.C.Cir.1996) ("Following *Bazemore*, courts have taken the view that a defendant cannot undermine a regression analysis simply by pointing to variables not taken into account that might conceivably have pulled the analysis's sting.").

Dow challenges Dr. McClave's exclusion of: (1) domestic demand variables for TDI, and (2) various demand variables for MDI and polyether polyols.

b. TDI

The district court reasonably concluded that Dr. McClave had a reliable evidentiary foundation to tie TDI exports to price. Dow challenges the exclusion of domestic demand variables, but does not question the relevance of TDI exports. The exclusion of domestic demand variables was not fatal because Dr. McClave had no need to consider every measurable factor—just the "major" ones. *Bazemore*, 478 U.S. at 400, 106 S.Ct. 3000. The district court reasonably found that Dr. McClave had accounted for the major factors affecting demand, and Dow's arguments bore on the weight of Dr. McClave's opinions, not their admissibility.

Dow argues that Dr. McClave mistakenly selected variables based on the data instead of picking variables that "made economic sense." Appellant's Opening Br. at 46. This argument does not invalidate the district court's contrary finding.

For this argument, Dow relies on a law review article by Franklin Fisher. Franklin M. Fisher, *Multiple Regression in Legal Proceedings*, 80 Colum. L.Rev. 702 (1980). There, Dr. Fisher states that in multiple regression, the analyst "specifies the major variables that are believed to influence the dependent variable," then tests the accuracy of the chosen variables. *Id*. at 705-06, 715. According to Dow, Dr. McClave did the opposite, picking variables based on his own data rather than picking variables based on what he would have expected.

But the district court could reasonably infer that Dr. McClave followed the protocol urged by Dow. Dr. McClave stated under oath that for TDI, he tested variables that best explained the changes in price, then tested how well these variables served to predict

price changes. AA 2081, 2085. With this explanation, the district court concluded that TDI exports could reliably be used as a proxy for demand. *Id*. at 503. In drawing this conclusion, the court pointed out that none of Dow's experts had questioned the sufficiency of a relationship between TDI exports and demand. *Id*. Even now, Dow does not refer to any such evidence.[12]

Instead, Dow argues that Dr. McClave should have considered other independent variables addressing domestic demand. But Dr. McClave tested domestic demand variables and concluded they did not bear a statistically significant relationship to price. *Id*. at 2221. He explains that when he tested domestic demand variables, price decreased as demand increased. *Id*. at 2161. Dr. McClave regarded this finding as a "nonsensical negative sign [ ]," which made domestic demand unusable as an independent variable affecting TDI prices. *Id*.

Dr. McClave pointed to other evidence substantiating his statistical conclusions that domestic demand proved less significant than exports. For example, a 2004 Bayer document identified exports as a driver of TDI prices. And the plaintiffs' economic expert (John Solow, Ph.D.) opined that ("the marginal demand driver for TDI was not domestic

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[12] In district court, Dow appeared to criticize Dr. McClave's inclusion of TDI exports as a variable. Dow's Mot. to Exclude Dr. McClave's Test. at 20 (Aug. 17, 2012) (Doc. 2391) (stating that it was improper for Dr. McClave to use TDI exports rather than measures of U.S. demand). But on appeal, Dow appears to retract its criticism of Dr. McClave's decision to include TDI exports as a demand variable. Dow's Reply Br. at 15-16 ("The problem . . . is not the *inclusion* of TDI exports as a demand variable. . . .").

demand . . . but rather expert demand"). Corrected Solow Report at 22 n. 71 (June 16, 2011).[13]

Dr. McClave's treatment of domestic demand is open to debate. But the district court had the discretion to accept Dr. McClave's explanation for omitting variables addressing domestic demand. Thus, the district court did not abuse its discretion in concluding that Dow's complaints bore on the weight of Dr. McClave's testimony rather than its admissibility.

c. MDI and Polyols

In its opening brief, Dow devotes two sentences to the choice of variables for MDI and polyether polyols: "In specifying his MDI and polyols models, in contrast, Dr. McClave used only *domestic* demand variables and did not include a variable for exports. He continued his results-oriented approach in the MDI and polyols models by selectively picking and choosing among the variables used as a proxy for domestic demand." Appellant's Opening Br. at 46-47 (citations omitted). Dow followed the two sentences with a chart comparing Dr. McClave's proxies for domestic demand with a report of the top uses in 2002. *Id*. at 47.

We question whether the two sentences and the chart fairly develop a claim challenging the use of variables for MDI and polyols. *See Thompson R2-J Sch. Dist. v. Luke P., ex rel. Jeff P.*, 540 F.3d 1143, 1148 n. 3 (10th Cir.2008). But even if we were to construe these sentences and the chart as a separate appeal point, it was not raised in Dow's motion to exclude Dr. McClave's testimony. *See* Dow's Mot. to Exclude Dr.

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[13] Dr. Solow's report was omitted from the appendices. But the report was filed in district court as an attachment and is subject to judicial notice. *See Guttman v. Khalsa*, 669 F.3d 1101, 1127 n. 5 (10th Cir.2012).

McClave's Test., *passim* (Aug. 17, 2012) (Doc. 2391). Thus, if Dow has presented an appeal point for MDI and polyols, we would confine our review to the plain-error standard. *See McKenzie v. Benton*, 388 F.3d 1342, 1350-51 (10th Cir.2004).

Dow's brief assertions do not show an obvious error in Dr. McClave's choice of variables for MDI or polyols. As a result, even if we were to construe Dow's brief references to MDI and polyols as a separate argument, it would not warrant reversal under the plain-error standard. *See*, *e.g.*, *Royal Maccabees Life Ins. Co. v. Choren*, 393 F.3d 1175, 1181-82 (10th Cir.2005) (stating that the plain-error standard requires demonstration of an error "that is plain or obvious under existing law").

2. "Benchmark Shopping"

Dow also argues that Dr. McClave engaged in "benchmark shopping," arguing that he moved 2004 from the conspiracy period to the competitive/ benchmark period in order to manufacture supra-competitive prices during the conspiracy period. The plaintiffs maintain that this decision was made for legitimate reasons. But even if Dow could prove otherwise, its benchmark-shopping argument does not implicate the reliability of Dr. McClave's methodology.

Reliability "is primarily a question of the validity of the methodology employed by an expert, not the quality of the data used in applying the methodology or the conclusions produced." *Manpower, Inc. v. Ins. Co. of Penn.*, 732 F.3d 796, 806 (7th Cir.2013). Accordingly, a district court must admit expert testimony as long as it is based on a reliable methodology. It is then for the jury to evaluate the reliability of the underlying data, assumptions, and conclusions. *Id*. at 806-08.

Dow argues that Dr. McClave skewed the results by including 2004 data in the prices for the benchmark period. This argument involves a swearing match. Dow asserted to the district court that Dr. McClave had moved 2004 to the "benchmark" period in order to maximize damages. The plaintiffs disagreed, presenting Dr. McClave's explanation that he had included 2004 as part of the benchmark period based on test results reflecting that 2004 prices "were more consistent with competition than collusion." AA 2081, 2215. The district court resolved this swearing match in favor of the plaintiffs. SA 498. We have no basis to regard this resolution as an abuse of discretion. *See Hollander v. Sandoz Pharm. Corp*., 289 F.3d 1193, 1204 (10th Cir.2002).

IX. Sufficiency of the Evidence

Dow also challenges the sufficiency of the evidence regarding liability, arguing that the district court erred in denying the motion for judgment as a matter of law. We reject this challenge.

A. Standard of Review

We engage in de novo review of the district court's denial of judgment as a matter of law, applying the same standard as the district court. *Myklatun v. Flotek Indus., Inc*., 734 F.3d 1230, 1233-34 (10th Cir.2013). This standard requires us to determine whether the evidence allowed a verdict for the plaintiffs. *See Wolfgang v. Mid-Am. Motorsports, Inc*., 111 F.3d 1515, 1522 (10th Cir.1997). In applying this standard, we view the evidence and related inferences in the light most favorable to the plaintiffs. *See Myklatun*, 734 F.3d at 1234. Judgment as a matter of law should not be granted "[u]nless the proof is all one way or so overwhelmingly preponderant in favor of the movant

as to permit no other rational conclusion." *Greene v. Safeway Stores, Inc.*, 98 F.3d 554, 557 (10th Cir.1996).

This evidence, viewed in the light most favorable to the plaintiffs, was sufficient for a finding of liability.

B. Dow's Arguments

Dow argues that: (1) there was insufficient evidence that the alleged price-fixing agreement was effectively implemented, (2) there was insufficient evidence of a conspiracy involving Lyondell, and (3) the jury necessarily rejected Dr. McClave's models, leaving insufficient evidence of impact and damages. We reject each argument.

1. Implementation of the Conspiracy

Dow does not dispute:

- the existence of an agreement to coordinate price-increase announcements and try to make them stick, or
- the existence of evidence involving coordination in announcing price increases.

Rather, Dow questions the existence of evidence that the conspirators followed through with the agreement by requiring suppliers to make the price increases stick. Without evidence of follow-through, Dow argues, the price-fixing claim fails as a matter of law. We reject Dow's argument.

a. Parallel Announcements of Price Increases

The argument rests on a purported distinction between two categories of price-fixing conspiracies: (1) those involving an agreement to set prices directly, and (2) those involving an agreement to announce price increases and try to make them stick.

Conspiracies falling into the second category, Dow submits, require an evidentiary link between the price-increase announcements and subsequent prices. According to Dow, this evidentiary link is necessary because parallel price-increase announcements do not prove a conspiracy.

For the sake of argument, we can assume that evidence of parallel price-increase announcements would not establish a price-fixing conspiracy. But the plaintiffs did more than show parallel announcements. The evidence included admissions by industry insiders, collusive behavior, susceptibility of the industry to collusion, and setting of prices at a supra-competitive level.

For example, the plaintiffs presented testimony by Ms. Stephanie Barbour (Dow), who admitted that Dow had participated in a price-fixing conspiracy. Ms. Barbour directly implicated at least three Dow executives in the conspiracy: Mr. Marco Levi, Mr. David Fischer, and Mr. Peter Davies.

Another key witness for the plaintiffs was Mr. Lawrence Stern (Bayer), who recounted numerous conversations he had had with his counterparts at Dow, BASF, and Huntsman. Mr. Stern described these conversations as "inappropriate," for they pertained to future pricing and "the possibility of raising prices." SA 912-14. Mr. Stern added that he had:

- discussed prices with David Fisher (Dow) on eight to fifteen occasions, and
- exchanged confidential pricing information with competitors to spur industry-wide price increases.

Id. at 896-97, 905.

Mr. Stern also testified that he had taken "unusual steps" to conceal his conversations with Bayer's competitors. *Id*. at 881. For instance, he would use pay telephones instead of calling from his office and would use a prepaid phone card. *Id*. Other times, Mr. Stern met with competitors at off-site locations, such as coffee shops or hotels. Commenting on these secretive communications, the plaintiffs' expert econometrician told the jury that "economists associate secrecy with collusion." *Id*. at 2688.

Testimony about a conspiracy also came from others, such as:

- Mr. Edward Dineen (Lyondell), who implicated Mr. Jean Pierre Dhanis (BASF) and Mr. Robert Wood (Dow) in the conspiracy,
- Mr. Robert Kirk (Bayer), who confirmed Mr. David Fischer's (Dow) involvement, and
- two Bayer executives (Ms. Michelle Blumberg and Mr. Gerald Phelan) who had grounds to suspect their colleague, Mr. Wolfgang Friedrich, of price-fixing.

The jury also heard from the plaintiffs' expert, Dr. John Solow, who testified about: (1) collusive conduct he had observed in the polyurethane industry, and (2) the industry's susceptibility to collusion.

Dr. Solow had observed four types of collusive conduct.

First, the defendant companies had issued "a series of . . . lockstep price increase announcements," which came within weeks of each other, communicated the same or similar price increases, and were to take effect at about the same time. *Id*. at 2678-79, 2682.

Second, Dr. Solow noticed "a widespread pattern of communication" among the top executives of the defendant companies. *Id*. at 2679. Dr. Solow was struck not only by the frequency and secrecy of these communications but also by their timing, for the contacts frequently occurred within days of a lockstep price-increase announcement. *Id*. at 2706-09. This proximity suggested that the price-increase announcements had been coordinated. *Id*.

Third, Dr. Solow detected a "price over volume strategy," where the companies would stick to their list prices even if it meant walking away from opportunities to earn business or make sales at lower, but still profitable, prices. *Id*. at 2679. In Dr. Solow's view, these actions would not take place in a competitive market and the companies were acting contrary to their interests. *Id*. at 2711-12.

Fourth, the defendant companies monitored one another to prevent cheating and to discipline any supplier that was found cheating. *Id*. at 2723.

Dr. Solow also testified that the polyurethane industry was "ripe for collusion" based on six features:[14]

1. Sales of polyurethane products were "concentrated in the hands of only a handful of firms" during the conspiracy period;[15]

2. the market had high barriers to entry;[16]

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[14] SA 2675.

[15] *Id*. at 2644.

[16] *Id*. at 2645.

3. polyurethane products are homogenous;[17]

4. there were no close product substitutes available to customers;[18]

5. there was excess capacity for MDI, TDI, and polyether polyols during the conspiracy period, meaning that the companies could "produce more output than the customers actually want[ed] to buy," putting a "strong downward pressure on prices;"[19] and

6. the industry has several trade associations, which provided "an opportunity to engage in price fixing behavior."[20]

The evidence also included testimony by Dr. McClave. He testified that class members had been overcharged for polyurethane products because of "something other than competition." AA 1072-73, 1119; SA 6297.

The evidence, viewed favorably to the plaintiffs, goes beyond parallel announcements of price increases.

b. Announcements of Price Increases v. Actual Price Increases

Dow argues that even if a conspiracy existed, it did not work because the plaintiffs could not tie the announcements to actual price hikes. But the plaintiffs had no reason to connect the two, for they were not trying to prove that the price-increase

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[17] *Id*. at 2646.

[18] *Id*. at 2649.

[19] *Id*. at 2651-52.

[20] *Id*. at 2660-61.

announcements *caused* supra-competitive prices. Instead, the plaintiffs were trying to prove that the supra-competitive prices were caused by the conspiratorial agreement; the price-increase announcements were merely an instrument used to effectuate that agreement.

The jury could have inferred that the announcements proved successful, for the trial included testimony that: (1) manufacturers sometimes used the announcements to avoid price decreases,[21] and (2) some of the announcements were partially or fully accepted.[22] From this testimony, the jury could have inferred that a conspiracy existed and that it caused prices to be higher than they would have been in a marketplace free of collusion.

2. Involvement of Lyondell

Dow argues the evidence was insufficient regarding Lyondell's involvement in the conspiracy. This argument fails legally and factually.

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[21] SA 1964 (testimony of Mr. Jean-Pierre Dhanis).

[22] SA 892-93 (testimony of Mr. Larry Stern); *id*. at 4156 (testimony of Mr. Richard Beitel that price increases were fully paid for 40-50% of the announcements); *id*. at 299-300 (Bayer memorandum stating that "the price increases [are] becoming effective and being paid"); *id*. at 304 (Bayer memorandum stating that announcements of price increases allowed Bayer to benefit from the full impact); *id*. at 341-42 (Dow e-mails acknowledging that Dow had obtained "the full increases"); *id*. at 482 (Dow announcement in connection with pricing, stating "Its [sic] Working!!!!!!!"); *id*. at 3438, 3502-03 (testimony of Dr. McClave that prices exceeded competitive levels from 1999 to 2003); *id*. at 2732 (testimony of Dr. Solow that the alleged conspiracy succeeded because nearly all class members had to pay the higher prices).

The argument fails legally because even if the evidence had not shown Lyondell's involvement, Dow would not have been exonerated. A defendant can incur liability for a conspiracy under § 1 of the Sherman Act so long as the defendant did not act unilaterally. *See Copperweld Corp. v. Independence Tube Corp*., 467 U.S. 752, 768, 104 S.Ct. 2731, 81 L.Ed.2d 628 (1984). And, for the reasons discussed above, there is sufficient evidence of a conspiracy between Dow and the other defendant companies, regardless of Lyondell's involvement.

Dow's argument also fails factually because the evidence allowed a reasonable fact-finder to infer Lyondell's participation in the conspiracy. The inference was possible based on evidence that: (1) Lyondell and Dow communicated before three price hikes, (2) other conspirators discussed collusion in front of Lyondell's representative, and (3) other manufacturers colluded.

First, the plaintiffs presented evidence that Mr. Mario Portela (Lyondell) had communicated with Mr. Marco Levi (Dow) immediately before at least three lockstep price-increase announcements. *See* SA 3147-51, 3224-30; AA 1772-92.

Second, the evidence included testimony by Mr. Edward Dineen (Lyondell), who told the jury that: (1) he had attended a dinner with Mr. Jean-Pierre Dhanis (BASF) and Mr. Robert Wood (Dow), and (2) during the dinner, Mr. Dhanis made "comments regarding pricing and market conditions for urethanes" that made Mr. Dineen feel "uncomfortable from an antitrust perspective." SA 1984-85. The fact that Mr. Dhanis felt comfortable discussing prices in front of Mr. Dineen suggests the involvement of one or more Lyondell executives.

Finally, the evidence suggested participation by virtually every large manufacturer. This evidence could have led the jury to infer participation by Lyondell. *See In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 363 (3d Cir.2004) ("If six firms act in parallel fashion and there is evidence that five of the firms entered into an agreement, . . . it is reasonable to infer that the sixth firm acted consistent with the other five firms' actions because it was also a party to the agreement.").

3. Effect of the Jury Verdict on Dr. McClave's Models

The jury found no injury for the 23-month period preceding November 24, 2000. AA 513-14. From this finding, Dow infers that the jury partially rejected Dr. McClave's models. With this inference, Dow argues that Dr. McClave's models are invalid; and without valid models, Dow continues, the plaintiffs lack sufficient evidence of impact and damages. This series of inferences does not allow us to disturb the jury's unequivocal findings on impact and damages.

We conclude that:

- the plaintiffs' failure to prove a conspiracy for part of the alleged conspiracy period does not invalidate the finding of liability for part of this period, and
- we have no reason to believe that the jury rejected Dr. McClave's models in their entirety.

As the district court recognized, the jury may have fully credited Dr. McClave's models, but found the evidence insufficient to find an injury before November 24, 2000.

Citing *In re Rail Freight Fuel Surcharge Antitrust Litigation*, Dow contends that the models are invalid because they "detect[ ] injury where none could exist." Appellant's Opening Br. at 51 (quoting *In re Rail Freight Fuel Surcharge Antitrust Litig*., 725 F.3d 244, 252 (D.C.Cir.2013)). This case does not apply.

In *In re Rail Freight*, an expert witness found damages for plaintiffs who were bound by rates agreed to before the alleged conspiracy. 725 F.3d at 252. Thus, the plaintiffs could not have been harmed by the conspiracy. *Id*. And, under *Comcast*, the D.C. Circuit Court of Appeals regarded certification as questionable because damages might not be provable through class-wide evidence. *Id*. at 252-53. This analysis does not apply here for two reasons.

First, *In re Rail Freight* involved a certification challenge decided on interlocutory review; at that stage, the Court of Appeals could only predict whether common issues would predominate for purposes of class certification. Here, we have the benefit of knowing what happened at the trial: Common issues predominated over individualized issues. Thus, the D.C. Circuit's concern lacks any bearing on whether common issues predominated here.

Second, Dr. McClave's model does not suffer from the same flaw identified in *In re Rail Freight*. There, the appeals court could not credit the expert's opinion because his methodology yielded damages for a time period in which prices had been freely set. Thus, the expert found damages for plaintiffs who could not possibly have suffered injury. Here, by contrast, Dow has not identified a single class member for whom injury was impossible.

Rather, Dow asks us to infer a flaw based on the jury's finding of no damages for a specific time period. We cannot draw that inference, for the jury could have limited the time period for the conspiracy based on Dow's explanation for prices before November 24, 2000. Thus, the jury might have limited the conspiracy period while agreeing with Dr. McClave's analysis of pricing after November 24, 2000.

For both reasons, the flaw in *In re Rail Freight* does not exist here, and the jury's finding does not imply a failure to prove impact or damages after November 24, 2000.

X. The Damages Award

Dow's final challenge involves the award of damages. Dow argues that: (1) the damages award had no evidentiary basis, and (2) the resulting judgment violated the Seventh Amendment.

A. Evidentiary Support for the Award

The jury assessed damages of $400,049,039 even though Dr. McClave had calculated damages of $496,680,486. AA 514. Dow contends that the jury's assessment was speculative because it deviated from Dr. McClave's figure and lacked any other evidentiary support. We reject this contention.

In evaluating this argument, we must view the evidence in the light most favorable to the plaintiffs,[23] upholding the jury's damages award unless it is "clearly, decidedly or overwhelmingly against the weight of the evidence."[24]

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[23] *Snyder v. Moab*, 354 F.3d 1179, 1187-88 (10th Cir.2003).

[24] *Black v. Hieb's Enters*., 805 F.2d 360, 363 (10th Cir.1986).

In entering judgment based on the damages award, the district court reasoned that the jury might have discounted Dr. McClave's figure based on:

- Dow's arguments regarding systems,
- skepticism about Lyondell's involvement in the conspiracy, or
- a belief that the conspiracy had a shorter duration than Dr. McClave assumed.

Id. at 537. Dow does not question these possibilities. Instead, Dow insists that the jury had no evidentiary basis for a smaller amount because the plaintiffs had not "introduce[d] the underlying calculations or provide[d] the jury with the information necessary to adjust [Dr.] McClave's . . . damages figures if they disagreed with any of his assumptions." Appellant's Opening Br. at 63. We reject Dow's argument.

Dow assumes that the jury could not adjust Dr. McClave's damages figure without his "underlying calculations" or some other "tool." *Id*. at 63-64. This assumption is incorrect, for a jury can reduce an expert's calculations on damages even when unable to "run the exact numbers and calculations of [a damages] model with 'mathematical certainty.'" *Medcom Holding v. Baxter Travenol Labs., Inc*., 106 F.3d 1388, 1400-01 (7th Cir.1997); *see Russo v. Ballard Med. Prods*., 550 F.3d 1004, 1018 (10th Cir.2008) (rejecting the defendant's argument that the jury's award "exceeded what the record evidence could support" when the jury awarded an amount lying "somewhere in between the extremes suggested by the evidence received at trial"); *see also In re Scrap Metal Antitrust Litig*., 527 F.3d 517, 533-34 (6th Cir.2008) (rejecting the defendant's argument that "the jury must have resorted to speculation" to arrive at a

damages award of $11.5 million, when the expert calculated damages of $20.9 million); *Tuf Racing Prods., Inc. v. Am. Suzuki Motor Corp*., 223 F.3d 585, 591 (7th Cir.2000) (rejecting the defendant's argument that the jury's award should be set aside as "'speculative'" when the plaintiff's expert calculated damages of $1.2 million, but "the jury awarded only a bit more than 10 percent of that").

B. The Seventh Amendment

Dow also challenges the district court's decision to permit allocation of the damages award according to Dr. McClave's damages model. According to Dow, this method of distribution violates the Seventh Amendment by taking from the jury "the question of liability and the extent of the injury by an assessment of damages." *Dimick v. Schiedt*, 293 U.S. 474, 486, 55 S.Ct. 296, 79 L.Ed. 603 (1935). We disagree.

Because this argument implicates a constitutional question, our review is de novo. *J.R. Simplot v. Chevron Pipeline Co.*, 563 F.3d 1102, 1115 (10th Cir.2009).

According to Dow, the Seventh Amendment problem arises not from the use of Dr. McClave's model to distribute damages, but from the application of a pro rata reduction to reflect the jury's award of a lesser amount. The court's across-the-board reduction is problematic, Dow says, because the reason for the jury's reduction is unknown. Dow argues that: (1) the reduction was based on a finding that certain class members suffered no injury, and (2) as a result, Dow was unable to have a jury determine which class members had suffered less damage than Dr. McClave had figured. Appellant's Opening Br. at 65.

We reject this argument because Dow has no interest in the method of distributing the aggregate damages award among the class members. *See Allapattah Servs., Inc. v. Exxon Corp*., 333 F.3d 1248, 1258 (11th Cir.2003) ("[A] defendant has no interest in how the class members apportion and distribute a[n] [aggregate] damage [award] among themselves."); *Six (6) Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1307 (9th Cir.1990) ("Where the only question is how to distribute the damages, the interests affected are not the defendant's but rather those of the silent class members."). And Dow cannot complain about the uncertainties inherent in an aggregate damages award because Dow never requested individualized findings on damages. *See supra* pp. 1258-59 & note 11.

Dow claims an interest in the allocation of damages to ensure that all class members are bound by the judgment. But Dow fails to identify any threat to the binding effect of the judgment. The three cases that it cites are inapplicable.

In *Phillips Petroleum Co. v. Shutts*, the defendant challenged the trial court's jurisdiction over the class plaintiffs, raising a legitimate concern that the judgment would not bind all class members. 472 U.S. 797, 805, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985).

Carrera v. Bayer Corp. likewise involved a class-wide judgment with an uncertain binding effect. 727 F.3d 300, 310 (3d Cir.2013). The class there had been decertified because there was insufficient evidence of an ascertainable class. As a result, the class members could argue that they were not bound by the judgment. *Id*.

Dimick v. Schiedt was a case about additur. 293 U.S. 474, 55 S.Ct. 296, 79 L.Ed. 603 (1935). There, the

Supreme Court held that the Seventh Amendment is violated when a court "assess[es] an additional amount of damages" beyond that found by the jury. *Id*. at 486-87, 55 S.Ct. 296.

Unlike the defendants in *Phillips* and *Carrera*, Dow has not identified any reason to believe that the judgment here would fail to bind all class members. And the district court reduced the jury's damages award, rather than add to it as in *Dimick*. Accordingly, these cases do not apply.

We conclude that Dow has not established a Seventh Amendment violation.

XI. Conclusion

We affirm, rejecting Dow's challenges to the order for class certification, the refusal to decertify the class, the admission of Dr. McClave's testimony, the sufficiency of the evidence, and the award of damages.

APPENDIX B

UNITED STATES DISTRICT COURT,
D. KANSAS

MDL No. 1616
No. 04-1616-JWL

IN RE URETHANE ANTITRUST LITIGATION
This document relates to The Polyether Polyol Cases

July 26, 2013

MEMORANDUM AND ORDER

JOHN W. LUNGSTRUM, *District Judge.*

In this multi-district class action, the claim by plaintiff class that defendant Dow Chemical Company ("Dow") conspired with other manufacturers to fix prices for certain urethane chemical products, in violation of the Sherman Act, 15 U.S.C. § 1, was tried to a jury over a period of four weeks. On February 20, 2013, the jury returned a verdict in plaintiffs' favor. By Memorandum and Order dated May 15, 2013, the Court denied Dow's motion to decertify the class and Dow's motion for judgment as a matter of law or for a new trial (Doc. # 2879). In that order, the Court also modified the class certified in the case to exclude purchases in 2004, and it ordered plaintiffs to provide a proposed notice to the class of that modification. Also on May 15, 2013, the Clerk of Court issued a judgment in favor of the plaintiff class, including trebling the amount of the jury's verdict pursuant to 15 U.S.C.

§ 15, in the amount of $1,200,147,117.00, with interest at a rate of 0.11 percent as provided by law.

This matter now comes before the Court on plaintiffs' motion to amend the judgment (Doc. # 2885); Dow's motion to amend the judgment (Doc. # 2897); and plaintiffs' motion for approval of their notice to the class and for tolling of the statute of limitations (Doc. # 2903). For the reasons set forth below, plaintiffs' motion to amend the judgment is *granted*; Dow's motion to amend the judgment is *granted in part and denied in part*, as set forth herein; and plaintiffs' motion for approval of the notice and for tolling is *granted*.

1. In its motion, Dow makes a number of arguments against the entry of any judgment against it in favor of plaintiff class based on the verdict issued by the jury. For instance, Dow argues that the verdict was ambiguous; that an award of aggregate damages was improper; that individual damage determinations for each class member were required; that any award cannot be distributed in the absence of jury adjudication of each class member's damages; and that Dr. McClave's model is insufficient and was rejected by the jury. Dow also argues that the commonality and predominance required for class certification are lacking. The Court has already rejected these arguments in denying Dow's motion for decertification and its motion for judgment as a matter of law or a new trial. As the Court noted then, any arguments not based specifically on trial testimony should have been raised much earlier, either at the certification stage, after receipt of Dr. McClave's report, or in a *Daubert* motion. The Court further notes that Dow failed to argue at trial that the jury could not find aggregate damages or that a separate trial was required for an

adjudication of individual members' damages. Moreover, these arguments are not new merely because a judgment has now been entered or because they are now made in the context of opposing plaintiffs' plan for allocation. Finally, Dow has not provided any basis for reconsideration of the Court's prior rejection of these arguments; indeed, Dow has not bothered to address the Court's reasoning from its prior orders in once again making these arguments. Accordingly, the Court denies this aspect of Dow's motion to amend the judgment.

2. Dow also challenges the judgment's trebling of the jury's award of damages, based on its argument that the jury was required to find damages individually for each class member, which individual awards could then be trebled. The Court rejects this argument. Dow has not persuaded the Court that aggregate damages could not be awarded here, and it has provided no authority suggesting that an aggregate award should not be trebled in accordance with the clear language of 15 U.S.C. § 15. The Court thus denies this basis for challenging the judgment.

3. Dow makes only a few comments about the form of the judgment. Both sides agree that the judgment should be amended to account for settlements reached by the class with other defendants totaling $139,300,000. Accordingly, both sides' motions are granted on that issue, and the judgment shall be amended to be in the amount of $1,060,847.117.00.

4. Dow notes that under Fed.R.Civ.P. 23(c)(3)(B), the judgment in a class action must include a definition of the class certified under Rule 23(b)(3). Plaintiffs agree that the judgment should be amended in this way. Accordingly, the judgment will be amended to include the definition of the class (as

presently constituted after modification by the Court).[1]

5. Dow argues that the judgment should be amended to include a judgment in its favor with respect to any transaction prior to November 24, 2000. The jury found that the injury suffered by the class from the conspiracy involving Dow did not include any overcharges prior to that date. The Court does not agree, however, that Dow is entitled to such a judgment as requested. Plaintiffs brought a claim of antitrust conspiracy, on which it prevailed. The fact that they did not prevail to the full extent of that claim or recover all of the damages they sought does not entitle Dow to a judgment on some portion of plaintiffs' claim. Dow did not assert its own claim with respect to the pre-November 24 period (for a declaration of no liability, for instance), and Dow has not cited any authority suggesting that it is nevertheless entitled to a judgment in its favor for the time period for which plaintiffs did not recover. The Court denies Dow's motion for such an amendment.[2]

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[1] Dow also questions whether the Court approved the form of judgment in accordance with Rule 58(b)(2)'s requirement of court approval after a verdict with answers to written questions, like the verdict in this case. The Court did approve the judgment issued by the Clerk in this case, although that approval was not noted expressly on the record. To remove all doubt, the amended judgment will include a notation of the Court's approval.

[2] Dow notes that plaintiffs have not opposed this requested amendment in their brief. The Court does not agree, however, that it therefore should not consider the merits of this request. Plaintiffs do not have a real interest in this issue, as the requested amendment would essentially affect only non-parties. Thus, the Court has an independent duty to consider the proper form of the judgment.

6. The final issue with respect to the judgment is plaintiffs' request that the judgment be amended to include approval of plaintiffs' proposed plan of allocation of the damages among the class members. *See Cook v. Rockwell Int'l Corp*., 618 F.3d 1127, 1137-38 (10th Cir.2010) (judgment was final on class action claim where it included a plan of allocation that established the formula for the division of damages among class members and the principles that would guide the disposition of unclaimed funds). Under plaintiffs' proposed plan, a particular company (the administrator previously appointed by the Court for distribution of settlement amounts in this case) would be appointed as administrator; the damage award would be distributed to class members on a pro rata basis in accordance with each member's estimated overcharges for the period from November 24, 2000, through December 31, 2003, as calculated by plaintiffs' testifying expert, Dr. James McClave; the Court would establish and approve appropriate procedures, similar to those approved for the settlement amounts, for approval of the proposed final allocation and notice to the class; distribution would not take place until after any appeal; the costs and expenses of the administrator would be paid from the judgment fund; and any remaining unclaimed funds would be distributed to participating class members. In their reply brief, plaintiffs concede that the Court could also approve a *cy pres* distribution of unclaimed funds, and they suggest that the Court would be in a better position to make that determination after the expiration of the claims period, when the amount of unclaimed funds will be known.

Dow attacks plaintiffs' proposed plan of allocation as an improper adjudication of individual members' damages, which Dow argues must be performed by a

jury. The Court has already rejected that argument, both as untimely and on the merits. In addition, although Dow has an interest in making sure that the judgment against it is proper, the Court agrees with plaintiffs that Dow has no interest in the particular manner in which the total damages found by the jury are distributed among the class members. *See*, *e.g*., *Allapattah Servs., Inc. v. Exxon Corp*., 333 F.3d 1248, 1258-59 (11th Cir.2003) (Supreme Court precedent "suggests that a defendant has no interest in how the class members apportion and distribute a damage fund among themselves") (citing *Boeing Co. v. Van Gemert*, 444 U.S. 472, 481 n. 7 (1980)); *Six (6) Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1307 (9th Cir.1990) ("Where the only question is how to distribute the damages, the interests affected are not the defendant's but rather those of silent class members.").

The Court concludes that plaintiffs' proposed plan for the distribution of the damages is reasonable and appropriate, and the judgment shall be amended to incorporate that plan. That plan establishes the method for distribution of the damages, leaving only a mechanical application for the administrator. Thus, the Court concludes that the resulting judgment will be final under the requirements discussed by the Tenth Circuit in its *Cook* opinion. *See Cook*, 618 F.3d at 1137-38. Moreover, the Court agrees with plaintiffs that any final determination concerning the disposition of unclaimed funds should be left until the expiration of the claims period. *See, e.g., In re Universal Serv. Fund Tel. Billing Practices Litig*., 2013 WL 2476587 (D. Kan. June 7, 2013) (determining whether to distribute unclaimed funds to participating class members or to order a *cy pres* distribution).

Accordingly, plaintiffs' motion to amend is granted to that extent.[3]

7. As noted above, when the Court modified the definition of the class to exclude 2004 purchases, it ordered plaintiffs to submit a proposed notice to the class of that modification. In moving for approval of their proposed notice, plaintiffs have also requested an order tolling the statute of limitation for claims based on 2004 purchases, for a period extending from May 15, 2013 (the date of the modification order) to 60 days after the mailing of the notice. Dow concedes that courts have allowed for such periods of tolling after decertification, and it states that it does not oppose tolling for the requested period. Accordingly, the Court orders that the statute of limitations for claims by former or present class members based on 2004 purchases is hereby tolled for the period from May 15, 2013, to 60 days after the mailing of the notice approved in this order.

Dow does take issue with language in the proposed notice suggesting that the statute of limitations for such claims was tolled for some period prior to May 15, 2013, as Dow seeks to reserve the right to argue in the future that there was no such tolling under the *American Pipe* doctrine. Plaintiffs have agreed to remove such language from the notice, and they have submitted a revised notice with that change. The Court approves that revision by plaintiffs and the

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[3] Plaintiffs also moved that the judgment be amended to include a confirmation of their right to an award of their costs, including attorney fees, pursuant to 15 U.S.C. § 15; in their reply brief, however, plaintiffs have effectively withdrawn that request by their agreement with Dow that any such issue should be addressed after any appeals are resolved.

language in that proposed notice relating to this tolling order.

8. Finally, Dow opposes the notice as proposed by plaintiffs on the ground that it does not set out the circumstances relating to the Court's ultimate modification of the class definition. Dow would include various statements that would set forth Dow's position with respect to plaintiffs' abandonment of a claim that would include 2004 transactions. The Court agrees with plaintiffs, however, that the circumstances giving rise to the modification should not be included in the notice. Such exclusion avoids any risk of including argument by Dow (with the Court's apparent imprimatur) in the notice.

The Court has reviewed the revised notice proposed by plaintiffs, and it finds that notice to be reasonable and proper. Accordingly, the Court approves the revised notice submitted by plaintiffs, and plaintiffs are ordered to send that notice to former and present class members forthwith.

IT IS THEREFORE ORDERED BY THE COURT THAT plaintiffs' motion to amend the judgment (Doc. # 2885) is *granted.*

IT IS FURTHER ORDERED BY THE COURT THAT defendant Dow's motion to amend the judgment (Doc. # 2897) *is granted in part and denied in part*, as set forth herein.

IT IS FURTHER ORDERED BY THE COURT THAT plaintiffs' motion for approval of its class notice and for tolling of the statute of limitations is *granted*. The statute of limitations for claims by former or present class members based on 2004 purchases is hereby tolled for the period from May 15, 2013, to 60 days after the mailing of the notice approved in this

order. Plaintiffs revised proposed notice to former and present class members is hereby approved.

IT IS SO ORDERED.

APPENDIX C

UNITED STATES DISTRICT COURT,
D. KANSAS

MDL No. 1616
No. 04-1616-JWL

IN RE URETHANE ANTITRUST LITIGATION
This document relates to: The Polyether Polyol Cases

May 15, 2013

MEMORANDUM AND ORDER

JOHN W. LUNGSTRUM, *District Judge.*

In this multi-district class action, the claim by plaintiff class that defendant Dow Chemical Company ("Dow") conspired with other manufacturers to fix prices for certain urethane chemical products, in violation of the Sherman Act, 15 U.S.C. § 1, was tried to a jury over a period of four weeks. On February 20, 2013, the jury returned a verdict in plaintiffs' favor. Specifically, the jury found that Dow participated in a price-fixing conspiracy; that the conspiracy caused plaintiff to pay more for chemicals than they would have absent the conspiracy; that such overpayments did not include any overpayments prior to November 24, 2000 (the date four years prior to the filing of this suit); and that plaintiffs suffered damages in the amount of $400,049,039.00.

This matter now comes before the Court on Dow's motion to decertify the class (Doc. # 2706) and its post-

trial motion for judgment as a matter of law or for a new trial (Doc. # 2808). For the reasons set forth below, the Court *denies* both motions. The Court also modifies the class certified in this case to exclude purchases in 2004.

I. Motion to Decertify the Class

A. Untimely Motion

On July 28, 2008, the Court issued its order certifying a class in this case. On January 22, 2013—one day before the start of trial—Dow filed a motion to decertify the class. The Court took the motion under advisement and granted leave to the parties to supplement the motion and plaintiffs' opposition in connection with the briefing on Dow's post-trial motion.[1]

Dow purports to base its motion to decertify on events that have occurred since the Court's 2008 certification order. Dow's arguments are based primarily on the opinions of Dr. James McClave, plaintiffs' damages expert, who created a model purporting to show that prices paid during the alleged conspiracy period exceeded those prices that would have been paid absent a price-fixing conspiracy. Dow has had Dr. McClave's expert report, however, since April 2011. All of the issues raised in Dow's original brief in support of its motion to decertify could have been raised at least a year before trial. Dow has not offered any reason why it could not have filed its motion much earlier and why it instead filed its motion literally on the eve of trial. Reconsideration of the

[1] The Court has deferred issuing a judgment in this case until after the Court's resolution of this motion to decertify the class. *See* Fed.R.Civ.P. 23(c)(1)(C) (allowing for modification of a class certification order before final judgment).

Court's certification order at that time or even post trial would cause severe prejudice to plaintiffs, who prepared for a long and complex trial at great expense and who might find it much more difficult to assert individual claims at this time. Accordingly, except with respect to issues based on events occurring at trial or based on the Supreme Court's recent *Comcast* opinion, the Court denies this motion as untimely. *See*, *e.g.*, *Gortat v. Capala Bros., Inc.*, 2012 WL 1116495, at *4 (E.D.N.Y. Apr. 3, 2012) (late stage of litigation weighs against decertification; granting the eleventh-hour motion to decertify, where facts were known for well over a year, would prejudice class members who have not taken independent steps to protect their rights); *In re Sulfuric Acid Antitrust Litig.*, 847 F.Supp.2d 1079, 1083 (N.D.Ill.2011) (reconsideration of four-year-old certification order two months before trial after reassignment of the case to a new judge was inappropriate where issues could have been raised at the time of the original order; rescinding order would cause undue harm to plaintiffs); *Easterling v. Connecticut Dept. of Corr.*, 278 F.R.D. 41, 44 (D.Conn.2011) ("A court should be wary of revoking a certification order at a late stage in the litigation process.") (citing *Woe v. Cuomo*, 729 F.2d 96, 107 (2d Cir.1984)); *In re Scrap Metal Antitrust Litig.*, 2006 WL 2850453, at *20 (N.D.Ohio Sept. 30, 2006) ("request to decertify the Plaintiff Class literally on the eve of trial was inappropriate and untimely").[2]

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[2] Dow notes that Fed.R.Civ.P. 23(c)(1)(C) allows for alteration or amendment of a certification order before final judgment, and it argues that the Court's certification order in this case was therefore inherently tentative. That rule, however, does not sanction untimely motions for decertification based on issues known to the movant for a long time.

The Court further notes that, even if these issues had been raised in a timely fashion, they would have failed on their merits. First, Dow notes that under Dr. McClave's model, a few class members did not suffer any damages, and Dow argues that each class member must suffer harm from the alleged conspiracy. The Court agrees with plaintiffs, however, that all members of the class may be shown to have been impacted by a conspiracy that elevates prices above the competitive level, even if some members may have mitigated their damages or otherwise did not suffer damages that may be quantified. Moreover, Dow has not cited any authority supporting the argument that the presence of a few "zero-damages" class members necessarily defeats certification. In fact, caselaw is to the contrary. For instance, the Seventh Circuit has noted that a class will almost inevitably include persons who have not been injured by the defendant's conduct, and that fact (or even inevitability) does not preclude certification. *See Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 823 (7th Cir.2012) (quoting *Kohen v. Pacific Inv. Mgmt. Co.*, 571 F.3d 672, 677 (7th Cir.2009)). The Seventh Circuit further noted that a class is too broad to permit certification only if it includes a great number of members who *could* not have been harmed by the defendant's conduct (as opposed to a great number who *ultimately* are shown to have suffered no harm). *See id*. at 824. Indeed, a "fail-safe" class consisting only of members who suffered damages may be improper because whether the person qualifies as a member then might depend on whether he has a valid claim. *See id*. at 825. In this case, plaintiffs have shown persuasively that only a very small percentage of class members suffered no damages (particularly considering the class as re-

defined, below). Thus, the presence of those few members does not compel decertification.[3]

Second, Dow points to the fact that Dr. McClave's model provided for the extrapolation of damages for some class members. Dow argues that Dr. McClave therefore did not show that such members suffered an adverse impact from the alleged conspiracy. Dow did not seek to exclude Dr. McClave's testimony on this basis before trial, however, and Dr. McClave was thus permitted to testify that such members did suffer impact and damages. Nor has Dow provided any expert opinion at this time to show that Dr. McClave's method was unreliable. Again, Dow has failed to support this argument with any relevant precedent, and the Court is not persuaded that Dr. McClave's model was not capable of showing impact and the amount of damages in a class-wide manner.[4]

Third, Dow complains that 2004 purchases were included in the class definition even after plaintiffs abandoned any claim of a conspiracy during that year. As plaintiffs note, however, any problems from the inclusion of such members within the class are obviated by modification of the class to exclude those members. Dow opposes such a modification, but

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[3] For the same reason, the Court rejects Dow's argument that decertification is warranted by the fact that some class members' claims (those prior to November 24, 2000) failed at trial. The claims were capable of class-wide proof, and Dow has not provided any authority suggesting that the failure of some claims provides a basis for decertification post trial.

[4] The Court also rejects Dow's argument that decertification is appropriate because plaintiffs failed to prove classwide impact or a basis for aggregate damages at trial. The Court previously held that these elements were capable of class-wide proof, and Dow has not provided any basis for reconsideration of that ruling.

at this stage, such modification is far superior to decertification. *See Woe*, 729 F.2d at 107 ("Indeed, it is an extreme step to dismiss a suit simply by decertifying a class, where a 'potentially proper class' exists and can easily be created."). As Dow has stressed in seeking decertification, Rule 23 permits alteration of the class certification order before final judgment. *See* Fed.R.Civ.P. 23(c)(1)(C). Dow has not pointed to any significant prejudice from plaintiffs' failure to seek a modification of the class definition before trial.[5] Dow had clear notice of the temporal scope of plaintiffs' claim well before trial, and the Court actually instructed the jury as if the class included only purchasers through 2003. Thus, the Court now modifies the definition of the plaintiff class to exclude the year 2004. *See, e.g., Garcia v. Tyson Foods, Inc*., 890 F.Supp.2d 1273, 1297 (D.Kan.2012) (modifying class definition post trial) (citing authority).

Fourth, Dow argues that plaintiffs' claim of fraudulent concealment presents individual issues too substantial to allow for class certification. The Court notes that, because of the jury's verdict, no such individual issues were considered, and Dow has not cited any authority suggesting that such issues could nonetheless provide the basis for post-trial decertification. Moreover, Dow's argument on this issue has not changed since the Court's certification order, and the Court declines to reconsider that order as it relates to this issue.

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[5] The Court does not agree with Dow that prejudice arises from the possibility that 2004-only purchasers might now bring individual suits that will escape the MDL process.

B. The Supreme Court's *Comcast* Opinion

In its reply brief, Dow raised a new argument based on the Supreme Court's opinion in *Comcast Corp. v. Behrend*, 133 S.Ct. 1426 (2013), issued on March 27, 2013. Specifically, Dow argues that Dr. McClave's model and opinions do not provide a proper causal link between plaintiff's theory of liability and the impact on the class members, and that impact is therefore incapable of class-wide proof as required for certification of a class action. This argument, based on Dr. McClave's expert report, is arguably untimely, as it could have been raised well before trial. Moreover, Dow failed to raise this specific argument in either its original brief in support of its motion for de-certification or its supplemental post-trial brief, and the Court would ordinarily refuse to entertain an argument raised for the first time in a reply brief. Nevertheless, in light of the intervening Supreme Court decision and the fact that plaintiffs were given an opportunity to file a sur-reply addressing the *Comcast* opinion, the Court will consider the merits of this argument.

In *Comcast*, which related to the provision of cable-television services, plaintiffs alleged illegal swap agreements in violation of Section 1 of the Sherman Antitrust Act and monopolization in violation of Section 2 of that Act. *See id*. at 1430. Plaintiffs alleged four different theories of antitrust impact, but the district court accepted only one of those theories as capable of classwide proof. *See id*. at 1431. The Supreme Court reversed the district court's class action certification on the basis that plaintiffs' re-gression model (created by the same Dr. McClave who testified in this case) did not isolate damages resulting from the sole accepted theory of antitrust impact, but

instead was based on a determination of hypothetical prices in the absence of all of the anticompetitive activities alleged by the plaintiffs. *See id.* at 1431-35. Thus, the Court held that the model failed to establish that damages were capable of measurement on a classwide basis, and in the absence of another methodology, questions of individual damage calculations would overwhelm common questions, and plaintiffs could therefore not establish predominance under Fed.R.Civ.P. 23(b)(3). *See id*. at 1433.

Dow argues that Dr. McClave's model in the present case is similarly flawed. Specifically, Dow notes that in his expert report, Dr. McClave stated that plaintiffs had alleged an illegal conspiracy to fix prices and to allocate customers that he had assumed that those allegations are true, and that he had determined impact to the class from such activities by determining what prices would have been in the absence of those activities. Because plaintiffs later abandoned their theory relating to the allocation of customers, Dow thus argues that, as in *Comcast*, Dr. McClave's model cannot provide a proper causal link between the sole remaining theory (price-fixing) and impact to the class in the form of supracompetitive prices, because Dr. McClave's model cannot exclude the possibility that other prohibited conduct (the allocation of customers) actually caused prices to exceed competitive levels.

The Court rejects this argument. The key distinction between this case and *Comcast* is the stage of litigation involved. In *Comcast*, the district court certified a class action based on particular testimony by Dr. McClave, and the Supreme Court found that testimony insufficient on interlocutory appeal. In the present case, Dow did not raise this issue at the pretrial class certification stage. Nor did Dow raise

this issue in attacking the reliability of Dr. McClave's methodology in its pretrial *Daubert* motion, and the Court concluded that Dr. McClave's methodology was sufficiently reliable to allow his expert testimony. Nor did Dow object to Dr. McClave's testimony at trial on this basis. Thus, on the present state of the record, Dr. McClave's methodology is defined by his trial testimony.

At trial, Dr. McClave gave his opinion that the conspiracy alleged by plaintiffs—a horizontal price-fixing conspiracy—impacted nearly every class member because prices during the alleged conspiracy period exceeded those that would have prevailed absent that conspiracy, which competitive prices were determined from an analysis of prices during a post-conspiracy benchmark period. Thus, in his testimony, Dr. McClave did provide a causal link between the single price-fixing conspiracy alleged by plaintiffs at trial and the impact to plaintiffs. Although Dow points to Dr. McClave's initial report, that report was not in evidence at trial. Dow did not object to his testimony on this basis, and Dow had every opportunity to cross-examine him about whether the impact on plaintiffs could have resulted from some other wrongdoing, such as customer allocation. Neither side presented any evidence at trial of any illegal customer allocation. Accordingly, there is no basis to strike Dr. McClave's testimony or to conclude that his methodology could not provide a proper causal link between plaintiff's theory of liability and the classwide impact. Dow's motion for decertification is therefore denied.

II. Motion for Judgment Based on the Verdict

Dow argues that it is entitled to judgment as a matter of law on plaintiff's antitrust claim based on the jury's verdict. Specifically, Dow argues

that plaintiffs alleged a single five-year price-fixing conspiracy lasting from 1999 through 2003; that the jury's award of damages only beginning in November 2000 shows that it did not find a conspiracy of the five-year duration alleged by plaintiffs; and that plaintiffs' sole claim therefore fails. The Court rejects this argument for judgment in Dow's favor.

Dow essentially argues, without any supporting authority, that plaintiffs were required to predict, with temporal exactness, the precise conspiracy that the jury would find. In other words, according to Dow, if the jury decided that the conspiracy did not exist for even a single day within the alleged conspiracy period, or that plaintiffs otherwise failed to meet their burden of proof to show a conspiracy and impact and damages with respect to that single day, then plaintiffs' entire claim of conspiracy would fail as a matter of law. Dow has not shown that that position represents the law of antitrust conspiracy, however, and the absurdity of its premise—that Dow could escape liability for an illegal antitrust conspiracy because plaintiffs alleged a longer conspiracy than that found by the jury—convinces the Court that it should not create new law by adopting Dow's position. As the Court instructed, the jury was not required to find that all of the means and methods alleged by plaintiffs were actually used to carry out the conspiracy; nor was it required to find that each of the alleged co-conspirators actually participated in the conspiracy. *See ABA Model Jury Instructions in Civil Antitrust Cases* at B-4 (2005); *see also*, *e.g.*, *United States v. Suntar Roofing, Inc.*, 897 F.2d 469, 476 (10th Cir.1990) (in criminal antitrust case, jury was not required to find conspiracy involving all of the alleged co-conspirators).

In this case, the jury found that plaintiffs were harmed by an illegal conspiracy involving Dow for at least a portion of the period alleged by plaintiffs. The fact that plaintiffs failed to prevail with respect to the entire period does not provide a basis to award Dow judgment on the entire claim. Accordingly, Dow's motion is denied with respect to this issue.

III. Motion for Judgment as a Matter of Law

Dow seeks judgment as a matter of law based on its argument that the evidence was not legally sufficient to establish its liability. Judgment as a matter of law under Fed.R.Civ.P. 50(b) is improper "unless the proof is all one way or so overwhelmingly preponderant in favor of the movant as to permit no other rational conclusion." *See Crumpacker v. Kansas Dept. of Human Resources*, 474 F.3d 747, 751 (10th Cir.2007). In determining whether judgment as a matter of law is proper, a court may not weigh the evidence, consider the credibility of witnesses, or substitute its judgment for that of the jury. *See Sims v. Great American Life Ins. Co.*, 469 F.3d 870, 891 (10th Cir.2006). In essence, the court must affirm the jury verdict if, viewing the record in the light most favorable to the nonmoving party, it contains evidence upon which the jury could properly return a verdict for the nonmoving party. *See Bartee v. Michelin North America, Inc.*, 374 F.3d 906, 914 (10th Cir.2004). Conversely, a court may enter judgment as a matter of law in favor of the moving party only if "there is no legally sufficient evidentiary basis for a reasonable jury to find for the issue against that party." *See Sims*, 469 F.3d at 891 (citing Fed.R.Civ.P. 50(a)(1)).

A. Classwide Impact and Damages

Dow argues that plaintiffs' evidence of classwide impact and damages was insufficient. The Supreme Court has traditionally followed a rule "excusing antitrust plaintiffs from an unduly rigorous standard of proving antitrust injury." *See J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 565 (1981). The Supreme Court has noted that damages issues in such cases "are rarely susceptible to the kind of concrete, detailed proof of injury which is available in other contexts," and that a factfinder may reasonably infer injury from proof of the defendant's wrongful acts and their tendency to injury plaintiffs' businesses. *See id*. at 565-66 (quoting *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264 (1946)). The Court has also noted that a wrongdoer should not be able insist upon a stricter standard of proof of the injury that it has itself inflicted. *See id.* at 566-67. Similarly, in *Law v. National Collegiate Athletic Association*, 5 F.Supp.2d 921 (D.Kan.1998), the court noted that antitrust plaintiffs' "burden in proving fact of injury may be discharged by reasonable inferences from circumstantial evidence," and that "[a]ny evidence which is logically probative of a loss attributable to the violation will advance plaintiffs' case." *See id*. at 927 (citing cases). The court in *Law* further noted that "[a]s a practical matter, in a class action context, proof of an effective conspiracy to fix prices will include facts which tend to establish—perhaps circumstantially—that each class member was injured." *See id.*

Moreover, as noted above with respect to Dow's motion for decertification, the law does not support Dow's argument that plaintiffs' claim fails if they do not show injuries and damages suffered by each and every class member. *See id.* ("[T]he fact that defendant

may be able to defeat a showing of causation as to a few individual class members would not defeat the inference of antitrust injury; the exact amount of injury to each class member should be treated as an issue at the damage phase of the trial.").

In this case, the Court concludes that the evidence, taken in the light most favorable to plaintiffs, was sufficient to establish injury to the class from the alleged price-fixing conspiracy. As plaintiffs have noted, they introduced evidence at trial that Dow participated in a conspiracy with other manufacturers to fix prices; that the conspiracy involved high-ranking executives at the companies who exercised control over pricing decisions across a variety of products; that the alleged conspirators engaged in lockstep pricing and price announcements; that such pricing decisions were effective; that the structure of the industry was conducive to an effective price-fixing conspiracy; and that prices were supracompetitive during the conspiracy period. This evidence, which was not limited merely to experts' opinions, is sufficient to show injury to the class from the alleged conspiracy.

Dow's specific arguments to the contrary are unavailing. Dow argues that the jury's failure to award damages for the period before November 2000 shows that the jury rejected Dr. McClave's model and thus rejected his opinion that the variance between actual prices and his but-for model could be attributed to the alleged price-fixing. Dow therefore argues that no reasonable jury could have concluded that the variance post-November 2000 was attributable only to the wrongful conspiracy. Dow points to its evidence that the variance could be explained by other factors. The Court rejects this argument. There was sufficient evidence, including Dr. McClave's model and

testimony, that the post-2000 variance shown by the model was linked to the alleged price-fixing. The fact that the jury found that plaintiffs failed to sustain their burden of proof with respect to one period of time does not necessarily mean that the evidence was not sufficient to support the jury's finding of liability with respect to another period. It cannot be said as a matter of law that the jury rejected Dr. McClave's entire model; indeed, the verdict suggests that the jury accepted that model in finding liability and awarding damages for the later period. The jury may simply have accepted Dow's criticisms or alternative explanations with respect to the earlier period without rejecting Dr. McClave's model entirely. At any rate, there was sufficient evidence supporting the jury's finding of injury for the post-November 2000 period, and the jury was free to reject Dow's arguments with respect to that period.

Dow again cites the Supreme Court's *Comcast* decision in its reply brief, but that opinion is inapposite for the reasons stated above. Dow again points to the two theories of liability noted in Dr. McClave's report, but as previously discussed, Dr. McClave's trial testimony was premised on only a single theory of price-fixing. Dow did not raise this issue in its *Daubert* motion or otherwise before trial, nor did it object to Dr. McClave's testimony on this basis at trial; thus, the evidence came in, and the jury was entitled to consider it in determining whether the class suffered injury.

Dow also argues that plaintiffs have failed to show classwide injury because Dr. McClave's model included damages that had been estimated or extrapolated for certain class members. The Court rejects this argument. Dow did not challenge the

reliability of this aspect of Dr. McClave's method of determining injury and damages to the class, either in its *Daubert* motion or at trial, and the jury thus heard and could rely on evidence that the class suffered injury. The fact that plaintiffs did not offer into evidence Dr. McClave's underlying data and information relating to every single class member is not material; Dow has not cited any authority supporting such a requirement, and Dr. McClave testified that his model showed that nearly all class members suffered overcharges. Moreover, as noted above, plaintiffs' evidence of injury to the class was not limited to Dr. McClave's testimony.

Finally, the Court rejects Dow's argument that the amount of damages was not sufficiently supported by evidence because the jury did not pick a damages figure specifically mentioned by Dr. McClave. Dow has offered no authority supporting that argument. As the Court instructed, the jury was entitled to estimate damages, and the amount of the jury's award is supported by the evidence. Dr. McClave opined that the class suffered damages for the post-November 2000 period in the amount of $496,680,486. The jury's reduction of that figure to $400,049,039 could reasonably have been reached in a number of ways, as the jury could have accepted one or more of Dow's arguments attacking that damage figure. For instance, the jury might have accepted Dow's arguments with respect to systems and thus decided to exclude Dr. McClave's figure for post-November 2000 damages for those products ($68,079,341). The jury might have accepted Dow's argument that plaintiffs did not prove that Lyondell was a member of the conspiracy and thus reduced damages to account for Lyondell's approximate 20 percent share of TDI damages. The jury might have decided that the

conspiracy did not exist for the entirety of the post-November 2000 period. The fact that Dr. McClave did not do the precise mathematical calculations for the jury does not mean that the verdict was not reasonably supported by evidence.

B. Conspiracy

Dow also argues that the evidence at trial was insufficient to support a finding that Dow participated in a price-fixing conspiracy. In so arguing, Dow disputes that there was any direct evidence of a conspiracy; notes that parallel conduct may be expected in an oligopoly; argues that alleged pricing discussions were not extensive; notes the contrary evidence by its own expert; and generally argues that the circumstantial evidence was not enough to tip the scales to allow a reasonable inference that the alleged wrongful conduct occurred because of collusion.

The Court rejects this arguments and concludes that the evidence was sufficient to support a finding of a price-fixing conspiracy involving Dow. The Court addressed these same arguments at the summary judgment stage, *see In re Urethane Antitrust Litig.*, 2012 WL 6610878, at *2-8 (D.Kan. Dec. 18, 2012), and that analysis applies again here. At trial, plaintiffs presented the following types of evidence: direct evidence of agreements regarding pricing from Stephanie Barbour, Michele Blumberg, and Gerard Phelan; testimony regarding pricing discussions involving various executives; parallel conduct regarding price announcements and price increases; communications, including those involving prices, at or near the time of that parallel conduct; evidence of efforts to maintain the secrecy of communications, particularly those involving pricing; evidence that the alleged conspirators acted in a manner contrary to

their interests; expert evidence that the structure of the industry was particularly conducive to collusion; and expert evidence that prices were at a supracompetitive level. Thus, plaintiffs' evidence was not merely limited to evidence of parallel conduct or to evidence of pricing discussions, and the totality of the evidence was sufficient to tip the scales beyond evidence that could reasonably be consistent with competitive behavior and to allow a reasonable inference of collusion. That same kind of evidence was sufficient to escape summary judgment, and plaintiffs presented even more evidence at trial that they did at that stage. Moreover, at trial, the jury was free to judge the credibility of the witnesses, and the jury's rejection of the conspirators' denials was reasonable.

Dow also argues that plaintiffs' conspiracy theory, as stated by their liability expert, Dr. John Solow, included an agreement to penalize cheaters within the conspiracy, and that plaintiffs failed to provide sufficient evidence of such efforts to penalize. The jury was not required specifically to find an agreement to penalize, however, and the Court instructed that the jury did not need to find that all alleged methods were in fact utilized. Moreover, Dr. Solow testified that he did see evidence of efforts to penalize, in support of the conspiracy that he testified about, and such testimony provides any necessary evidentiary support—Dow's own arguments that such evidence was weak notwithstanding.

The Court also rejects the new arguments raised by Dow for the first time in its reply brief. As noted above, such arguments are untimely. Moreover, even if the Court considered them, it would conclude that they lack merit. Dow suggests that the circumstantial evidence was insufficient as it related to specific

products; as noted in the Court's summary judgment order, however, there was evidence to include each of the four products at issue within the conspiracy. *See id.* at *9-10. Dow also argues that the evidence of Lyondell's involvement in the conspiracy during the post-November 2000 period was insufficient. Such a failure of proof, however, would not require judgment in Dow's favor, as the jury could reasonably have found a conspiracy involving Dow and at least one of the other manufacturers. Finally, Dow argues that there was no evidence supporting a finding that the conspiracy began on November 24, 2000. The jury made no such finding, however; it merely indicated that none of its damages included overcharges from before that date.

Accordingly, the Court denies Dow's motion for judgment as a matter of law.[6]

IV. Motion for a New Trial

A. Verdict Form

Dow also moves for a new trial based on error by the Court.[7] First, Dow argues that the Court erred in failing to craft the verdict form to require the jury, in the event that it found in plaintiffs' favor, to specify the time period of the conspiracy found, the conspirators, and the products to which the conspiracy

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[6] The jury's verdict rendered the issue of fraudulent concealment moot; thus, the Court need not rule on whether plaintiffs' evidence of fraudulent concealment was sufficient.

[7] In a footnote, Dow states, without analysis, that it is entitled to a new trial because the Court should not have denied its *Daubert* motions to exclue testimony by Dr. Solow and Dr. McClave. Because Dow has not supported that basis for a new trial with any argument, the Court will not reconsider its *Daubert* rulings.

related.[8] As it did at trial, the Court rejects this argument. As the Court explained above, the jury was not required to find that a conspiracy existed for the entire period alleged by plaintiffs. Nor was it required to find that the conspiracy involved all of the alleged conspirators or products. A conspiracy to fix prices for any product involving Dow and any other manufacturer for any period within the alleged conspiracy period would give rise to liability. Dow has not identified any authority requiring such specific jury interrogatories. Accordingly, the Court rejects this basis for a new trial.[9]

B. Instructions

1. Dow argues that the Court erred in instructing the jury. First, Dow argues that the Court should have instructed that in order to find for plaintiffs, the jury had to find a conspiracy existing for the entire five-year period alleged by plaintiffs. The Court has already rejected this argument that the jury could not find a shorter conspiracy than alleged. Accordingly,

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[8] Dow also argues that the verdict form should have asked the jury to identify the particular transactions by class members for which damages were awarded. Dow did not propose a verdict form with that inquiry or object to the Court's verdict form on that basis, however, and it has therefore waived that argument.

[9] Dow argues that the absence of information about which class members were injured in what amount would lead to an impermissible "fluid recovery," which Dow defines as "the distribution of unclaimed or unclaimable funds to persons not found to be injured." The case from which Dow takes that definition, however, makes clear that the prospect of a fluid recovery is not implicated in an antitrust class action where damages may be determined on a classwide or aggregate basis and there is no danger that damages cannot be returned to a meaningful number of class members on some individual basis. *See In re NASDAQ Market-Makers Antitrust Litig.*, 169 F.R.D. 493, 525-26 (S.D.N.Y.1996).

the Court concludes that it did not err in refusing to instruct as urged by Dow. For the same reason, the Court concludes that it did not err in failing to give such an instruction in response to the question asked by the jury.

2. Dow also argues that the Court erred in the wording of Instruction 14, which defined the concept of a conspiracy for the jury. Dow argues that the Court should have given Dow's proposed instruction, which defined "agreement" as "a meeting of the minds in which each party makes a conscious commitment to a common scheme." The Court does not agree, however, that its instruction misstated the law or was insufficient. Instruction 14 required that the jury find an agreement to act together and that Dow knowingly entered into that agreement. Dow has not explained how such language did not make clear to the jury that a conspiracy requires two parties to consciously commit to a common scheme. Dow has not provided any authority suggesting that the Court's instruction improperly stated the law or that Dow's proposed language was required. Moreover, the Court does not agree that the instruction's statement that a "formal or written agreement" was not required obscures the requirement of an agreement, as the instruction was rife with references to the required agreement. The Court denies this basis for a new trial.

3. The Court next rejects Dow's challenge to Instruction 17, which related to evidence of competition. Dow argues that competition is a direct defense to a claim of conspiracy, in the sense that actions taken for competitive, non-collusive reasons are not illegal, and it further argues that Instruction 17 did not make that sufficiently clear and in fact

suggested that competition might not be a defense. The instruction stated as follows:

> Evidence that Dow and other urethane chemical manufacturers actually engaged in price competition in some manner has been admitted to assist you in deciding whether they entered into the alleged conspiracy. If you find that the alleged conspiracy existed, however, it is no defense that the manufacturers actually competed in some respects with each other or that they did not eliminate all competition between them. Similarly, a price-fixing conspiracy is unlawful even if it did not extend to all products sold by the manufacturers or did not affect all of their customers or transactions.

The Court concludes that this instruction adequately states the applicable law. Evidence of competition may bear on whether a conspiracy existed, and the first sentence so instructed the jury. The jury was further instructed, however, that an illegal conspiracy could still exist even if the participants did compete in some manner. Dow has not shown why that statement of the law is erroneous. Accordingly, the Court denies this basis for a new trial.

4. Dow argues that the Court should have instructed the jury that plaintiffs were required to produce evidence that tended to exclude the possibility that Dow acted independently. Dow draws that "tends to exclude" language from *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). The Court addressed that standard in its summary judgment order, as follows:

> Dow urges the Court to apply this standard from *Matsushita* by examining every piece of

> evidence to determine whether it "tends to exclude the possibility" that the alleged conspirators acted independently. The Supreme Court was making clear, however, that the evidence, as a whole, must tip the scales, such that a reasonable jury could find in favor of the plaintiff, before a triable issue is created. That is because, as the Supreme Court made clear in its footnote, conduct that is equally consistent with collusion and competition—ambiguous evidence—does not, *by itself*, support an inference of conspiracy sufficient to defeat summary judgment. *See also Gibson v. Greater Park City Co*., 818 F.2d 722, 724 (10th Cir.1987) (noting, in applying *Matsushita*, that evidence is "ambiguous" if it is "as consistent with the defendants' permissible independent interests as with an illegal conspiracy"). Thus, the Court, in examining class plaintiffs' evidence of a conspiracy, must determine whether that evidence is ambiguous, in the sense that it is equally consistent with collusion and competition, or whether a reasonable jury could find that a conspiracy existed, either from direct evidence or from circumstantial evidence that creates a reasonable inference of a conspiracy (or from a combination of the two).

In re Urethane Antitrust Litig., 2012 WL 6610878, at *3. The Court has already concluded that the jury could reasonably have found a conspiracy here. The law then required the jury to find, by a preponderance of the evidence, that a conspiracy existed, and the Court so instructed the jury. The Court does not believe that its instructions improperly stated the law, or improperly relaxed plaintiffs' burden, by failing to include the "tends to exclude" language from *Matsushita*, and Dow has not provided any authority

suggesting that such language was required in the jury instructions. Accordingly, the Court rejects this basis for a new trial.

5. Dow next argues that the Court erred in refusing to give Dow's proposed instruction relating to document retention and destruction. Dow notes that at trial, plaintiffs stated in their opening that Dow destroyed certain documents despite complaints raised by Stephanie Barbour, and Dow argued at trial that plaintiffs were improperly alleging spoliation. Plaintiffs responded at trial that they were not making a spoliation argument or seeking any sort of instruction providing for an inference that destroyed documents contained information favorable to their case; rather, they argued that evidence of document destruction related to efforts by Dow to cover up the conspiracy. Dow argued at trial that an instruction was required to combat an unfounded suggestion that Dow acted improperly by destroying documents, when there had been no evidence that any destruction was improper. Accordingly, Dow proposed the following instruction:

> You have heard testimony that the files of David Fischer and Bob Wood were subject to the standard and routine application of Dow's record retention process after their employment with Dow ended. I am instructing you that this evidence cannot support a finding or inference of conspiratorial or other improper conduct.
>
> You also heard testimony that computer files of Stephanie Barbour were subject to Dow's record retention process after her employment at Dow ended. Under the process, certain files were preserved and others were not. Those files that were preserved became part of the legal process in

> this case. I am instructing you that this evidence regarding Ms. Barbour's files cannot support a finding or inference of conspiratorial or any other improper conduct.

The Court concludes that it did not err in refusing to give Dow's proposed instruction. First, plaintiffs' evidence concerning the destruction of documents was admitted by the Court. Dow appears to take issue with the Court's admission of deposition testimony by Arthur Eberhart concerning the destruction of documents, arguing that such evidence was irrelevant and unfairly prejudicial. As the Court ruled at trial, however, evidence that could show an attempt by Dow to cover up its illegal activities would be relevant. *See, e.g., United States v. Curtis,* 635 F.3d 704, 717 (5th Cir.2011) (acts of concealment are circumstantial evidence of a conspiracy's existence); *United States v. Fields,* 871 F.2d 188, 197 (1st Cir.1989) (post-conspiracy activity may be admissible if probative of the evidence of a conspiracy). Moreover, Dow has not addressed the Court's ruling that Dow waived any such argument by failing to object to Mr. Eberhart's deposition testimony in a timely manner.

Moreover, the admission of this evidence did not require the Court to give Dow's proposed instruction, as there was no legal component to this evidence requiring explanation for the jury. Dow was entitled to rebut this evidence with its own evidence (to the extent that it had properly designated such witnesses or testimony for trial) and argument that any document destruction was routine and not for nefarious purposes. Dow's instruction essentially would have invaded the province of the jurors by instructing them that they should agree with Dow and should not draw the inferences properly urged by

plaintiffs. Such an instruction was clearly improper, and the Court did not err in refusing to give it.

6. Finally, Dow argues that the Court erred in refusing to give the following instruction:

> During the case you have heard references to an investigation carried out within Dow during 2004 concerning complaints made by Stephanie Barbour in connection with the termination of her employment. You should not speculate about the nature or results or any such investigation, and the references to that investigation should not play any part in your consideration of this case.

Dow also complains about the Court's refusal to give such an instruction during the presentation of evidence in connection with particular testimony.

Before trial, Dow refused to produce documents relating to a 2004 investigation on the grounds that such documents were privileged, and the Magistrate Judge allowed Dow to rely on that privilege on the basis that Dow would not attempt to use evidence about the 2004 investigation at trial. Then, mere days before trial, Dow attempted to produce some of those documents and add them to their exhibit list. The Court did not rule on that request by Dow before trial, other than to prohibit the parties from referring to that investigation before the Court could make a final determination. At trial, Dow did not seek to admit the documents in question, and thus the Court was not called upon to issue a ruling concerning the documents. Instead, Dow repeatedly asked the Court for an instruction as noted above.

The Court concludes that it did not err in refusing to give this instruction. In its supporting brief, Dow argued that plaintiffs introduced evidence concerning

the 2004 investigation, but Dow did not identify any such particular testimony. In its reply, Dow cites to references in Stephanie Barbour's testimony to an investigation that would be conducted of her claims of misconduct, but Dow itself designated such deposition testimony for use at trial. Dow also cites to deposition testimony by David Fischer about an investigation, but Dow failed to object to that testimony in a timely fashion. Thus, Dow waived any argument at trial that objectionable testimony was admitted and that a curative instruction was therefore necessary. Moreover, when the issue was raised in a timely manner at trial, the Court refused to allow either side to present evidence concerning the 2004 investigation.

In summary, the jury heard only a couple of passing references to the 2004 investigation, and that testimony came in without objection. Those references were not significant enough to create any inference within the jury that the results of a 2004 investigation were adverse to Dow, such that Dow was penalized for its invocation of its privilege. Thus, no instruction was required as urged by Dow, and the Court rejects this basis for a new trial.

C. Evidence of Larry Stern's Immunity Agreement

Dow argues that the Court erred in granting plaintiffs' motion in limine to exclude evidence concerning Larry Stern's agreement with the Department of Justice that granted him immunity from a criminal antitrust prosecution. Dow argues, as it did in connection with the motion in limine, that Mr. Stern was able to stay in a lucrative job by avoiding a criminal investigation; that Mr. Stern therefore had a motive to "embellish" his story to secure an immunity agreement from the DOJ; and that the evidence of the agreement therefore bore on the credibility of his

testimony that he engaged in improper pricing discussions with competitors.

The Court concludes that it did not err in excluding this evidence pursuant to Fed.R.Evid. 402 and 403. Both before trial and in this briefing, Dow was unable to explain how there was a link between Mr. Stern's agreement and his credibility at trial. Dow's suggestion that Mr. Stern had a motive to "embellish" his story to the DOJ is pure speculation, as Dow has no information concerning the terms or conditions of Mr. Stern's immunity agreement and his provision of information to the DOJ. In support of the present motion, Dow cites a general DOJ requirement that a person must admit participation in a criminal antitrust violation in order to secure an immunity agreement, but Dow failed to present any such information in connection with the motion in limine or at trial. Moreover, Dow cannot say whether that general requirement was followed in Mr. Stern's case.

In addition, as plaintiffs noted in connection with the motion in limine, Mr. Stern's agreement required him to tell the truth. Thus, the Court concludes that Mr. Stern's incentive to be truthful in talking to the DOJ was just as strong, if not stronger, than any incentive to "embellish" or lie at that time. For that reason, the evidence was not relevant under Rule 402.

Finally, as the Court ruled at the limine conference, any minimal probative value of this evidence was substantially outweighed by a danger of unfair prejudice, confusion, and undue delay. See Fed.R.Evid. 403. Specifically, plaintiffs would have suffered unfair prejudice from a suggestion (clearly intended by Dow) that Mr. Stern somehow acted improperly in seeking an immunity agreement or that he lied to gain an immunity deal, in the absence of

evidence to that effect. In addition, the admission of such evidence would unnecessarily have prolonged the trial and possibly confused the jury, as parties would then have been forced to litigate and argue about the reasons why a person might enter into an immunity agreement and the DOJ's practice in offering such agreements. In light of Dow's inability to demonstrate more than speculative relevance, such a diversion into motive and procedures would have created confusion and delay, which would have substantially outweighed any minimal probative value.

Accordingly, the Court denies Dow's motion for a new trial on this basis.

D. Joint and Several Liability

As its final basis for a new trial, Dow argues that the imposition of joint and several liability in this case, by which Dow is responsible for damages caused by other members of the conspiracy, violates the Due Process Clause of the Fifth Amendment because such damages (especially after the statutory trebling) are vastly disproportionate to the effects of Dow's own conduct.[10]

First, the Court concludes that Dow has waived this defense to joint and several liability by failing to preserve it in the pretrial order. *See Youren v. Tintic Sch. Dist.*, 343 F.3d 1296, 1304 (10th Cir.2003)

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[10] The Court rejects Dow's argument that plaintiffs should not be entitled to joint and several liability because they failed to request such relief in their complaint. Plaintiff's request for joint and several liability was included in the pretrial order in this case, which superseded the pleadings, *see Youren v. Tintic Sch. Dist.*, 343 F.3d 1296, 1304 (10th Cir.2003), and Dow has not identified any possible prejudice from the failure to include that relief in the complaint. Nor has Dow shown that plaintiffs were required to plead their request for such relief.

(defense may be waived if not included in the pretrial order). Because plaintiffs did not raise this issue of waiver, however, the Court will also address the merits of this argument.

The Court rejects this argument on the merits. As plaintiffs note and as the jury was instructed, one member of a conspiracy is responsible for the acts of its co-conspirators in furtherance of the conspiracy. Thus, *all* of the damages awarded by the jury effectively related to Dow's own conduct. Courts have consistently imposed joint and several liability in civil antitrust actions. *See*, *e.g., Texas Indus., Inc. v. Radcliff Materials, Inc.,* 451 U.S. 630, 646 (1981) (joint and several liability in civil antitrust cases ensures that the plaintiffs will be able to recover the full amount of damages from some, if not all, participants). Dow has not cited any authority suggesting that the imposition of joint and several liability in the conspiracy context may violate the Due Process Clause. Accordingly, the Court rejects this basis for a new trial.

IT IS THEREFORE ORDERED BY THE COURT THAT defendant Dow Chemical Company's motion to decertify the class (Doc. # 2706) is *denied*.

IT IS FURTHER ORDERED BY THE COURT THAT the definition of the class certified in this case is hereby modified to exclude purchases in 2004. Plaintiffs are ordered to submit, on or before *June 14, 2013*, for the Court's approval, a notice of this modification to be sent to the class members as originally defined. Dow should file any comments concerning such proposed notice by *June 28, 2013*.

IT IS FURTHER ORDERED BY THE COURT THAT defendant Dow Chemical Company's motion for judgment as a matter of law or for a new trial (Doc. # 2808) is *denied*.

IT IS SO ORDERED.

APPENDIX D

UNITED STATES DISTRICT COURT,
D. KANSAS

No. 04-MD-1616-JWL

IN RE URETHANE ANTITRUST LITIGATION
This Order Relates to the Polyether Polyol Cases

July 28, 2008

MEMORANDUM AND ORDER

JOHN W. LUNGSTRUM, *District Judge.*

This multidistrict litigation consists of numerous putative class action lawsuits in which plaintiffs claim that defendants engaged in unlawful price fixing conspiracies with respect to urethane chemical products in violation of the Sherman Act, 15 U.S.C. § 1. The court originally consolidated two separate sets of cases—the Polyester Polyol Cases and the Polyether Polyol Cases. The parties have settled the Polyester Polyol Cases, and those cases have been dismissed. This Memorandum and Order relates to the Polyether Polyol Cases, in which the polyether polyol plaintiffs (hereinafter, plaintiffs) are purchasers of certain polyether polyol products sold and manufactured by the polyether polyol defendants (hereinafter, defendants). This matter is presently before the court on Plaintiffs' Motion for Class Certification (doc. 552). The court has fully reviewed the record and the parties' oral arguments from the class certification

hearing on July 21, 2008. After careful consideration of the matter, the court is now prepared to rule. Despite defendants' vigorous and well presented efforts to defeat class certification, the court believes that class certification is warranted under the applicable legal standards and the record before the court. For the reasons explained below, then, the court therefore will certify a class of purchasers of polyether polyol products under the revised product definition set forth in plaintiffs' reply brief.

BACKGROUND

In the First Amended Consolidated Complaint (doc. 307), plaintiffs Seegott Holdings, Inc., Industrial Polymers, Inc., and Quabaug Corporation[1] allege that the defendants and others engaged in a price-fixing conspiracy for polyether polyol products in violation of § 1 of the Sherman Act, 15 U.S.C. § 1. The alleged conspirator defendants include Bayer AG. Bayer Corporation, Bayer MaterialScience LLC f/k/a Bayer Polymers LLC (collectively, the Bayer defendants); BASF AG, BASF Corporation (collectively, BASF); the Dow Chemical Company; Huntsman International LLC; and Lyondell Chemical Company. Plaintiffs have settled and dismissed their claims against the Bayer defendants. Thus, this action proceeds against the remaining defendants—BASF, Dow, Huntsman, and Lyondell.

The polyether polyol products that are the subject of the alleged conspiracy fall into essentially four

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[1] Actually, Quabaug Corporation and Elliott Company of Indianapolis, Inc. were permitted to intervene as named plaintiffs by way of a later court order (doc. 484). Elliott Company subsequently withdrew as a class representative (doc. 665).

categories—monomeric and polymeric diphenylmethane diisocyanate (MDI), toluene diisocyanate (TDI), polyether polyols, and polyether polyol systems. These chemical products are generally sold to and used by manufacturers, who use the products in manufacturing other end products.[2] MDI is a type of isocyanate that is used mainly as a raw material in the production of rigid insulation and structural foams.[3] TDI is another type of isocyanate, and it is used primarily as a raw material in the production of flexible foams such as those used in furniture, mattresses, packaging foam, and automobile seating.[4] Polyether polyols are intermediate chemicals that are generally combined with isocyanates (usually either MDI and/or TDI) to produce polyurethane polymers.[5] The parties generally refer to these three categories of products (polyether polyols, MDI, and TDI) as the "basic chemicals." These basic chemicals are the building blocks for polyurethanes.

These basic chemicals are distinct from the parties' discussion of polyether polyol "systems." A polyether polyol system is comprised of two liquid components

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[2] One might recall the slogan BASF has used in its television advertising: "*We don't make a lot of the products you buy. We make a lot of the products you buy better.*®"

[3] MDI consumption mainly involves the use of polymeric MDI to make rigid and semi-rigid polyurethane foams, whereas lesser quantities of pure (monomeric) MDI are used mainly for reaction injection-molding.

[4] TDI used in industrial applications is a mixture of two TDI isomers, the most common of which is referred to as 80/20 TDI.

[5] Polyols can be classified as either poly *ether* polyols or poly *ester* polyols. Polyether polyols and polyester polyols have different physical properties. Polyether polyols constitute approximately ninety percent of the world's polyol use.

(A and B). One of these components contains the isocyanate, such as TDI or MDI. The other component consists primarily of polyether polyols and other additives, including a catalyst. When the purchaser mixes the A side and the B side together, they react to form a specific type of polyurethane polymer.

The complaint alleges that the defendants engaged in a nationwide price-fixing conspiracy that affected plaintiffs and other direct purchasers by causing them to pay more for these products than they otherwise would have paid absent the conspiracy. The proposed class consists of all direct purchasers of polyether polyol products in the United States from January 1, 1999, through December 31, 2004. Plaintiffs now seek certification of a plaintiff class pursuant to Federal Rule of Civil Procedure 23(a) and (b)(3).

BASF, Dow, Huntsman, and Lyondell oppose class certification primarily on the ground that plaintiffs have failed to show that antitrust injury and damages are susceptible to common proof on a class-wide basis, and therefore they contend that predominance and superiority are lacking. Their theory is that the proposed class contains such an overly broad mix of purchasers and products, operating in multiple markets, that it would not be possible to analyze the putative class with common proof. In short, they contend that individual questions will predominate the claims in this case. Defendants also originally argued that plaintiffs have not defined the class with objective and ascertainable criteria. Furthermore, they contend that the named plaintiffs do not satisfy the requirements of typicality and adequacy.

LEGAL STANDARD FOR CLASS CERTIFICATION

The standards for certifying a class action are set forth in Fed.R.Civ.P. 23. This rule requires all four prerequisites of Rule 23(a) and at least one of the three requirements of Rule 23(b) to be satisfied. *Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 614, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997); *In re Integra Realty Res., Inc.,* 354 F.3d 1246, 1262 (10th Cir.2004). The decision whether to certify a class is committed to the broad discretion of the trial court. *Rector v. City & County of Denver,* 348 F.3d 935, 949 (10th Cir.2003); *J.B. ex rel. Hart v. Valdez,* 186 F.3d 1280, 1287 (10th Cir.1999). The court must perform a rigorous analysis of whether the proposed class satisfies the requirements of Rule 23. *Gen. Tel. Co. v. Falcon,* 457 U.S. 147, 155, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982); *J. B.,* 186 F.3d at 1287-88; *see also Reed v. Bowen,* 849 F.2d 1307, 1309 (10th Cir.1988) (party seeking to certify a class is under a strict burden of proof to show that all of the requirements are clearly met). The court should accept the allegations in the complaint as true, although it "need not blindly rely on conclusory allegations which parrot Rule 23 requirements [and] may . . . consider the legal and factual issues presented by plaintiff's complaints." *J.B.,* 186 F.3d at 1290 n. 7 (quotation omitted; brackets in original). The court is to remain focused on the requirements of Rule 23 rather than looking at the merits underlying the class claim. *Shook v. El Paso County,* 386 F.3d 963, 971 (10th Cir.2004) (noting the question is not whether the plaintiffs will prevail on the merits, but rather whether the requirements of Rule 23 are met); *Adamson v. Bowen,* 855 F.2d 668, 676 (10th Cir.1988); *Anderson v. City of Albuquerque,* 690 F.2d 796, 799 (10th Cir.1982).

DISCUSSION

For the reasons explained below, the court finds that class certification is warranted. The court readily finds that the Rule 23(a) requirements of numerosity and commonality are satisfied. More to the heart of the parties' dispute, the court also finds that the Rule 23(b)(3) requirements of predominance and superiority are satisfied because plaintiffs have shown that they can present their case as to the two elements of an antitrust violation and injury in fact (i.e., impact) with class-wide proof. The fact that the damage element may involve more predominantly individualized issues does not defeat the fact that common issues will predominate the claim as a whole. Similarly, plaintiffs' allegations of fraudulent concealment can largely be proven with proof that is common to the class rather than individual to each class member. The court expressly rejects defendants' arguments that the named plaintiffs are not typical and adequate class representatives. Lastly, the court will appoint co-lead counsel and liaison counsel in the polyether polyol cases as class counsel and direct the parties to begin the process of disseminating class notice.

I. Definition of the Class

In plaintiffs' original motion for class certification, they initially sought certification of the following class:

> All persons and entities who purchased polyether polyols, monomeric or polymeric diphenylmethane diisocyanate (MDI), toluene diisocyanate (TDI), or polyether polyol systems except any such systems that also contain polyester polyols directly from a defendant at any time from January 1, 1999 through December 31, 2004 in the United States and its territories or for

> delivery in the United States and its territories (excluding all governmental entities, any defendants, their employees, and their respective parents, subsidiaries, and affiliates).

Defendants' threshold argument in their response brief is that plaintiffs' proposed class definition does not define the class with sufficiently definite and readily ascertainable criteria. *See* Manual for Complex Litigation § 21.222, at 270 (4th ed.2005) (class definition must be precise, objective, and presently ascertainable). Their argument is that this proposed class definition is unclear in three respects: (1) it does not distinguish between aromatic and aliphatic MDI and TDI, (2) it does not reference MDI and TDI prepolymers, and (3) it is not clear enough as to the types of polyether polyols included.

In response to the first argument, plaintiffs explain that the class definition does not need to distinguish between aromatic and aliphatic MDI and TDI because both are "aromatic in composition." SIR Consulting, *CEH Marketing Research Report: Diisocyanates and Polyisocyanates* (Dec.2005), at 11 (discussing the "most widely used diisocyanates and polyisocyanates" as "aromatic in their composition" and specifically discussing MDI and TDI). Furthermore, plaintiffs point out that in the deposition of defendants' expert, Richard T. Rapp, he testified that none of the non-settling defendants even manufacture aliphatic isocyanates. Thus, according to plaintiffs, there is no need to distinguish between whether the MDI and TDI at issue in this case is aromatic or aliphatic. In response to defendants' second argument concerning the lack of clarity about prepolymers, plaintiffs affirmatively state that prepolymers are not included in the class definition. According to plaintiffs, then,

the product definition (which does not purport to include prepolymers) does not need to be revised in this respect.

In response to defendants' third argument, plaintiffs clarify that the polyether products at issue in this case are propylene oxide-based polyether polyols. This term, they point out, is used and recognized throughout the industry. *See* SIR Consulting, *CEH Marketing Research Report: Polyether Polyols for Urethanes* (July 2002), at 15-18 (listing annual capacities of polyether polyol producers in terms of two categories: propylene oxide-based and PTMEG). They explain that pure ethylene oxide-based polyols (*i.e.,* not containing any propylene oxide) and PTMEG polyols are not propylene oxide-based, and therefore they are not included in the class. According to plaintiffs, this proposed clarification that the polyether polyols at issue here are those that are "propylene oxide-based" is similar to the polyester polyol plaintiffs' clarification that the only polyester polyols at issue in that set of consolidated cases were "aliphatic" polyester polyols. *See, e.g., In re Urethane Antitrust Litig.,* 237 F.R.D. 440, 445 (D.Kan.2006). Plaintiffs further explain that they wish to clarify that the product definition also includes MDI-TDI blends. In light of these points of clarification, in plaintiffs' reply brief they propose the following class definition:

> All persons and entities who purchased Polyether Polyol Products (defined below) directly from a defendant at any time from January 1, 1999 through December 31, 2004 in the United States and its territories (excluding all governmental entities, any defendants, their employees, and their respective parents, subsidiaries and

> affiliates). Polyether Polyol Products are: propylene oxide-based polyether polyols; monomeric or polymeric diphenylmethane diisocyanates (MMDI or PMDI—collectively, MDI); toluene diisocyanates (TDI); MDI-TDI blends; or propylene oxide-based polyether polyol systems (except those that also contain polyester polyols).

At oral argument, the court asked defense counsel whether plaintiffs and their proposed revised proposed product definition clarified the former ambiguities with respect to the products at issue. Defense counsel did not indicate any objection to plaintiffs' revised product definition. It appears to the court, then, that defendants' objections to the product definition were resolved by plaintiffs' response and plaintiffs' revised proposed product definition. Thus, the court accepts this as the proposed class definition that is now at issue, and rejects defendants' initial argument that the proposed class definition is not sufficiently definite and ascertainable.

II. Class Certification

In determining whether class certification is appropriate, the court must first find that the proposed class meets the four prerequisites of numerosity, commonality, typicality, and adequacy of representation set forth in Fed.R.Civ.P. 23(a). *In re Integra Realty Res., Inc.,* 354 F.3d 1246, 1262 & n. 3 (10th Cir.2004). If so, the court must then find that the plaintiffs' claim is maintainable as a class action under one (or more) of the three categories of suits described in Rule 23(b). *Id.* Based on the class certification record submitted by plaintiffs, the court readily concludes that the Rule 23(a) requirements of numerosity and commonality are satisfied here. The requirements contested by defendants are (1) the Rule

23(a) requirements of typicality and adequacy of representation as those issues relate to the proposed class representatives, and (2) the Rule 23(b)(3) requirements of predominance and superiority. The court turns first to the heart of defendants' opposition to plaintiffs' motion for class certification, which is their argument that plaintiffs cannot demonstrate that common questions predominate over individual questions or that a class action is superior to individual actions under Rule 23(b)(3).

A. Predominance and Superiority

To certify a class under Rule 23(b)(3), the court must find that common questions "predominate over questions affecting only individual members" and that the class resolution is "superior to other available methods for fairly and efficiently adjudicating the controversy." Fed.R.Civ.P. 23(b)(3); *Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 615, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997). "The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prods.,* 521 U.S. at 623, 117 S.Ct. 2231. "The nature of the evidence that will suffice to resolve a question determines whether the question is common or individual." *Blades v. Monsanto Co.,* 400 F.3d 562, 566 (8th Cir.2005). If the proposed class members will need to present evidence that varies from member to member in order to make out a prima facie case, then it is an individual question. *See id.* If, on the other hand, the same evidence will suffice for each member to make out a prima facie case, then it is a common question. *See id.*

To establish an antitrust violation, a plaintiff must prove (1) a violation of the antitrust laws, (2) that plaintiffs suffered some resulting injury from the

violation, and (3) the measure of damages. *See In re Scrap Metal Antitrust Litig.,* 527 F.3d 517, 532 (6th Cir.2008); *Deiter v. Microsoft Corp.,* 436 F.3d 461, 467 (4th Cir.2006); *Blades,* 400 F.3d at 566. The parties do not dispute that the alleged antitrust violation will be subject to common proof. *See, e.g., In re Visa Check/MasterMoney Antitrust Litig.,* 280 F.3d 124, 136 (2d Cir.2001) (affirming district court's determination that common proof could be used to prove antitrust violations); *see also* 7A Charles A. Wright, Arthur R. Miller and Mary Kay Kane, Federal Practice & Procedure § 1781, at 228 (3d ed.2005) (noting that "whether a conspiracy exists is a common question"); 6 Alba Conte & Herbert Newberg, Newberg on Class Actions § 18.28, at 102 (4th ed. 2002) ("As a rule, the allegation of a price-fixing conspiracy is sufficient to establish predominance of common questions."). The point of their dispute is whether the issues of antitrust impact, damages, and fraudulent concealment are amenable to class-wide proof at trial.

1. Injury from the Antitrust Violation, or "Impact"

The second essential element of plaintiffs' horizontal price-fixing claim is that the proposed class suffered injury from the alleged antitrust violation—an element commonly called "impact." "An antitrust injury is an injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendant's acts unlawful." *Elliott Indus. Ltd. v. BP Am. Prod. Co.,* 407 F.3d 1091, 1124 (10th Cir.2005) (quotation omitted). This element arises from the fact that "[t]he Sherman Act was designed to protect market participants from anticompetitive behavior in the marketplace." *Id.* Thus, the antitrust injury requirement allows a plaintiff to recover only if

the plaintiff has suffered a loss that stems from a competition-reducing aspect of the defendant's behavior. *Id.* at 1124-25. This element can be "likened to the causation element in a negligence cause of action. The term means simply that the antitrust violation caused injury to the antitrust plaintiff." *State of Alabama v. Blue Bird Body Co.,* 573 F.2d 309, 317 (5th Cir.1978).

Like most class certification motions involving horizontal price-fixing claims in cases of recent vintage, both parties have submitted and rely heavily on competing expert affidavits. Plaintiffs rely on the opinions of their expert economist, John C. Beyer, who has conducted an investigation of the polyurethane industry and analyzed defendants' prices, and has concluded that the alleged conspiracy would have impacted all members of the proposed class through higher prices for polyether polyol products than otherwise would have prevailed in the market. This conclusion rests on his understanding that during the class period the industry possessed the following characteristics: defendants enjoyed considerable market power; there was overlap in the defendants' geographic markets and channels of distribution; the production of polyether polyol products is marked by high entry barriers; polyether polyol products are interchangeable, commodity-like products; there are no close substitutes for the products; basic chemicals are the principal ingredients and cost components of systems; and the pricing of basic chemicals and systems is related such that increases in the prices of basic chemicals will raise the prices of systems. These characteristics led Dr. Beyer to conclude that a price-fixing conspiracy for polyether polyol products would have a common class-wide impact. Furthermore, he analyzed defendants' price announcements and concluded that the nature of the announcements

confirmed to him that defendants perceived and intended their pricing actions to have a broad, generalized impact on all purchasers. And, his analysis of defendants' transaction pricing data provided additional support for his opinion that the price-fixing conspiracy, if proved, would have a generalized, class-wide impact.

Defendants, on the other hand, ask the court to discount Dr. Beyer's opinions on the ground that he does not understand the products and markets. Relying on the affidavit of their expert, Dr. Rapp, they contend that the proposed product categories are not within a single relevant market; that the availability of product substitutes varies within the proposed class; that the products at issue in this case are not undifferentiated commodities, but instead represent a range of specialized chemicals; that they do not have market power in certain market segments because of the existence of non-defendant polyether polyol suppliers and systems houses; and that, in reality, prices were not based on price lists but were individually negotiated. According to defendants, the market segments and end-use applications for MDI, TDI, polyether polyols, and systems are diverse and varied. Furthermore, they contend that pricing for MDI, TDI, and polyether polyols is individualized by customer and product.

In support of defendants' arguments, they direct the court's attention to other cases in which courts have criticized or rejected Dr. Beyer's opinions where he did not obtain a thorough and proper understanding of the product market. *See, e.g., Blue Cross & Blue Shield United v. Marshfield Clinic,* 152 F.3d 588, 593 (7th Cir.1998) (Posner, J.) (referring to Dr. Beyer's expert opinion as "worthless"); *Allied Orthopedic Appliances,*

Inc. v. Tyco Healthcare Group L.P., 247 F.R.D. 156, 171-77 (C.D.Cal.2007) (criticizing Dr. Beyer's opinions and denying class certification). In particular, in *Lantec, Inc. v. Novell, Inc.,* 306 F.3d 1003 (10th Cir.2002), the Tenth Circuit affirmed the district court's exclusion of his testimony at trial concerning the relevant market for a monopoly claim. *Id.* at 1025-26. But, it is equally true that there are many other cases in which courts have found his opinions to be sufficient to support class certification on antitrust price-fixing claims. *See generally, e.g., In re Linerboard Antitrust Litig.,* 305 F.3d 145 (3d Cir.2002) (affirming district court's grant of class certification where the evidence, including Dr. Beyer's opinion, was sufficient to establish antitrust impact common to the class); *In re Foundry Resins Antitrust Litig.,* 242 F.R.D. 393 (S.D.Ohio 2007) (granting motion for class certification based, in part, on Dr. Beyer's opinions); *In re Polyester Staple Antitrust Litig.,* MDL No. 3:03CV1516, 2007 WL 2111380, at *1-33 (W.D.N.C. July 19, 2007) (same); *In re Bulk (Extruded) Graphite Prods. Antitrust Litig.,* Case No. 02-6030(WHW), 2006 WL 891362, at *1-*16 (D.N.J. April 4, 2006) (same); *In re Vitamins Antitrust Litig.,* 209 F.R.D. 251 (D.D.C.2002) (same). Thus, the court is not concerned with whether other courts have credited or discredited Dr. Beyer's opinions in other cases, but rather whether his opinions in support of plaintiffs' motion for class certification in *this* case are worthy of credence in light of the class certification record currently before the court.

The appropriate analysis begins with a recognition that defendants seeking to defeat class certification in horizontal price-fixing cases such as this one face an uphill battle. "Predominance is a test readily met in certain cases alleging . . . violations of the antitrust laws," *Amchem Prods.,* 521 U.S. at 625, 117 S.Ct. 2231,

because proof of the *conspiracy* is a common question that is thought to predominate over the other issues of the case, 7AA Charles Alan Wright et al., Federal Practice & Procedure § 1781, at 228 (3d ed.2005). Even more specifically, it is widely recognized that the very nature of horizontal price-fixing claims are particularly well suited to class-wide treatment because of the predominance of common questions. *See, e.g., Cordes & Co. Fin. Servs., Inc. v. A.G. Edwards & Sons, Inc.,* 502 F.3d 91, 105-08 (2d Cir.2007) (reversing district court's determination that common questions did not predominate the issue of impact in horizontal price-fixing case); *Cohen v. Chilcott,* 522 F.Supp.2d 105, 116 (D.D.C.2007) ("Antitrust actions involving allegations of price-fixing have frequently been found to meet the predominance requirement in class certification analyses."); *In re Foundry Resins Antitrust Litig.,* 242 F.R.D. at 409 (observing that some courts have presumed impact in these types of cases). The rationale is that "because the gravamen of a price-fixing claim is that the price in a given market is artificially high, there is a presumption that an illegal price-fixing scheme impacts upon all purchasers of a price-fixed product in a conspiratorially affected market." *In re Potash Antitrust Litig.,* 159 F.R.D. 682, 695 (D.Minn.1995); *see also In re Linerboard Antitrust Litig.,* 305 F.3d at 151 ("'If the price structure in the industry is such that nationwide the conspiratorially affected prices at the wholesale level fluctuated within a range which . . . was higher . . . than the range which would have existed . . . under competitive conditions, it would be clear that all members of the class suffered some damage, notwithstanding that there would be variations . . . as to the extent of [the plaintiffs]

damage.'") (quoting *Bogosian v. Gulf Oil Corp.,* 561 F.2d 434, 455 (3d Cir.1977)).

Nonetheless, this rule is by no means absolute because the Courts of Appeals have at times held that class certification of horizontal price-fixing cases was not warranted. For example, in *Blades v. Monsanto Co.,* 400 F.3d 562 (8th Cir.2005), the Eighth Circuit affirmed the district court's denial of class certification in a case involving an alleged conspiracy to fix prices of genetically modified soybean seeds. There, the seeds were not homogenous products, the "premium" portion of the seed could not be segregated from the rest of the seed, the seeds were not offered for sale at a uniform price, and in many instances the price of the genetically modified seeds could not be compared to anything because they had no conventional counterparts. *Id.* at 570-72. In *Robinson v. Texas Auto. Dealers Ass'n,* 387 F.3d 416 (5th Cir.2004), the Fifth Circuit held that the district court committed reversible error by certifying a class of automobile purchasers against automobile dealers who had charged a Vehicle Inventory Tax as a separate line item on each sales contract because the predominance requirement was not satisfied. The court held that the class impermissibly included "consumers with divergent negotiating histories" in purchasing automobiles and reasoned that in order to determine the implications of these negotiations, "a court would have to hear evidence regarding *each purported class member and his transaction*" thus destroying any alleged predominance present in the proposed class. *Id.* at 423-24 (emphasis in original). And, in *Windham v. Am. Brands, Inc.,* 565 F.2d 59 (4th Cir.1977) (en banc), the Fourth Circuit held that the district court did not abuse its discretion in denying certification of a class of purchasers of flue-cured tobacco, which is a

nonstandardized or non-fungible commodity. In that case, the Fourth Circuit affirmed the district court's decision in light of the "multiplicity of claimants" (numbering approximately 20,000), "the complexity of their claims," and the "highly individualized character the proof of injury and damages would assume." *Id.* at 66. The court noted the "staggering problems of logistics" where the issues of damages and impact do not lend themselves to mechanical calculation, but require separate mini-trials on an overwhelmingly large number of individual claims. *Id.* at 67.

With this and an abundance of other case law concerning class certification on price-fixing antitrust claims in mind, the court turns to an evaluation of the class certification record in this case to determine whether common issues, or individualized questions, will dominate the issue of antitrust impact. The pertinent legal inquiry is whether, as a result of defendants' alleged price-fixing conspiracy, the putative class plaintiffs paid a price that was artificially high because competition was removed from the market. Of course, at this procedural juncture on a motion for class certification, the plaintiffs need not prove this element. Rather, they "need only make a threshold showing that the element of impact will predominantly involve generalized issues of proof, rather than questions which are particular to each member of the plaintiff class." *In re Linerboard Antitrust Litig.,* 305 F.3d at 152. In the court's evaluation of the class certification record, "[t]he operative question here is not whether the plaintiffs can establish class-wide impact, but whether class-wide impact may be proven by evidence common to all class members." *In re Bulk (Extruded) Graphite Prods. Antitrust Litig.,* 2006 WL 891362, at *10. The court considers "only whether plaintiffs have made a

threshold showing that what proof they offer will be sufficiently generalized in nature that . . . the class action will provide a tremendous savings of time and effort." *In re Potash Antitrust Litig.,* 159 F.R.D. at 697.

The parties' arguments rely largely on their respective expert reports, each of which, not surprisingly, lend support to their respective positions. The recent trend of authority is to permit the district court to compare the relative weight of expert opinions in ruling on a motion for class certification to the extent necessary to resolve the independent question of whether the plaintiff has shown that common questions will predominate. *See Heerwagen v. Clear Channel Commc'ns,* 435 F.3d 219, 231-32 (2d Cir.2006) (affirming denial of class certification where district court weighed competing expert reports); *Blades,* 400 F.3d at 569-70 (affirming denial of class certification where the district court "considered all expert testimony offered by both sides in support of or in opposition to class certification and . . . afforded that testimony such weight as [the court] deemed appropriate"). This view is grounded in the Supreme Court's directive that the court must perform a "rigorous analysis" of whether the class certification requirements of Rule 23 are met. *Gen. Tele. Co. v. Falcon,* 457 U.S. 147, 161, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982). Accordingly, the court has evaluated the parties' respective expert opinions along with the other documents submitted by the parties as exhibits, all of which collectively comprise the class certification record.

Based on this record, the court is satisfied that plaintiffs have shown that they can establish their case on the element of impact by way of generalized proof as opposed to proof that is particular to each

member of the class. In reaching this conclusion, the court wishes to assure defendants that the court has carefully and thoroughly reviewed the class certification record, even though the court will not discuss in this order each and every argument raised by them. Defendants argue, for example, that Dr. Beyer does not understand the polyether polyol market because, essentially, he does not view the market to be as complex as defendants believe it is. But, the factual record (other than defendants' expert opinions) supports the notion that Dr. Beyer's understanding of the industry is at least reasonably accurate. Plaintiffs have directed the court's attention to an abundance of documents indicating that even the defendants themselves, along with Bayer, largely regard the basic chemicals as commodities and, furthermore, that the market is characterized by supply-side substitution. Although Dr. Rapp mentions the possibility of product substitutes in some market segments, he does not discuss any of those alleged substitutes in sufficiently meaningful detail to undermine Dr. Beyer's conclusion that they are not viable economic substitutes. Additionally, in plaintiffs' reply brief they direct the court's attention to evidence that one of the primary alleged substitute products in one application (substituting phenyl formaldehyde for PMDI as a binding agent for oriented strand board) has lost ground as a competitive substitute to PMDI because manufacturers have increasingly recognized the higher performance characteristics of PMDI. Dr. Rapp also discusses the existence of non-defendant suppliers, but only in the context of polyether polyol sales (not MDI and/or TDI, with respect to which defendants possessed 100% of the market share) and, even then, defendants still possessed 76% of the market share for polyether polyols. Defendants'

arguments concerning their view of the industry does not involve individual issues that are particular to the putative class members, but rather to the nature of the industry as a whole. At this procedural juncture, the court is satisfied that Dr. Beyer's opinions are grounded in a sufficiently accurate understanding of the structure of the polyether polyol industry that the court will not disregard them.

Defendants also argue that class certification is not warranted because, they contend, pricing for the basic chemicals is highly individualized by customer and by product. It may well be that sales of the basic chemicals were characterized by individual negotiations, variations in contractual relationships, and the like. But, "the issue in the common impact analysis is the *fact,* not the amount, of injury." *In re Potash Antitrust Litig.,* 159 F.R.D. at 694 (emphasis added). Here, plaintiffs have directed this court's attention to product price lists maintained by the defendants during the class period as well as coordinated price increase announcements from the defendants relating to the polyether polyol products. This evidence of a standardized pricing structure, which (in light of the alleged conspiracy) presumably establishes an artificially inflated baseline from which any individualized negotiations would proceed, provides generalized proof of class-wide impact. *See, e.g., In re High Fructose Corn Syrup Antitrust Litig.,* 295 F.3d 651, 656 (observing that "sellers would not bother to fix list prices if they thought there would be no effect on transaction prices"); *In re Industrial Diamonds Antitrust Litig.,* 167 F.R.D. 374, 382-84 (S.D.N.Y.1996) (finding that common issues predominated price-fixing claims for purchasers of list-price products, but that individual questions predominated those claims for purchasers of non-list price products;

granting in part and denying in part class certification accordingly). Certainly, individualized negotiations and a diversity of prices paid do not automatically foreclose class action treatment. *In re NASDAQ Market-Makers Antitrust Litig.,* 169 F.R.D. 493, 523 (S.D.N.Y.1996) ("Neither a variety of prices nor negotiated prices is an impediment to class certification if it appears that plaintiffs may be able to prove at trial that, as here, the price range was affected generally."). Class certification is appropriate as long as the alleged antitrust violation has caused widespread injury to the class as a whole. *In re Cardizem CD Antitrust Litig.,* 200 F.R.D. 297, 321 (E.D.Mich.2001); *NASDAQ,* 169 F.R.D. at 523.[6] Here, plaintiffs have sufficiently shown that they can demonstrate such widespread injury using proof that is common to the class as a whole, as opposed to proof that is distinct to individual class members.

Defendants separately argue that the court should not certify a class that includes systems (as opposed to the basic chemicals). Their arguments in this respect are essentially twofold. First, they point out that systems are customized products that are specifically engineered to meet the performance requirements of individual customers. As such, they are not commodity

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[6] Defendants' argument concerning an absence of actual price increases following the announcements (which, according to defendants, demonstrates the ineffectiveness of the price increase announcements) is unavailing on class certification. Aside from the fact that this argument goes to the merits of the case and not the issue of whether plaintiffs' case concerning impact is amenable to class-wide proof, the mere fact that prices did not *increase* at the seemingly appropriate times does not conclusively establish that they were not artificially inflated so as to keep them from falling to the extent that they might have done so in a competitive market.

products. It is clear to the court that systems are heterogenous, non-commodity, non-fungible products. They are highly specialized chemicals that clearly are not subject to class certification based on the same rationale as stated above with respect to the basic chemicals. Instead, plaintiffs argue that they intend to show class-wide impact of the conspiracy on systems purchasers by virtue of the fact that systems are made up overwhelmingly of the allegedly price-fixed basic chemicals. Certainly, there is ample authority to support such a theory. *See, e.g., In re Linerboard Antitrust Litig.,* 305 F.3d at 153-53 (conspiracy to control the output of linerboard, and therefore to raise its price, was sufficient to also encompass corrugated boxes, which are made from linerboard); *In re Flat Glass Antitrust Litig.,* 191 F.R.D. 472, 475 (W.D.Pa.1999) (certifying a class including flat glass "and all products subsequently fabricated therefrom"). Defendants do not contest the viability of this legal theory, but instead argue that systems prices were individually negotiated and not based on list price. They further contend that the cost of the basic chemicals does not determine systems prices. Their theory in this regard is that pricing of systems is value-based instead of being based on the cost of the raw material inputs. Despite the documents produced by the defendants to support this theory, however, plaintiffs have directed the court's attention to ample internal documents from the defendants themselves demonstrating that systems prices are, at least to some extent, based on the costs of the basic chemicals that make up the systems. In addition, plaintiffs have produced documents from the defendants showing that the defendants viewed their price increase for basic chemicals to be successful in helping them increase systems prices. And, notably, Mike

Gionfriddo of plaintiff Quabaug Corporation testified in his deposition that price was "extremely important" in Quabaug's purchasing decisions. In light of this record, the court is satisfied that plaintiffs' proof that systems purchasers were impacted by the alleged price-fixing conspiracy as to basic chemicals is amenable to class-wide, as opposed to individualized, proof.

In sum, plaintiffs have shown that they can make their case that the putative class members were, in fact, injured by the alleged price-fixing conspiracy by using class-wide proof. Accordingly, the court is satisfied that common questions will predominate this element of their antitrust claim.

2. Damages

Plaintiffs contend that they can show damages using class-wide proof by using a methodology proposed by Dr. Beyer—a "before-during-after" benchmark price analysis supplemented by multiple regression. Dr. Beyer further proposes to perform separate damages calculations for purchases of products from each basic chemical category. Defendants, however, point out that Dr. Beyer's proposed methodology is unworkable given the multitude of variations in the respective positions of the putative class plaintiffs. The court is not nearly as persuaded that the issue of damages is as amenable to class-wide proof as the issues of antitrust conspiracy and impact in light of the myriad of products, pricing structures, individual negotiations, and contracts at issue. But, "even where there are individual variations in damages, the requirements of Rule 23(b)(3) are satisfied if the plaintiffs can establish that the defendants conspired to interfere with the free-market pricing structure." *In re Scrap Metal Antitrust Litig.,*

527 F.3d 517, 535-36 (6th Cir.2008) (affirming district court's grant of class certification in antitrust case even though individual issues would predominate the damage inquiry). The court believes that the most likely scenario is that plaintiffs will be able to use a formulaic approach to damages through Dr. Beyer's testimony with respect to some damage calculations, but others may require individualized determinations. The possibility that individual issues may predominate the issue of damages, however, does not defeat class certification by making this aspect of the case unmanageable. The court's reasoning on this issue remains the same as that expressed in the polyester polyol cases.

> Even if individualized issues (rather than common issues) were to predominate the damage inquiry, the more appropriate course of action would be to bifurcate a damages phase and/or decertify the class as to individualized damages determinations. In other words, even if individualized issues predominate the issue of damages, the court believes that common questions nonetheless predominate in this case because common questions will govern the more difficult, threshold liability issues of proving an antitrust violation and impact.

In re Urethane Antitrust Litig., 237 F.R.D. 440, 452 (D.Kan.2006). Accordingly, the court is not persuaded that the possibility of individualized determinations regarding damages defeats the predominance of common issues on this claim as a whole.

3. Fraudulent Concealment

Defendants also argue that plaintiffs cannot prove fraudulent concealment through common proof. The

court rejected a similar argument by the polyester polyol defendants. *Id.* at 452 (finding that common issues will predominate the fraudulent concealment analysis because "the key inquiry will focus on the defendants' conduct—that is, what the defendants did—rather than on the plaintiffs' conduct"). So, too, here, plaintiffs' fraudulent concealment theory rests on the defendants' conduct in issuing pretextual price increase announcements. Defendants nonetheless contend that this proof is not "common" because different members of the proposed class allegedly received different price increase announcements. They point out that purchasers received price increase announcements only from the defendants from whom they purchased products and only those announcements that pertained to the products that they purchased. Even so, the key inquiry will nevertheless still focus on the defendants' conduct—that is, what the defendants did—in issuing pretextual price increase announcements. Thus, the court's reasoning from the polyester polyol cases applies with equal force in this set of consolidated cases. *See id.* (collecting case law on this issue).

4. Conclusion Regarding Predominance and Superiority

In sum, the court is satisfied that the key issues plaintiffs will need to prove are susceptible to common proof on a class-wide basis. These common questions will include the two issues necessary to establish liability—antitrust injury and impact—as well as defendants' alleged fraudulent concealment of the alleged price-fixing conspiracy by issuing pretextual price increase announcements. It appears that a determination of damages will be individualized, at least to some extent, and some aspects of plaintiffs'

fraudulent concealment allegations may require individualized proof. Overall, however, the court is satisfied that common issues will predominate over questions affecting only individual class members. For this reason, the court believes that class resolution is superior to other available methods for the fair and efficient adjudication of this lawsuit. *See, e.g., id.* at 453 (explaining why a class action "is by far the best method for resolving the claims at issue in this lawsuit"). Accordingly, the court finds that the predominance and superiority requirements of Rule 23(b)(3) are satisfied.

B. Typicality

A prerequisite for certification is that the class representatives be a part of the class and possess the same interest and suffer the same injury as class members. *Schlesinger v. Reservists Comm. to Stop the War,* 418 U.S. 208, 216, 94 S.Ct. 2925, 41 L.Ed.2d 706 (1974). Rule 23(a)(3) requires plaintiffs to demonstrate that the claims or defenses of the class representatives are typical of the claims of the class members they seek to represent. *Rector v. City and County of Denver,* 348 F.3d 935, 949 (10th Cir.2003).

Defendants' first argument that the named plaintiffs' claims are not typical is similar to the reasons that they advanced with respect to the predominance and superiority requirement. They once again rely on their theory that the polyether polyol products are myriad compounds traded in distinct markets. They point out, for example, that many members of the proposed class did not buy the same products as other members of the proposed class. Some members bought only certain types of MDI, some bought only certain types of TDI, some bought only certain polyether polyol formulations, and some

bought only customized systems. Also, not every defendant sold each of the products at issue, such as the fact that Lyondell did not sell or manufacture MDI or systems products.

Defendants' argument is without merit because it is well established that "differing fact situations of class members do not defeat typicality under Rule 23(a)(3) so long as the claims of the class representative and class members are based on the same legal or remedial theory." *Adamson v. Bowen,* 855 F.2d 668, 676 (10th Cir.1988); *see also Anderson v. City of Albuquerque,* 690 F.2d 796, 800 (10th Cir.1982) (noting it is well established that the claims of all the class need not be identical to those of the named plaintiffs). "Typicality refers to the nature of the claims of the representative, not the individual characteristics of the plaintiff." *In re Cardizem CD Antitrust Litig.,* 200 F.R.D. 297, 304 (E.D.Mich.2001). In this case, the named plaintiffs' claims "are typical in that they must prove a conspiracy, its effectuation, and damages therefrom—precisely what the absent class members must prove to recover." *In re Foundry Resins Antitrust Litig.,* 242 F.R.D. 393, 405 (S.D.Ohio 2007) (in the context of antitrust claims, typicality is established when the plaintiffs and all class members allege the same antitrust violations by the defendants); *see also In re Dynamic Random Access Memory (DRAM) Antitrust Litig.,* Case No. M 02-1486, 2006 WL 1530166, at *5 (N.D.Cal. June 5, 2006) (collecting case law) (observing that "there is substantial legal authority holding in favor of a finding of typicality in price fixing conspiracy cases, even where differences exist between plaintiffs and absent class members with respect to pricing, products, and/or methods of purchasing products"). "The typicality requirement does not mandate that

products purchased, methods of purchase, or even damages of the named plaintiffs must be the same as those of the absent class members." *Thomas & Thomas Rodmakers, Inc. v. Newport Adhesives & Composites, Inc.,* 209 F.R.D. 159, 165 (C.D.Cal.2002) (quotation omitted); *accord In re Vitamins Antitrust Litig.,* 209 F.R.D. 251, 261 (D.D.C.2002); *see also In re Potash Antitrust Litig.,* 159 F.R.D. 682, 691 (D.Minn.1995) ("Nor will differing damages, resulting from varied methods of procuring and purchasing the product, defeat satisfaction of Rule 23(a)(3)."); 6 Alba Conte & Herbert B. Newberg, Newberg on Class Actions § 18.9, at 30 (4th ed.2002) (noting the typicality requirement can be met "even though there were many products sold at varied prices" because typicality refers to the nature of the claim, "not to the specific facts from which it arose").

1. Seegott Holdings, Inc.

Defendants also raise more specific arguments as to why they believe each of the named plaintiffs' claims are not typical. They contend that plaintiff Seegott is atypical in at least five respects. First, it was a distributor that purchased all of its TDI, MDI, and polyether polyols during the class period from BASF. The mere fact that Seegott was a distributor does not distinguish it from the putative class plaintiffs' price-fixing claim because Seegott's claim is based on the same legal theory insofar as it was a *purchaser* of polyether polyol products during the class period. Consequently, Seegott's antitrust claim is typical of the class plaintiffs' claims because those claims are all based on the allegation that all purchasers of the polyether polyol products during the class period were injured by the defendants' alleged conspiratorial behavior. Thus, the mere fact that Seegott was also a

distributor does not make its horizontal price-fixing claim atypical.

Second, defendants argue that Seegott actually benefitted in some instances from the price increases because it was paid a commission on certain sales. Defendants' theory is that the higher the product price, the higher Seegott's commission on those products. The thrust of this argument is that Seegott did not suffer as great of a net loss on its purchases because of its position in the market. But, the mere fact that Seegott may have been able to offset some of its antitrust damages with commissions does not negate its allegation that it—like the class plaintiffs—paid *some* illegal overcharges for polyether polyol products. In this respect, Seegott's price-fixing claim is entirely typical. In the seminal case of *Hanover Shoe, Inc. v. United Shoe Machinery Corp.,* 392 U.S. 481, 88 S.Ct. 2224, 20 L.Ed.2d 1231 (1968), the court expressly rejected the defendant's argument that the plaintiff could not recover for an antitrust overcharge if that party was able to pass on the overcharge to others. *Id.* at 489, 88 S.Ct. 2224. The Court explained that "[a]s long as the seller continues to charge the illegal price, he takes from the buyer more than the law allows. At whatever price the buyer sells, the price he pays the seller remains illegally high, and his profits would be greater were his costs lower." To illustrate the point, defendants' argument on this point is based on Dr. Rapp's affidavit that Paul Seegott testified in his deposition that on some sales Seegott received a five percent commission. If one were to assume an illegal overcharge of ten cents per pound on a ten-pound purchase, Seegott would have suffered damages of one hundred dollars for that particular purchase. Even if Seegott were paid a five percent commission on the sale of that product (a $5 commission), that would not

fully ameliorate the $100 overcharge. In that scenario, the mere fact that Seegott may have recouped a portion of this overcharge does not mean that its claim is atypical because Seegott, just like the other class plaintiffs, was subject to the alleged overcharge. Courts have expressly rejected similar arguments that a named plaintiff's recovery of the overcharge or potential ability to recover the overcharge defeats class certification. *See, e.g., In re Wellbutrin SR Direct Purchaser Antitrust Litig.,* Case No. 04-5525, 2008 WL 1946848, at *6 (E.D.Pa. May 2, 2008); *J.B.D.L. Corp. v. Wyeth-Ayerst Labs., Inc.,* 225 F.R.D. 208, 216 (S.D.Ohio 2003).

Defendants' third argument that Seegott's claim is atypical rests on an exception carved out in *Hanover Shoe* where an antitrust plaintiff is able to pass on the entire overcharge to subsequent purchasers by way of cost-plus pricing. The Court observed that "there might be situations—for instance, when an overcharged buyer has a pre-existing 'costplus' contract, thus making it easy to prove that he has not been damaged—where the considerations requiring that the passing-on defense not be permitted in this case would not be present." *Hanover Shoe,* 392 U.S. at 494, 88 S.Ct. 2224. Defendants suggest that this exception applies to plaintiff Seegott based on Paul Seegott's deposition testimony concerning Seegott's ability to implement cost-plus pricing. The court has reviewed Mr. Seegott's testimony, however, and it does not establish that Seegott used pre-existing cost-plus contracts with its customers. He testified that in response to BASF's price increase announcements Seegott "tried to raise [its] prices to customers" so that Seegott would still make its margin, but if Seegott could not get that margin it would "have to walk from the business or . . . take less margin." His testimony

by no means establishes that Seegott sold the allegedly price-fixed products solely on the basis of pre-existing cost-plus contracts. *See Kansas v. UtiliCorp United, Inc.,* 497 U.S. 199, 217-18, 110 S.Ct. 2807, 111 L.Ed.2d 169 (1990) (denying application of the cost-plus contract exception where the defendant gas utility company's sales to its customers under regulations and tariffs did not amount to pre-existing cost-plus contracts).

Fourth, defendants argue that Dr. Rapp's analysis shows that Seegott's price patterns for the products it purchased are not price patterns experienced by any other customers. This argument, too, is without merit. Once again, the critical issue is not whether Seegott was harmed by the same amount as other purchasers, but whether Seegott's claims are typical because Seegott—like other polyether polyol product purchasers—was harmed by the alleged conspiratorial overcharge.

Defendants' fifth and final argument that Seegott's claims are not typical is that Seegott is subject to a counterclaim by BASF. The Courts of Appeals have held that unique defenses bear on both the typicality and adequacy of a class representative. *See Beck v. Maximus, Inc.,* 457 F.3d 291, 296 (3d Cir.2006) (collecting cases). The challenge presented by such a defense is that the class representative's interests might not be aligned with those of the class and the representative might devote time and effort to the defense at the expense of issues that are common and controlling for the class. *See id.* at 297; *see also Hanon v. Dataproducts Corp.,* 976 F.2d 497, 508 (9th Cir.1992) (holding class certification should not be granted if there is a danger that absent class members will suffer if their representative is preoccupied with

defenses unique to it). Thus, "[a] proposed class representative is not adequate or typical if it is subject to a unique defense that threatens to play a major role in the litigation." *In re Milk Prods. Antitrust Litig.,* 195 F.3d 430, 437 (8th Cir.1999).

In this case, the nature of BASF's counterclaim against Seegott gives the court some cause for concern about whether Seegott is a typical and adequate class representative. The counterclaim is for $2.4 million for Seegott's alleged non-payment pursuant to the terms of its distributor agreement with BASF. Ultimately, however, the court believes that this counterclaim does not threaten to play such a major role in this litigation that the putative class plaintiffs will suffer by Seegott devoting time and effort to defending this counterclaim at the expense of prosecuting the antitrust claim. In fact, this counterclaim is likely to play only a small role in this multidistrict litigation proceeding for several reasons. First, Seegott is not the only named plaintiff and, therefore, it would not be able to succumb to negotiating pressures because it would lack the power to unilaterally settle this case on behalf of the class plaintiffs. Second, the named plaintiffs are represented by counsel who are experienced and well versed in horizontal price-fixing antitrust litigation who have shown themselves to be motivated to obtain meaningful benefits for the putative class. Third, the $2.4 million counterclaim is dwarfed by the scope and value of this litigation as a whole. For example, the named plaintiffs and their representatives have already obtained a $55.3 million settlement from Bayer. Moreover, one view of the impact of this counterclaim on this lawsuit is that Seegott has an even greater incentive to show that its unpaid balance is the result, at least in part, of conspiratorial overcharges in order to reduce, if not

entirely eliminate, the amount that it owes to BASF. For all of these reasons, then, the court is not persuaded that this is a case where the existence of BASF's counterclaim against Seegott—even though it is a sizeable counterclaim—will in any way disadvantage the class as a whole by shifting the focus of this litigation. In sum, the court is satisfied that plaintiff Seegott's claim is sufficiently typical of those of the putative class plaintiffs.

2. Industrial Polymers, Inc.

The court turns, then, to defendants' arguments that plaintiff Industrial Polymers, Inc. does not satisfy the typicality requirement. They argue that the claim of Industrial Polymers is not typical of many class members' claims because it is an independent systems house. As an independent systems house, it purchases certain types of MDI, TDI, and polyether polyols and formulates them into systems. For some systems products, Industrial Polymers is actually a competitor with defendants, not a customer. Like plaintiff Seegott, however, Industrial Polymers' claim is typical of those of other purchasers of the basic chemicals inasmuch as it allegedly paid conspiratorially inflated prices for those products. The fact that it is a competitor of the defendants with respect to systems does not render its claim atypical simply because other class plaintiffs may have been forced to pay overcharges on systems purchases to the defendants.

Defendants also point out that Industrial Polymers did not purchase any polyols from defendants during the class period because it switched its source of supply from BASF Corp. to non-defendant Arch Chemicals because Arch provided a more consistent source of supply. Even so, however, Industrial Polymers purchased TDI from defendants. Therefore,

it was subject to the alleged conspiratorial overcharges with respect to its TDI products. Industrial Polymers' claim involves the same legal theory and elements of proof as the claims of other purchasers of polyether polyol products. Therefore, Industrial Polymers has every incentive to prosecute this claim on behalf of the putative class plaintiffs.

Lastly, defendants seek to characterize Industrial Polymers as a "zero impact" customer. Their rationale is that the pricing for Industrial Polymers' TDI purchases appears to have been constant or declining throughout the class period. Defendants' logic is that because Industrial Polymers did not experience price increases during the class period it was not impacted by the alleged conspiracy. This argument rests on the erroneous assumption that a horizontal price-fixing plaintiff must show that the prices it paid increased or remained stable in order for a conspiracy to have existed. The critical inquiry is not whether the plaintiff's prices went up or down, but rather whether the plaintiff paid prices higher than the plaintiff would have paid in a competitive market unaffected by the alleged conspiracy. Accordingly, defendants' argument on this point is without merit. Having rejected defendants' arguments that Industrial Polymers' claim is atypical, then, the court is satisfied that its claim is typical of the class.

3. Quabaug Corporation

Defendants argue that the claim of named plaintiff Quabaug Corporation is not typical because Quabaug purchased only systems, and those systems obviously were not commodities. As explained above in the court's discussion of the predominance and superiority requirements, however, plaintiffs' claim regarding

"systems" does not rest on their nature as commodity chemicals. Instead, it rests on the theory that the artificially inflated prices of the basic chemicals likewise caused the prices of systems to be artificially inflated. In this respect, then, Quabaug's claim is in fact typical of the claims of other systems purchasers.

Defendants further point out that Quabaug's prices fell or were fixed by contract during the class period. Thus, according to defendants, Quabaug is subject to "the obvious defense that it sustained no impact from the alleged conspiracy because its prices either fell in response to the alleged conspiracy or its prices were insulated from the alleged conspiracy by virtue of its contract pricing." Defendants' argument that Quabaug's prices "fell" suffers from the same flaws in logic as discussed above with respect to Industrial Polymers' prices. Simply stated, the inquiry is not whether Quabaug's prices rose or fell, but rather whether they were fixed or maintained at supracompetitive levels.

Defendants' argument that Quabaug's prices were insulated from the alleged conspiracy by virtue of its contract pricing is factually inaccurate. The class certification record establishes that Quabaug initially purchased its system from Huntsman. When Quabaug received the first price increase letter from Huntsman in January 2001, Quabaug simply refused to take the price increase. In February 2001, Quabaug began purchasing its system from Bayer at five cents per pound less than it had been purchasing from Huntsman. Quabaug's representative Michael V. Gionfriddo testified in his deposition that Quabaug sought out Bayer because the products it had been purchasing from Huntsman were not meeting its performance specifications. Until April of 2003,

Quabaug made its purchases from Huntsman and Bayer on a "spot" basis. It was not until April 1, 2003, that Quabaug began purchasing a system from Bayer pursuant to a contract. This was more than three years into the class period that began on January 1, 1999. Thus, Quabaug's prices were not "insulated" (as defendants argue) from the alleged conspiracy during this entire time period, but rather were negotiated during the conspiracy up until April of 2003. Moreover, the alleged conspiracy may have impacted the contract price ultimately agreed upon between Quabaug and Bayer. Accordingly, the court rejects defendants' arguments and finds that Quabaug's claim is typical of those of the putative class plaintiffs.

C. Adequacy of Representation

Rule 23(a)(4) requires that the named plaintiffs must fairly and adequately protect the interests of class members. To satisfy this prerequisite to class certification, the plaintiffs must show that their interests are aligned with those of the persons they seek to represent and that they will vigorously prosecute the class through qualified counsel. *Rutter & Wilbanks Corp. v. Shell Oil Co.,* 314 F.3d 1180, 1187-88 (10th Cir.2002). Defendants argue that plaintiffs Seegott and Industrial Polymers are not adequate class representatives because as a distributor and a systems house they may have actually benefitted from price increases. Defendants contend that their interests are therefore antagonistic to those of the other class members. For all of the reasons explained above, the court finds defendants' arguments in this respect to be without merit. Seegott and Industrial Polymers have the same interests as the other class members in proving that they were all damaged by defendants' alleged price-fixing

conspiracy with respect to the polyether polyol products. Furthermore, the court is satisfied based on its experience to date in this multidistrict litigation proceeding that the named plaintiffs and class counsel acting on their behalf will prosecute this action vigorously on behalf of the class. Accordingly, the court finds that Rule 23(a)(4)'s adequacy of representation requirement is met in this case. Having found that the four Rule 23(a) requirements as well as the Rule 23(b)(3) requirements are met, then, the court hereby finds that certification of a class is warranted for plaintiffs' antitrust claim and related issues in this multidistrict litigation proceeding.

III. Appointment of Counsel

An order certifying a class must also appoint class counsel that will adequately represent the interests of the class. Fed.R.Civ.P. 23(c)(1)(B), (g)(1). The court must consider the work counsel has done in identifying or investigating potential claims in the actions, counsel's experience in handling class actions and other complex litigation and claims of the type asserted in the present action, counsel's knowledge of the applicable law, and the resources counsel will commit to representing the class. Fed.R.Civ.P. 23(g)(1)(C). The court is satisfied that the law firms of Fine, Kaplan and Black, R.P.C. and Cohen, Milstein, Hausfeld & Toll, P.L.L.C. satisfy these criteria and will adequately represent the interests of the class as lead counsel. Morris, Laing, Evans, Brock & Kennedy, Chartered shall continue to serve as liaison counsel.

IV. Notice

Rule 23(c)(2)(B) provides that "[f]or any class certified under Rule 23(b)(3), the court must direct to class members the best notice practicable under the

circumstances, including individual notice to all members who can be identified through reasonable effort." The court believes that the overwhelming majority of, if not all, class members can likely be identified through reasonable efforts. To that end, defendants are directed to provide to plaintiffs the names, addresses, and telephone numbers of all customers who are potential members of the class on or before *August 29, 2008*. Also on or before *August 29, 2008*, plaintiffs shall prepare and submit to the court for approval an order regarding notice that complies with the requirements of Fed.R.Civ.P. 23(c).

IT IS THEREFORE ORDERED BY THE COURT that Plaintiffs' Motion for Class Certification (doc. 552) is granted.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

[Filed: 11/7/2014]

No. 13-3215

IN RE: URETHANE ANTITRUST LITIGATION

ORDER

Before LUCERO, MURPHY, and BACHARACH, *Circuit Judges*.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

/s/ Elisabeth A. Shumaker
Elisabeth A. Shumaker,
Clerk

APPENDIX F

FEDERAL STATUTES

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

(a) Amount of recovery; prejudgment interest

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

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

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

behavior or otherwise providing for expeditious proceedings; and

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

* * * *

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

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

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

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

APPENDIX G

FEDERAL RULE

Federal Rules of Civil Procedure Rule 23. Class Actions

* * * *

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

* * * *

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

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

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

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

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

* * * *