No. 13-3215

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

IN RE: URETHANE ANTITRUST LITIGATION

CLASS PLAINTIFFS,
Appellees

On Appeal from the United States District Court
For the District of Kansas
The Honorable John W. Lungstrum
D.C. No. 04-md-1616-JWL

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CORPORATE DISCLOSURE STATEMENT

Named plaintiffs Seegott Holdings, Inc., Industrial Polymers, Inc. and Quabaug Corporation have no parent corporation or affiliates that are publicly traded. No publicly traded company owns ten percent or more of the stock of any named plaintiff.

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STATEMENT OF PRIOR OR RELATED CASES

This Court previously denied Dow's appeal of the class certification order in this case. *In re Urethane Antitrust Litig.*, No. 08-602 (10th Cir. Sept. 2, 2008).

ISSUES PRESENTED

1. Whether sufficient evidence supports the jury's verdict finding Dow liable on a class-wide basis for successfully conspiring to fix prices of billions of dollars of commerce?

2. Whether the district court abused its discretion in admitting the testimony of Class Plaintiffs' expert econometrician?

3. Whether the district court abused its discretion in denying Dow's dilatory motion to decertify the class on predominance grounds, when the questions in the case were overwhelmingly common and a jury found class-wide liability and damages based on common evidence?

4. Whether the jury's damages award is supported by the evidence?

INTRODUCTION

After a four-week trial and a vast evidentiary showing, the jury below rendered a verdict that the Dow Chemical Company conspired to fix prices of billions of dollars of commerce, allowing the cartel to reap hundreds of millions of dollars of overcharges from its customers. The award is large only because the cartel fixed prices of a far larger volume of commerce.

The judgment below is correct in all respects. The evidence was extensive and damning. There was direct testimony that Dow entered a price-fixing agreement, and corroborating evidence that included conspirators sneaking off to gas station payphones to have illicit conversations without detection. Numerous fact witnesses, industry documents, and multiple experts supported the verdict that the cartel worked as intended, causing industry-wide harm from November 24, 2000 through December 31, 2003.

Class certification is also proper. Price-fixing is the "supreme evil of antitrust" and an archetypal use of Federal Rule of Civil Procedure 23(b)(3). *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004); *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 625 (1997). The experienced district judge carefully performed the necessary "rigorous analysis" supporting certification and Dow did not move to decertify until the eve of trial—and even then did not preserve many arguments it raises here. Any concern that common issues would not

predominate is now demonstrably unfounded, as is any concern that certification could pressure defendants into settling meritless claims. Dow did not settle, aired its arguments and evidence before the jury—and lost. The trial and verdict confirm the district court's considered judgment that, as in many price-fixing cases, common questions predominated. The jury relied on common evidence to provide common answers to common questions, and trial was eminently manageable. Indeed, decertification of a price-fixing case on the posture here would be unprecedented.

Dow contends that decertification is warranted because the testimony of Plaintiffs' damages expert, Dr. James McClave, cannot alone prove the fact of class-wide injury. But the jury found that the evidence as a whole *did* prove class-wide injury, and Dow's argument is little more than a repackaged sufficiency challenge. Ample evidence in addition to McClave's testimony supported the verdict, and McClave's testimony was powerful, properly admitted, and sound. Dow's reliance on *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), and *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013) is wholly misplaced. *Wal-Mart* was a commonality decision, and Dow concedes commonality here: Dow conspired to fix prices industry-wide. And unlike in *Comcast*, this case has predominance in spades. Indeed, the jury properly relied on the overwhelming evidence that Dow's cartel caused class-wide impact and damages, rendering a verdict in Plaintiffs' favor. This Court should affirm.

STATEMENT OF THE CASE

A. Statutory Scheme

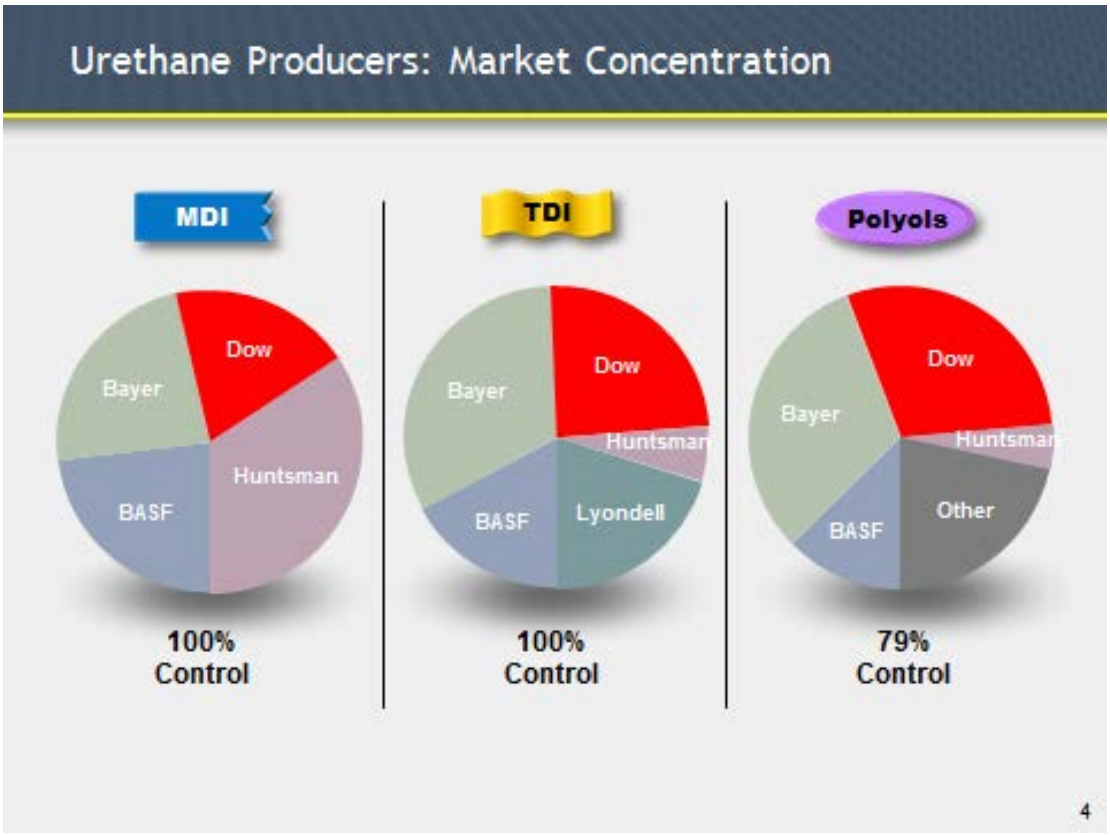
"Every violation of the antitrust laws is a blow to the free-enterprise system envisaged by Congress." *Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251, 262 (1972). But not all antitrust violations are created equal. The Supreme Court has emphasized that price-fixing is the "supreme evil of antitrust." *Verizon*, 540 U.S. at 408. The requirements for proving a price-fixing conspiracy are well-established, and "any person who shall be injured in his business or property by reason of" such a conspiracy may sue and recover treble damages. 15 U.S.C. § 15(a). 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." Cert-Op. 10 (AA0400).

B. The Urethanes Industry

This case is about Dow's conspiracy to fix prices of billions of dollars of commerce in commodity "urethane" chemicals: methylene diphenyl diisocyanate (MDI), toluene diisocyanate (TDI), and polyether polyols (polyols). Dow and its co-conspirators sold these basic commodity chemicals to businesses that use them to make consumer products. SA2646-49; SA5164-66. The conspiracy also inflated prices of polyurethane "systems," which are primarily comprised of MDI and polyols. Cert-Op. 3 (AA0393); SA3537 (74% of average system is MDI and polyols). When "the price of basic chemicals is raised as a result of the cartel's

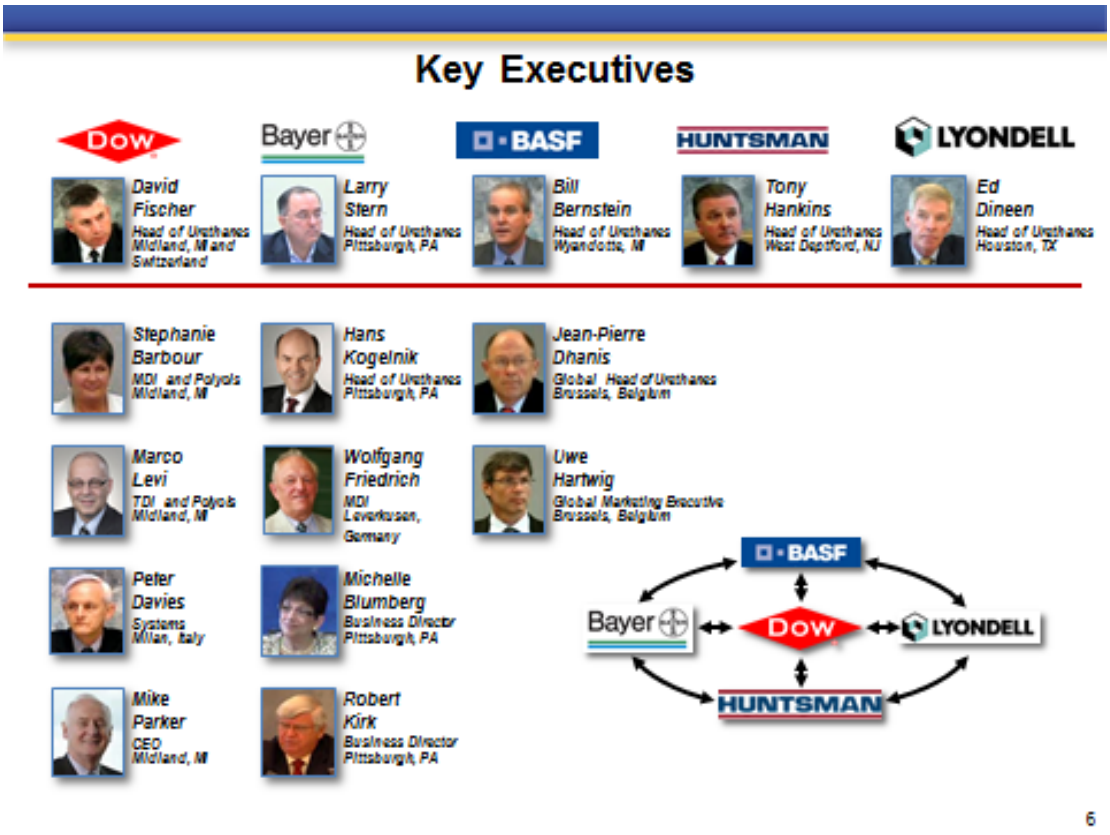
[collusive] behavior, then the prices of systems are going to be similarly increased by the cartel." SA2741-2745 (Solow); *see also* SA3536-41 (McClave) (similar); SA4445 (Davies) (basic chemical pricing "obviously" impacts systems pricing); SA2257-58 (Bernstein) (basic chemicals are a "major cost consideration" for systems). From 1999 through 2003, Class members purchased $8.4 billion of MDI, TDI, polyols, and systems. SA3572.

The urethanes market was "ripe for collusion." SA2675. "[T]he structure of the industry—a highly concentrated oligopoly with high barriers to entry and homogenous commodity products without close substitutes—was conducive to a price-fixing conspiracy" having class-wide effects. SJ-Op. 9 (SA9). The five conspirators—Dow, Bayer, BASF, Huntsman, and Lyondell—dominated the U.S. market, with 100% of MDI and TDI sales and 79% of polyols sales:



Tr. 2038-39. High capital costs imposed significant barriers to entry. SA2645-46. And because the basic chemicals are commodities, the conspiracy was "simplif[ied]" and more "likely to be successful." SA2648.

Conspirators included "top executives" at their companies for urethanes: David Fischer (Dow), Larry Stern (Bayer), Bill Bernstein (BASF), Tony Hankins (Huntsman), and Ed Dineen (Lyondell). SA2729. They controlled their companies' pricing and collectively controlled prices class-wide. *Id*. ("a top down cartel").



There was a "strong motive" to conspire. SA2652-53. The industry was in a "bad situation financially." SA1274. New plants had come online, but demand was stagnant. This excess capacity exerted "significant" downward pressure on prices and margins, creating a powerful motive to collude. SA2650-59 (Solow); *see also* SA4053-54; SA2681-82 ("many studies report that a cartel was formed during a period of falling prices"). The companies thus had a choice between free-market competition that would drive down prices or "work[ing] together [to] keep the price from falling." SA2652-53; *see also* SA5167. They chose the latter.

C. The Price-Fixing Conspiracy

1. A Phone Call

When David Fischer (Dow) left a message for Larry Stern (Bayer), Stern knew exactly how to respond. The two men—the top urethanes executives at Dow and Bayer—should have been fierce competitors. But rather than returning Fischer's call from the office, Stern got into his car and drove to a gas station. SA901-05. Using a phone booth to ensure nobody could overhear, Stern used a prepaid calling card to dial Fischer's cellphone. SA901-04. Stern told Fischer that Bayer intended to raise prices by a particular amount, and Fischer responded in kind, telling Stern that Dow planned to do the very same thing. SA903; SA904 (Stern "knew" they "were going to be talking … about future pricing").

2. Lockstep Price Increases

The conspiracy's modus operandi was that, "throughout the alleged conspiracy period, the alleged conspirators announced identical price increases simultaneously or within a very short time period." SJ-Op. 13 (SA13); *see also* AA1772-92 (summary of price increases); SA2680-85 (discussing numerous lockstep price increases); SA5048-49 (Elzinga) ("generally the price announcements were lockstep"); A5221-22 (Elzinga) (lockstep price announcements are a "hallmark" of cartels). The announcements stated that the increases "would apply to all [customers] regardless what they were paying at the time" and typically applied to all products. SA4097-99. For example, if one customer paid $0.80 per pound

and another paid $0.90, an increase of $0.06 per pound would raise the customers' prices to $0.86 and $0.96. *Id*. Systems price increases often were announced in lockstep with increases for MDI and Polyols. AA1772-92.

As in virtually any market, purchasers could try to negotiate down from the increased price. But the increase formed the baseline for any negotiations. *E.g.*, SA4095 (Beitel) ("if you go out 6¢, that's where the negotiation starts with the customers"); SA4100-03, SA4156-57 (similar). The announced increases caused prices to rise or prevented prices from falling as fast as they otherwise would have. *E.g.*, SA4156 (Beitel) (fully successful in increasing prices 40-50% of the time and achieved several cents per pound for others); SA1964 (Dhanis) (many price increases kept prices from falling); SA5212 (Elzinga) (same). The increases were typically a few cents per pound, but because the conspiracy affected billions of dollars of commerce, the cartel reaped over $400,000,000 in overcharges. SA2684; SA3506; AA0513.

3. Conspiratorial Communications

Stern's gas station call was just one of many communications in which conspirators "discussed future pricing, their companies' intent to raise prices, and the need for competitors to support their price increases." SJ-Op. 13 (SA13); *see, e.g.*, SJ-Op. 10-16 (SA10-16), 30 (SA30); SA884-90, 895-96, 905-12, 930-34, 1273-75, 1297-1311, 1322-23, 1903-04. Stern discussed future pricing with Fischer "8 to

15" times. SA905-08, 921, 997. Stern frequently "took actions to avoid being overheard" and even had his office swept for "bugs." SA881-82.

Stephanie Barbour, Dow's MDI executive, testified point-blank that "there was an agreement" between Dow and other manufacturers to fix prices. SA1274. Barbour asked Marco Levi, Dow's TDI and Polyols executive, "how he was successfully able to get his prices up" in the difficult market. SA1273. Levi answered that "he had met with the competition, and that there was an agreement, that they were all in a bad situation financially, and that they were going to make sure that these price increases stuck." SA1274. On at least ten occasions, Levi debriefed Fischer on these collusive communications. SA1297-99. Barbour testified that Dow's systems executive, Peter Davies, was involved and threatened that if she told anyone, "he would deny [it] and call [her] a liar." SA1276-80. Barbour implicated Dow in a conspiracy involving all products at issue. SA1274 (TDI and polyols); SA1395-96 (MDI); SA1277-79 (systems). Similarly, in 2000 and 2001, Dow's CEO Mike Parker played golf at the Greenbrier Resort with Stern (Bayer) and Bob Wood, Fischer's boss at Dow. SA910-11. The men discussed raising prices. SA912. After one outing and a few drinks, Parker told Stern: "we need to get prices up." SA977.

Dow's "competitors" also participated. *E.g.*, SA887, 930, 934. For example, in 2002, Bayer's MDI executive in Germany, Wolfgang Friedrich, told Bayer

employees that they "didn't have to worry about" the competition in the United States because they had been "talked to," giving "the impression that there was an understanding" on price increases. SA1133, 1135, 1176-77, 1200, 1205. When asked "isn't that illegal," Friedrich said "not in this country." SA1133. Bayer "was indeed able to achieve the price increase that had been discussed with Mr. Friedrich." SJ-Op. 11 (SA11).

Secret discussions occurred at trade association meetings, coffee shops, and airport hotels. SJ-Op. 15 (SA15), 29-30 (SA29-30). For example, in 2002, Stern (Bayer), Bernstein (BASF), Jean Pierre Dhanis (BASF), and Tony Hankins (Huntsman) met at the Shangri-La resort in Singapore. SA867-893. Beforehand, the conspirators called each other and Fischer (Dow) nearly every day. SA485-507; *see also* SA343; SA1652-53, 1972-73. At the Shangri-La, they discussed future pricing, deciding that each would announce an increase of 6-8 cents per pound. SA884-90 (Stern). Dow, Bayer, BASF, and Huntsman then did just that. SA890-91, 2441-43; SA485; AA1772-92.

On another occasion, Stern and Hankins met to discuss their "resolve" to "have the current price increase which was still solidifying stick." SA895-96; SA1091 ("The purpose … was to reinforce that Bayer had a conviction and a resolve to try to implement those announced price increases."). To help Hankins "ascertain where [Huntsman's] pricing was relative to the Bayer pricing," Stern gave Hankins

a confidential document showing Bayer's prices on particular accounts and asked Hankins to "destroy" the document afterwards. SA896-97. Stern believed this "would lead to price increases at those accounts and perhaps in the industry." *Id.*[1]

The conspirators recruited new members. For example, when Lyondell hired urethanes executive Ed Dineen, Bob Wood (Dow) invited him to dinner with other conspiring executives at The Swan, a restaurant in Belgium. SA1980-82. Dhanis (BASF) told the group that they "needed to get prices up" and that "if BASF raised prices, he needed some assurance that BASF would not lose volume." SA1984. Dineen "believed that Mr. Dhanis might have been attempting to coordinate pricing." SJ-Op. 13 & n.4 (SA13). Like clockwork, Dow, BASF, and Lyondell shortly thereafter announced identical price increases for the same products with the same effective dates. SA3993-94. And when Dhanis submitted his expense report, he falsified it—naming not the conspirators who attended, but BASF employees who did not. SA1995-98.

4. Email, Phone Records, and Other Corroborating Evidence

There were "a great number of communications and meetings and even vacations involving executives for these competitors, including communications involving pricing, and including communications at or near the time of price increase

[1] Stern knew he had "done something wrong" and "was immediately chagrined, embarrassed and flushed." SA897-98; *see also* SA879-81 ("It was not something that should have occurred.").

announcements by the companies." SJ-Op.14 (SA14); *see also* Pls' Post-Trial Br. 42-43 (SA88-89) (collecting examples). One remarkable episode surrounded an industry-wide 6-cents per pound increase for MDI, TDI, and polyols, effective April 1, 2001. In February 2001, Fischer (Dow) called Bernstein (BASF). SA2317. Days later, Dow and Bayer announced identical 6-cent increases. SA2319-20. But Bernstein was not ready to pull the trigger. *See* SA2329. In a March 8 internal email, Bernstein noted, "I have tried to determine what Huntsman's response will be, but have not connected." SA2322; SA316. Bernstein's phone records confirmed just that, showing that he had twice called Hankins (Huntsman) without connecting. SA2326-28. Later that day and the next day, Bernstein called Hankins *six more times*. SA2328, 2330, 2334. After they connected, BASF and Huntsman joined Dow and Bayer, announcing identical 6-cent increases effective April 1, 2001. SA2340, 2708.

5. The Conspirators Reinforced Their Agreement

The conspirators policed the agreement and each other's resolve. For example, when Bayer took an MDI customer (Firestone) away from BASF, Dhanis (BASF) called Bayer. Two hours later, Bayer's MDI executive berated—rather than congratulated—Bayer's sales force: "'Moving into Firestone'" was "to say it mildly—a disgrace and a tremendous disappointment!!! to joint management decisions." SA876; SA305; *see also* SA1277 (BASF effort to reinforce Dow's

resolve). Another example was a meeting between Stern (Bayer) and Fischer (Dow) at Bayer's corporate lodge. Beforehand, a large Dow customer (Foamex) had sought relief from an announced price increase. SA909; SA315. To discuss "future pricing," the conspirators "walked around the property" because "there could be some type of listening device" in the lodge. SA906-09 (Stern). Outside, they discussed "the need to increase pricing" and "specifically talked about pricing at the larger flexible foam customers, primarily Foamex." SA908. Afterwards, Dow denied Foamex's request for relief. SA315; SA315.

6. Lay Evidence of Class-Wide Impact

Extensive testimony showed that the conspiracy worked as intended. Given industry economics and excess capacity, the cartel aimed to stabilize the market—inflating baseline prices by a few cents per pound or forestalling an expected decline. *E.g.*, SA1964 (Dhanis) ("many price increase[s] [were] to stop price decrease[s]."); SA2680-81. Dow executive Richard Beitel testified that, about half the time, announced increases caused prices to increase by the full amount, SA4156-57, and that the announced prices formed the baseline for future negotiations. *E.g.*, SA4095 ("[I]f you go out 6¢, that's where the negotiation starts with the customers."); SA4100-03; 4156-57. Bob Wood, Dow's former head of polyurethanes, similarly testified that announcements "raise[d] prices" above what they would have been. SA3886. Stephanie Barbour, Dow's MDI executive, testified that Dow's

"agreement" with its co-conspirators allowed it "successfully" to get "prices up." SA1273-74; SA1411 ("[I]t did stick."). Larry Stern (Bayer) testified that the 6-cent increase agreed upon at the Shangri-La raised prices throughout the market by a few cents per pound. SA892.

In March 2002, Dow touted "Recent Successes," emphasizing a class-wide price increase: "Pricing—We announced 10cts on Polyols March 1, We announced 15 cts on TDI March 1, 2002 **Its Working!!!!!!!**" SA482 (emphasis in original). One BASF document stated that they "[t]ook a firm stand on price increases in '02, margins enhanced greatly," with MDI prices up 5 cents, TDI by 20 cents, and polyols by 10 cents. SA330. Stern updated his resume to highlight that he had "enabl[ed] an average price increase exceeding 10% in 2002" and that TDI increases "exceeded 25%." SA314. Numerous documents were to the same effect. *E.g.*, SA892-93 ("'July 1 MDI price increase has been partially accepted.'").

7. Expert Opinion Testimony

Expert economist Dr. John Solow, co-author of the leading antitrust law treatise, SA2621-24, 2740, testified that the economic structure, conduct and performance of the industry indicated a successful cartel having class-wide effects, and that the evidence was precisely the type economists have long observed in the study of cartels. SA2640-41, SA2740-41. Solow testified that "prices were maintained above a competitive level, and so these price increase announcements

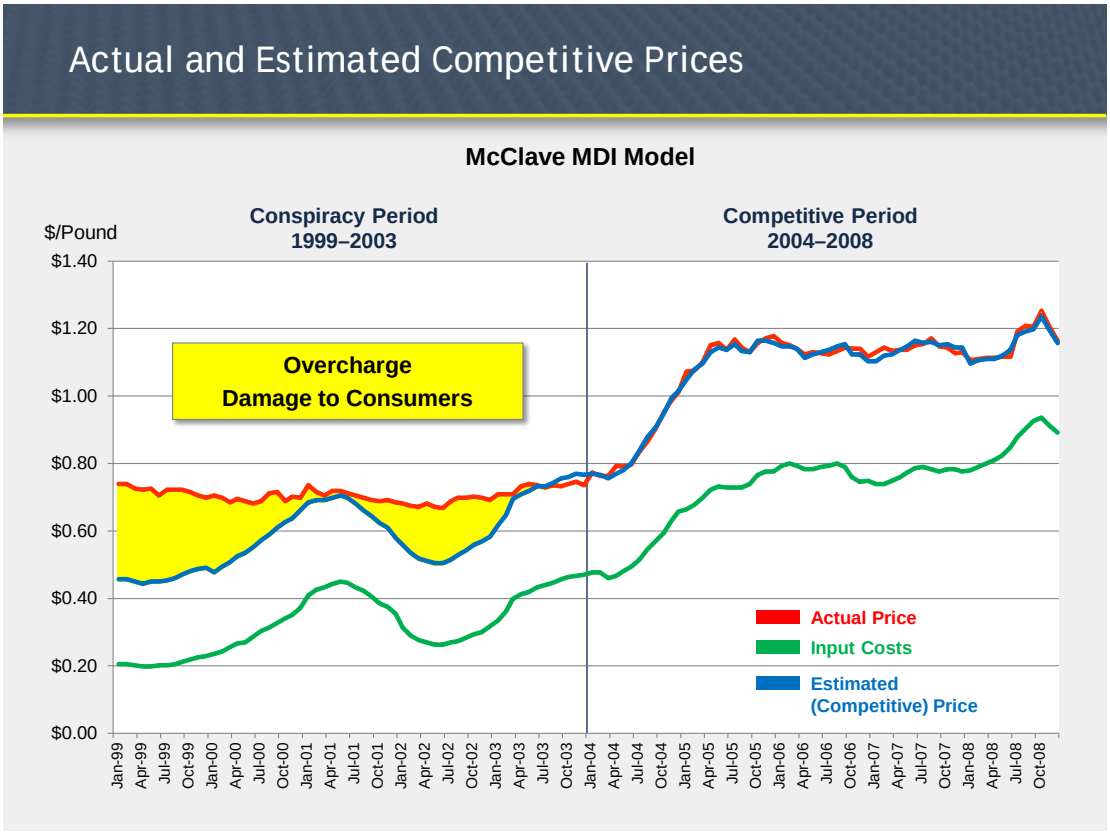
were having their desired effect of keeping the price from falling to competitive levels." SA2732. He testified that the "performance of the industry," and "prices in the market indicated that there was a successful price fixing cartel at work." SA2641; SA2741 ("this industry was collusive during this time period and … the firms were not competing independently"). Based on the totality of his economic analysis, Solow concluded that "nearly all of the members of the class were injured because they had to pay these higher prices." SA2641; *see also id*. (the cartel "raise[d] the price" to class members "above a competitive level"); SA2749 ("the behavior of prices indicates that the firms were in fact able to maintain their prices above a competitive level during this time.").

Econometrician and damages expert Dr. James McClave, whose textbooks are used by universities nationwide, ran multiple-regression "forecasting" models to compare pricing during the conspiracy to pricing after it ended. SA3436-39, 3519, 3531-41; *see also* SA5537-39 (Ugone) (forecasting is well-accepted); SA2739-40 (Solow) (same); 2A Areeda & Hovenkamp, Antitrust Law: An Analysis of Antitrust Principles and Their Application § 392d (2013) (one of the "fundamental approaches to measuring damages"). He compiled a database of about one million representative transactions, covering 50% of class sales and 25% of purchasers. SA3531-41. He identified economically-sensible factors—costs, capacity, supply, and demand, as well as customer-specific data including purchasing volume and

method of delivery—and used multiple regression to identify variables that explained competitive industry pricing. *E.g.*, SA3474, 3520-22. The statistical "p-values" of his models indicated over 99% probability that each variable was statistically significant in explaining industry price variation. SA3522-23; *see* SA5541-42 (p-value is a standard statistical measure of a model's reliability); SA5542 (Ugone) ("three models, more than 25 variables, more than 25 coefficients, every single one of them satisfied those tests").

During the 2004-2008 competitive period, the model predicted prices that were extraordinarily similar to actual prices. The "R-squared" test is the "most common" measure of "how much of the price variation is accounted for by the variables in the model." SA3520; *see also* Daniel L. Rubinfeld, *Reference Guide on Multiple Regression,* Reference Manual on Scientific Evidence 355 (3d ed. 2011). The R-squares here were "very high." SA3520; *see also* SA5541 (Ugone) (conceding that "most of the variation and the numbers can be explained" by the model).

During the conspiracy period, however, the model predicted competitive prices that were far below the actual prices that were charged:

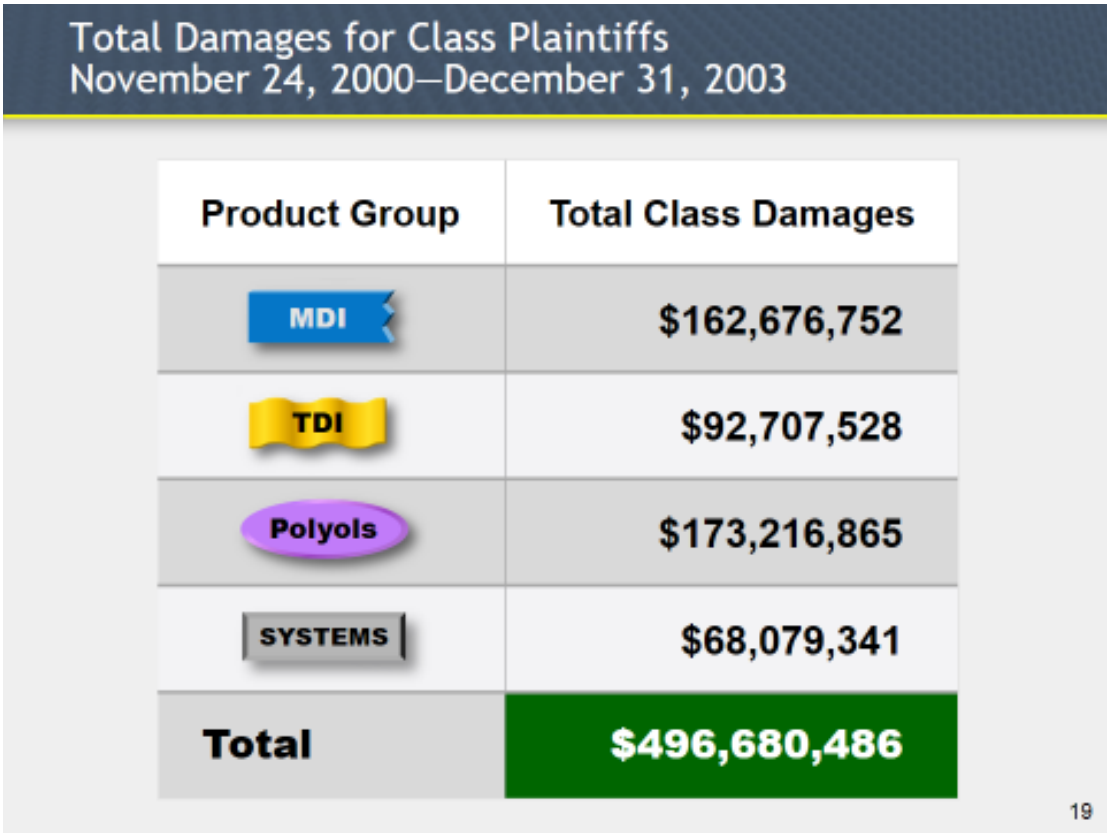


McClave estimated the customer-specific overcharge for every class member where reliable data was available. McClave found "general and systematic overcharges" across the entire period, "across all customers," "across all large customers," "all small customers," all products, "across the nation," "no matter what kind of transportation or container the product" was sold in, or whether the transaction was large or small. SA3502-03. Having controlled for competitive forces including cost, capacity and demand, McClave saw "no explanation" for the systemic pricing gap "other than the fact that there was not competition during much

of that period." SA376. Based on his analysis, McClave testified that, in his opinion, "nearly all" class members paid supra-competitive prices. SA3502; SA3438-39.

McClave modeled as many transactions as possible, but could not model every transaction during the class period. Among other issues, Lyondell entered bankruptcy, preventing full discovery of its data, and other defendants failed to provide complete or sufficiently reliable data, including for systems transactions. SA3532-33. To estimate damages for non-modeled transactions in basic chemicals (MDI, TDI, and polyols), McClave applied the average overcharges for each basic chemical. SA3572; 3531-35; Daubert Br. 17 (SA6298). To estimate overcharges for systems, which consist primarily of MDI and polyols, McClave conservatively selected the lower overcharge of the input costs (the 14.9% polyols overcharge) and used it to estimate the overcharge for the basic chemical portion of the system. SA3536-39. Applying the polyols overcharge to the 74% of the system made up of basic chemicals, McClave calculated a 7.2% overcharge for systems—the lowest overcharge percentage of the four product categories. SA3539-40.

For November 24, 2000 through December 31, 2003, McClave estimated damages of $496,680,486. SA3506.



Though Dow's expert, Dr. Keith Ugone, offered technical criticisms of McClave's testimony, McClave testified that, even accepting these criticisms, "the overcharges or the elevation in price remains highly significant, more than 10 percent in each case"—about 25% less than his initial estimate. SA3554-55, 3571. The jury found damages of $400,049,039, about 20% less than McClave's estimate. AA0514.

D. Procedural History

Class Certification. Plaintiffs' First Amended Complaint alleged that, between January 1, 1999, and December 31, 2004, Dow, Bayer, BASF, Huntsman, and Lyondell engaged in an illegal cartel. First Am. Compl. ¶¶ 2-3 (AA0369). In July 2008, after years of class certification discovery and exhaustive submissions, the district court certified the class. *See* Class Cert. Br. 1-42 (SA5937-87); Basic Chemicals Reply Br. 1-69 (SA5989-6067); Systems Reply Br. 1-50 (SA6221-76). In a 37-page order, the court performed the requisite "rigorous analysis" of the Rule 23 factors; recognized that plaintiffs bore "a strict burden of proof"; and "thoroughly reviewed the class certification record," including disputes that overlapped with the merits. Cert-Op. 5, 18 (AA0395, 0408). The court found that common questions predominated. Cert-Op. 11-24 (AA0401-0414).

Dow petitioned for permission to appeal pursuant to Rule 23(f). This Court denied the petition.

Pretrial Order. In July 2012, the district court entered a pretrial order "supersed[ing] all pleadings and control[ling] the subsequent course of this case." Pretrial-Order 1 (AA0448). It stated that Plaintiffs alleged that "Dow and its co-conspirators engaged in a conspiracy … to charge their customers artificially inflated and non-competitive prices" from January 1, 1999 through December 31, 2003.

Pretrial-Order 2-3, 15 (AA0449-50, 0462). Notably, Dow failed to request individualized damages determinations. Pretrial-Order 21-22 (AA0468-69).

Denial of Summary Judgment. In a thorough order, the district court denied Dow's motion for summary judgment. The court emphasized the extensive proof of collusion, including Barbour's testimony that there was "an agreement," which was "particularly compelling" direct evidence and "sufficient by itself to create a question of fact for trial concerning the existence of an agreement." SJ-Op. 12-16 (SA12-16).

Admission of McClave's Testimony. Dow moved to exclude McClave's testimony as unreliable because he (1) treated 2004 as a competitive year, not a conspiracy year; and (2) used variables Dow disputed, including TDI exports as a demand variable. Notably, after years of expert discovery, Dow did not mention the "extrapolation" or "customer allocation" arguments it now presses on appeal. The district court denied the motion, holding that Dow's arguments "go to the weight of McClave's opinions, not their admissibility." Daubert-Op. 17 (AA0504); *see also* Daubert Br. 3-4 (SA6284-85). McClave gave empirical reasons for using 2004 as a baseline year, and Dow "has not responded" to them. Daubert-Op. 10-11 (AA0497-11); *see also* Daubert Br. 18-26 (SA6299-307). TDI exports have "an obvious relation to the product," "were significant drivers of price" because "domestic demand was flat or falling," and were recognized even in Dow's documents "as an

important demand driver for TDI." Daubert-Op. 15-16 (AA0502-03); Daubert Br. 27-36 (SA6308-17).

Dow's Dilatory Decertification Motion. "[O]ne day before the start of trial"—four years after certification, 18 months after receiving McClave's report, and 6 months after advising the court it had no plans to seek decertification, SA515—Dow moved to decertify. Op. 2 (AA0523). The district court deferred consideration.

Trial and Verdict. During a four-week trial, the jury heard extensive evidence summarized above. The jury returned a class-wide verdict for Class Plaintiffs, finding that (1) "Dow participated in a conspiracy to fix, raise, or stabilize prices for urethane chemicals"; (2) the conspiracy "caused Class Plaintiffs to pay more for urethane chemicals than they would have paid absent a conspiracy"; (3) Class Plaintiffs did not prove that a conspiracy caused overcharges before November 24, 2000, which was the cutoff for the limitations period; (4) and damages were $400,049,039. AA0514-15.

Denial of Decertification and Post-Trial Relief. In May 2013, the district court denied Dow's decertification motion. First, it denied the eve-of-trial motion as untimely. Op. 2-3 (AA0523-24). "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." Op. 2 (AA0523). Second, the court again found that common issues predominated. "[A]ll 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." Op. 3-4, 14 (AA0524-25, 0535). The court rejected Dow's criticisms of McClave's "extrapolation" as unsupported "with any relevant precedent." Op. 5 (AA0526).

The court rejected Dow's "arguably untimely" *Comcast* arguments on the merits, explaining that the "key distinction between this case and *Comcast* is the stage of litigation." Op. 7-8 (AA0528-29). The trial record—including McClave's testimony pointing to collusion as the only explanation for widespread overcharges—expressly provided the causal link that was missing in *Comcast.* Op. 7-9 (AA0528-30).

The court denied Dow's motion for judgment as a matter of law or a new trial. It emphasized the overwhelming evidence of Dow's participation in the conspiracy and rejected as untimely and meritless Dow's argument, raised only in its post-trial reply brief, that the evidence did not prove Lyondell's participation. Op. 18 (AA0539). The court catalogued the extensive evidence of class-wide impact, "which was not limited merely to experts' opinions" and was "sufficient to show injury to the class from the alleged conspiracy." Op. 13 (AA0534). As to damages, the court found the jury's award supported by the evidence. McClave estimated damages at $496,680,486, and "[t]he jury's reduction of that figure to $400,049,039

could reasonably have been reached in a number of ways." Op. 15-16 (AA0536-37).

The court trebled damages and entered judgment. Dow then raised additional arguments, which the court rejected as untimely or for reasons previously given. *E.g.*, Amendment Order 2 (AA0554) ("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."). After offsetting prior settlements, the court entered final judgment.

STANDARD OF REVIEW

This Court reviews the merits of a denial of judgment as a matter of law under a standard "quite deferential to the jury's verdict." *Knowlton v. Teltrust Phones, Inc.*, 189 F.3d 1177, 1183-84 (10th Cir. 1999); *see Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000) ("court must draw all reasonable inferences in favor of the nonmoving party"). It will reverse "only if … without weighing the credibility of the witnesses the only reasonable conclusion is in [the moving party]'s favor." *Elm Ridge Exploration Co. v. Engle*, 721 F.3d 1199, 1216 (10th Cir. 2013). A jury may make any "just and reasonable estimate of the damage based on relevant data," including "probable and inferential as well as … direct and positive proof." *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264 (1946).

This Court reviews class certification for abuse of discretion. *DG ex rel. Stricklin v. Devaughn*, 594 F.3d 1188, 1194 (10th Cir. 2010). This discretion is "considerable," and the ruling need only "fal[l] within the bounds of rationally available choices given the facts and law involved in the matter at hand." *Id*.

This Court reviews an admission of expert testimony for abuse of discretion. *United States v. Garcia*, 635 F.3d 472, 476 (10th Cir. 2011).

SUMMARY OF ARGUMENT

The jury here gave common answers to common questions based on overwhelming common evidence. Chiefly in the guise of a class certification challenge, Dow argues that McClave's testimony "[was] insufficient" to prove class-wide injury. Dow-Br. 3, 5, 26-27, 53 ("cannot reliably show" class-wide impact; "incapable of establishing" same; not "able to prove" same). This is little more than a sufficiency-of-evidence challenge to the jury's verdict that the Plaintiffs *did* prove class-wide injury. Indeed, unlike a pretrial certification decision that necessitates predicting whether common issues will predominate in a future trial, here there is no need—or room—to speculate. Instead, there is a constitutional imperative to respect the role of the jury. The Seventh Amendment mandates that "no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." The jury verdict thus warrants "quite deferential" review, *Knowlton*, 189 F.3d at 1183-84, and the proper place for this Court to begin

is by reviewing the sufficiency of the evidence. *See* 28 U.S.C. § 2072(b) (rules of procedure "shall not abridge, enlarge or modify any substantive right").

I. The district court, intimately familiar with the voluminous record, correctly upheld the verdict. Extensive common evidence supports the verdict that Dow and its co-conspirators—including Lyondell—engaged in a price-fixing conspiracy. Extensive common evidence also supports the verdict that the conspiracy caused class-wide injury, including the conspirators' roles as high-ranking executives with pricing control, the industry's structural features, the lockstep industry-wide price increases, the conspirators' testimony, and their internal documents. Moreover, both Solow and McClave testified that all or nearly all class members were impacted. With its blinkered focus on McClave, Dow ignores the other testimonial and documentary evidence that overwhelmingly supports a finding of class-wide harm (and corroborates McClave's testimony).

II. The district court did not abuse its discretion in denying Dow's motion to decertify. Filed on the eve of trial, Dow's motion was dilatory, meritless, and failed to preserve many of the arguments Dow makes here. Pretrial, the district court performed the proper analysis and ruled that, as in myriad price-fixing cases, common questions predominated. This Court denied Rule 23(f) review. The subsequent trial confirmed the district court's finding: The jury heard weeks of common evidence that would have to be introduced over and over again in thousands

of individual trials to establish the common pattern of a successful price-fixing conspiracy. This is why the Supreme Court and decades of authority recognize cartel claims as particularly suitable for class treatment. Decertification is a "'drastic step,'" Newberg on Class Actions § 7:37 (5th ed. 2013) ("Newberg"), and decertification after a manageable trial and class-wide verdict even more so. In fact, decertification of a price-fixing case on the posture here would be unprecedented.

Wal-Mart is inapposite. Dow concedes this case has the common glue—a nationwide conspiracy to fix prices—that was missing there. Whereas certification in *Wal-Mart* would have required overriding well-settled law and practice in employment discrimination cases, here it is decertification that would mark a radical break from settled antitrust law and practice, which treats price-fixing cases as replete with common issues and a classic use of Rule 23(b)(3) . Nor does this case remotely resemble the novel Rule 23(b)(2) "Trial by Formula" *Wal-Mart* rejected. 131 S. Ct. at 2561. This is a Rule 23(b)(3) case and *Wal-Mart* emphasized that "individualized monetary claims belong in Rule 23(b)(3)." *Id*. at 2558. Plaintiffs presented a litany of evidence supporting the jury's finding of class-wide impact and damages.

Comcast is likewise inapposite. Unlike in *Comcast*, the district court here properly reviewed the merits of the case as necessary when finding that common questions predominated—and the jury definitively determined on the merits based

on common evidence that Dow's conspiracy caused class-wide harm. Unlike in *Comcast* where there was no reliable evidence to support the showing of causation needed there, here there was ample evidence, including McClave's testimony that Dow's cartel caused the very class-wide harm he measured. The district court properly admitted McClave's opinions, and *Comcast* provides no support for the notion that a verdict finding liability for part (but not all) of the alleged conspiracy period necessitates post-verdict decertification—in effect, a total unwinding of what the jury *did* find.

III. The district court correctly declined to disturb the jury's damages award. The jury awarded $400,049,039, about 20% less than McClave's estimate, and Dow's own expert presented evidence for reducing McClave's figure by up to 25%. Dow's premise that some class members may receive an award even though the jury found they were not damaged is speculative at best. In any event, Dow failed to preserve a request for individualized damages proceedings in the controlling Pretrial Order or in its proposed verdict form.

ARGUMENT

I. Sufficient Evidence Supports The Jury's Class-Wide Verdict

A. Sufficient Evidence Shows That Dow Participated in a Price-Fixing Conspiracy, Including With Lyondell

Dow does not deny that sufficient evidence establishes it participated in a multi-year conspiracy to fix prices of billions of dollars of commerce. Dow-Br. 54.

Dow only denies that sufficient evidence showed that *Lyondell*—the smallest producer in the industry—conspired. Dow-Br. 24, 54. Dow never raised this argument until its post-trial reply brief, and the district court did not err in rejecting it as untimely. *E.g.*, *United States v. Lee Vang Lor*, 706 F.3d 1252, 1256 (10th Cir. 2013); *FDIC v. Noel*, 177 F.3d 911, 915-16 (10th Cir. 1999).

There was ample evidence of Lyondell's participation. Lyondell sold TDI, and before at least three lockstep TDI price increases in 2002 and 2003, Mario Portela (Lyondell) communicated directly with his counterpart at Dow (Levi), an identified TDI price-fixer. SA3128-67; SA3224-30; SA485-507; AA1772-1792. These contacts were part of Levi's pattern of conspiratorial communications immediately before industry-wide TDI increases—which Lyondell consistently joined during the conspiracy period. *See* AA1772-1792. "Communications between competitors, followed by a price increase by multiple sellers, may indicate that prices rose pursuant to an agreement." *In re Titanium Dioxide Antitrust Litig.*, 2013 WL 4110501, at *29 (D. Md. Aug. 14, 2013); *see also In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 364-67 (3d Cir. 2004); *In re Publication Paper Antitrust Litig.*, 690 F.3d 51, 57-59 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 940 (2013). Moreover, all the evidence of industry-wide collusion is relevant in evaluating Lyondell's role. "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 ... was also a party to the

agreement." *Flat Glass*, 385 F.3d at 363. Lyondell's executive Ed Dineen also joined the co-conspirators at The Swan, where future pricing was discussed. SA2719-20. Dow, BASF, *and* Lyondell subsequently announced lockstep price increases. SA3992-94. Lyondell documents after the Swan dinner stated that Lyondell would "pass on new… North American and European business" and reduce "competitive intensity," SA2718-21, a shift that Solow testified suggested Lyondell's joining the conspiracy. *Id*. Dineen's self-serving denial that he conspired was entitled to little weight—and it was for the jury to weigh the evidence.

In any event, a cartel judgment "will stand if there is sufficient evidence … that a conspiracy existed between the appellants and any of the [alleged] conspirators." *United States v. Suntar Roofing, Inc.*, 897 F.2d 469, 476 (10th Cir. 1990); *Blankenship v. Herzfeld*, 661 F.2d 840, 846 (10th Cir. 1981). Dow does not dispute that the jury could have "found a conspiracy involving Dow and at least one of the other manufacturers." Op. 18 (AA0539).

B. Sufficient Evidence Shows Class-Wide Injury

To prove the fact of injury, a plaintiff must prove that the cartel caused injury to "his business or property." 15 U.S.C. § 15(a). Because price-fixing conspiracies distort the market and make "but for" conditions difficult to establish with certainty, the jury may reasonably infer injury "from the proof of defendant's wrongful acts and their tendency to injure plaintiffs' business." *J. Truett Payne Co. v. Chrysler*

Motors Corp., 451 U.S. 557, 565 (1981); *see also Aspen Highlands Skiing Corp. v. Aspen Skiing Co.*, 738 F.2d 1509, 1525 (10th Cir. 1984), *aff'd*, 472 U.S. 585 (1985). The burden of proving injury "is satisfied by … proof of some damage flowing from the unlawful conspiracy; inquiry beyond this minimum point goes only to the *amount* and not the *fact* of damage." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 114 n.9 (1969) (emphasis added); *Perkins v. Standard Oil Co. of Cal.*, 395 U.S. 642, 648 (1969) ("If there is sufficient evidence in the record to support an inference of causation, the ultimate conclusion as to what that evidence proves is for the jury.").

Extensive evidence supported the finding that the cartel caused class-wide injury. First, the scope and nature of the conspiracy supports the verdict. "As a practical matter, … proof of an effective conspiracy to fix prices will include facts which tend to establish—perhaps circumstantially—that each class member was injured." *Law v. NCAA*, 5 F. Supp. 2d 921, 927 (D. Kan. 1998). The inference of class-wide impact is "particularly strong" where, as here, there is a top-down conspiracy involving senior executives, "each of whom has final pricing authority," *Publication Paper*, 690 F.3d at 67-68. The industry's economic structure—"a highly concentrated oligopoly with high barriers to entry and homogeneous commodity products without close substitutes"—further supports that inference. SJ-Op. 9 (SA9); Op. 13 (AA0534); SA2641-42; *In re Linerboard Antitrust Litig.*, 305 F.3d

145, 153-55 (3d Cir. 2002) (structural features support class-wide impact and predominance); *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 656-58 (7th Cir. 2002) ("*HFCS*") (describing market structures where "secret price fixing might actually have an effect on price").

Second, the cartel announced numerous "lock-step increases … in an oligopolistic market." *In re Ethylene Propylene Diene Monomer (EPDM) Antitrust Litig.*, 256 F.R.D. 82, 88 (D. Conn. 2009); *e.g.*, AA1772-1792. The increases applied to "all [customers] regardless of what they were paying at the time." SA4097-99; *e.g.*, Op. 13 (AA0534); Cert-Op. 20 (AA0410); SA3922-25. Although purchasers could seek to mitigate damages through negotiation, the new prices provided "an artificially inflated baseline from which any individualized negotiations would proceed." Cert-Op. 20 (AA0410). Beitel (Dow) testified that announced prices in fact changed the baseline: "that's where the negotiation starts with the customers." SA4095-103, SA4156-57.

Third, testimony and exhibits showed that the conspirators believed the price increases were successful. *In re: High-Tech Emp. Antitrust Litig.*, ___ F. Supp. 2d ___, 2013 WL 5770992, at *39 (N.D. Cal. Oct. 24, 2013) (crediting such evidence of class-wide impact). Beitel (Dow) testified that they were fully successful in increasing prices 40-50% of the time and that Dow achieved several cents per pound on others. SA4156 (Beitel); *see also* SA1964 (BASF executive testifying that price

announcements resulted in price increases *and* prevented price decreases). Dow itself proclaimed "Pricing—We announced 10cts on Polyols March 1, We announced 15 cts on TDI March 1, 2002 **Its Working!!!!!!!**" SA482. An email from Fischer (Dow) confirmed that Dow "got the full increases." SA341-42. Other documents record average yearly price increases, *e.g.*, SA344-465, SA314, and show that certain increases had been "full[y]," SA341-42, or at least "partially" successful in inflating prices, SA892-93. *See* SA299-301 ("price increases becoming effective"); SA302-04 ("price increase … has been successful"); SA309-13 ("price increases … are beginning to take effect"); AA1639-45 ("solid price increases"); SA317-40 ("margins enhanced greatly"). Moreover, the conspirators took steps to ensure that announced increases "stuck." *E.g.*, SA2680-93 (reinforcing resolve); SA2710-17 (ensuring that sales personnel enforced price increases for all customers).

Fourth, expert testimony supported the verdict. Solow—whose testimony Dow does not challenge—testified that, based on his economic analysis of the industry, including thousands of pages of documents and testimony as well as McClave's analysis, "nearly all of the members of the class were injured." SA2641; SA2732 ("having their desired effect of keeping the price from falling to competitive levels"). Dow's own expert, Elzinga, conceded that actual price increases followed the conspiratorial announcements more than half the time. SA5258.

McClave testified, based on his analysis of one million transactions, that "prices were elevated above competitive levels during the period from 1999 to 2003." SA3438. McClave found "general and systematic overcharges" across all products, the entire class period, "across all customers," "across the nation," "no matter what kind of transportation or container the product" was sold in, whether the transaction was large or small. SA3502-03. That testimony was particularly probative because it examined differences not between *announced* and competitive prices, but between *actual* and competitive prices—and actual prices reflected discounts, rebates, negotiations, and the like. McClave concluded that "nearly all" customers paid supracompetitive prices. SA3502; *see also* AA2441 (99.9% of sales to overcharged customers). *See also Bazemore v. Friday*, 478 U.S. 385, 401 (1986) (per curiam) (Brennan, J., joined by all members of the Court, concurring in part) (court must "examine the regression analyses in light of all the evidence in the record").

Dow seeks judgment on grounds that "McClave's models are insufficient to demonstrate antitrust impact." Dow-Br. 53. But as the district court noted, "plaintiffs' evidence of injury to the class was not limited to McClave's testimony." Op. 15 (AA0536). Far from it. Similarly, citing authority on price signaling, Dow asserts that "price increase announcements that can be withdrawn are not alone evidence of an effective cartel." Dow-Br. 54. But this is a cartel case, not a price-

signaling case, and the verdict does not rest on anything "alone." It was for the jury to weigh the evidence as a whole, not for this Court to do so piece-by-piece. *See Continental Ore v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962). Considered as a whole, Plaintiffs' evidence is clearly sufficient.

The jury heard the same economic evidence Dow recites and did not credit it. *See Reeves*, 530 U.S. at 151 (this court "must disregard all evidence favorable to [Dow] that the jury is not required to believe.").[2] Indeed, Plaintiffs disproved that evidence at trial. Dow notes relatively stable prices during the conspiracy, but as Solow and others explained, excess capacity exerted "significant" downward pressure on price, motivating formation of the cartel to arrest that decline. SA2650-59; SA1964. Price stability in these circumstances is consistent with conspiracy, not contrary to it, and the jury justifiably credited Solow's analysis.

Dow notes that prices increased after the conspiracy ended in 2004, but those higher prices were explained by cost spikes and a drop in TDI capacity. SA3527-30; *supra* at 18 (McClave's demonstrative). Indeed, McClave's model—which

[2] Dow states that Class Plaintiffs "offered no evidence on actual pricing after the announcements" and that "undisputed evidence" shows "no discernible pattern between price announcements and subsequent prices." Dow-Br. 54-55. In fact, extensive evidence showed the effect and pattern, including McClave's modeling of actual prices and Solow's testimony that the "price increase announcements [had] their desired effect of keeping the price from falling to competitive levels." SA2732 (Solow); *supra* Part I.B.

measured the impact of input costs, demand, *and* capacity and other economically-sensible variables—forecast post-conspiracy pricing with remarkable accuracy. But during the conspiracy period, actual prices charged class-wide were far higher than economic factors would predict, with "nearly all" customers paying overcharges.[3] In sum, a litany of evidence, reaching far beyond McClave's testimony, supports the jury's finding of class-wide injury.

II. The District Court Did Not Abuse Its Discretion In Refusing To Decertify The Class After A Successful Trial

A. Common Questions Predominated

Dow tries to analogize this case to *Wal-Mart* and *Comcast*, but those cases did not create new categories of procedural error. *See Comcast* 133 S. Ct. at 1433 ("straightforward application of class certification principles"); *Wal-Mart*, 131 S. Ct. at 2556. The question for this Court, both before and after those decisions, is whether the district court properly exercised its considerable discretion in finding commonality and predominance. It plainly did.

First, Dow does not dispute commonality: the cartel conspired to fix prices class-wide. Second, this case was replete with "questions of law or fact common to

[3] Far from "admit[ting] that his models did not prove causation or impact," Dow-Br. 58, McClave testified that his analysis supported "an inference about the cause." SA3752; *accord* Areeda & Hovenkamp § 395b1 ("The differences between the predicted prices and the actual prices charged … are inferred to be the overcharges due to the conspiracy."); *Loeb Indus., Inc. v. Sumitomo Corp.*, 306 F.3d 469, 490-91 (7th Cir. 2002) (collecting cases).

class members," and they overwhelmingly "predominate[d] over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). That is no surprise. Price-fixing cases are paradigmatic candidates for class certification because "[p]redominance is a test readily met in certain cases alleging … violations of the antitrust laws." *Amchem*, 521 U.S. at 625. "[I]n antitrust cases, Rule 23, when applied rigorously, will frequently lead to certification." *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 815 (7th Cir. 2012) (quotation marks omitted); *see also Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251, 266 (1972) ("class actions … are definitely preferable in the antitrust area."); Cert-Op. 14-21 (AA0404-11) (collecting cases). The district court performed the requisite "rigorous analysis" of the Rule 23(b)(3) factors and "thoroughly reviewed the class certification record," including when certification issues overlapped with the merits, and specifically found that common issues would predominate. Cert-Op. 5, 18 (AA0395, 0408). This required some predictions about "how the case will be tried." Fed. R. Civ. P. 23 advisory committee's note. Post-trial, we have an even better metric: Using common evidence, Plaintiffs *did* prove that Dow participated in a cartel that caused class-wide harm and allowed the conspirators to reap $400 million in illegal overcharges.

Predominance was readily established here. "[W]hether a conspiracy exists is a common question that is thought to predominate over the other issues in the case

and has the effect of satisfying the first prerequisite in Rule 23(b)(3)." 7AA Wright & Miller, Federal Practice & Procedure § 1781 (3d ed. 2005); Cert-Op. 10-11 (collecting authorities) (AA0400-01). Furthermore, "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" as to antitrust impact. Cert.-Op. 14-15 (AA0404-05) (collecting authorities). And after "carefully and thoroughly review[ing]" the record, the court found that antitrust impact would also be readily amenable to common proof predominating any individualized issues. Cert.-Op. 18-22 (AA0408-12). The extensive common evidence of class-wide injury included the proof of the conspiracy among top-level executives to fix commodity prices industry-wide, structural conditions making the industry susceptible to a successful cartel, lockstep industry-wide price increase announcements, documents and testimony showing that increases worked, expert economic analysis of impact, and multiple-regression analysis showing that nearly all modeled purchasers in fact paid overcharges. Many courts have found predominance readily satisfied in horizontal price-fixing cases, often on lesser showings. *E.g.*, *In re Scrap Metal Antitrust Litig.*, 527 F.3d 517, 535-36 (6th Cir. 2008); *Linerboard*, 305 F.3d at 153; *EPDM*, 256 F.R.D. at 95; *In re Foundry Resins Antitrust Litig.*, 242 F.R.D. 393, 410 (S.D. Ohio 2007); *In re Bulk [Extruded]*

Graphite Prods. Antitrust Litig., 2006 WL 891362, at *12-13 (D.N.J. Apr. 4, 2006); *In re Vitamins Antitrust Litig.*, 209 F.R.D. 251, 2656-67 (D.D.C. 2002).

It is well-settled that the possibility that purchasers could negotiate prices in such a market is consistent with the predominance of common questions. Negotiations affect the *quantum* of damages, not the *fact* of injury. Cert.-Op. 19-21 (AA0409-11) (collecting cases); Op. 4 (AA0525). Many cases have held that common issues predominate, even when customers can individually negotiate prices, when collusive conduct artificially inflates the baseline for any negotiations.[4] *See In re Rubber Chems. Antitrust Litig.*, 232 F.R.D. 346, 352 (N.D. Ca. 2005) ("'[C]ontentions of infinite diversity of product, marketing practices, and pricing have been made in numerous cases and rejected.'"). "[S]ellers would not bother to fix list prices if they thought there would be no effect on transaction prices." *HFCS*, 295 F.3d at 656. Thus, purchasers who did not negotiate paid the increased price;

[4] *E.g.*, *In re Titanium Dioxide Antitrust Litig.*, 284 F.R.D. 328, 346-47 (D. Md. 2012) (rejecting "extensive negotiations" argument); *accord EPDM*, 256 F.R.D. at 88-95; *Foundry Resins*, 242 F.R.D. at 409-10; *Bulk [Extruded] Graphite*, 2006 WL 891362, at *11 ("courts have frequently found common impact in cases alleging price-fixing, despite the presence of individual negotiations"); *In re Carbon Black Antitrust Litig.*, 2005 WL 102966, at *16 (D. Mass. Jan. 18, 2005); *Vitamins*, 209 F.R.D. at 2664; *In re Flat Glass Antitrust Litig.*, 191 F.R.D. 472, 484-86 (W.D. Pa. 1999); *NCAA*, 5 F. Supp. 2d at 928-29; *In re NASDAQ Market-Makers Antitrust Litig.*, 169 F.R.D. 493, 523 (S.D.N.Y. 1996); *see also Publication Paper*, 690 F.3d at 67 (finding "particularly strong" inference of class-wide impact notwithstanding negotiations).

purchasers who did negotiate did so from "an artificially inflated baseline." Cert-Op. 20 (AA0410). Indeed, Dow's own witness testified that the announced increases changed the baseline. SA4095-4103, SA4156-57 (Beitel).

The evidence regarding contracts is also consistent with the predominance of common questions. The cartel announced price increases at least 30 days in advance precisely to accommodate the typical contractual term allowing price increases only upon 30 days' notice. Dow-Br. 18. Dow identifies no customer with contractually-fixed prices spanning the conspiracy period, and did not seek to introduce such evidence at trial. Contracts thus, at most, *delayed* the price increases, which injured contract and spot market customers alike.[5]

This proposition is not merely theoretical. Common evidence *showed* that all or nearly all purchasers paid inflated prices—even after negotiations, contracts, rebates, and any other efforts to mitigate. *E.g.*, SA2732, SA2641 (Solow); SA4156 (Beitel). McClave corroborated the common evidence of class-wide impact above, finding that, of one million transactions by 686 customers, 98% of customers

[5] The record forecloses Dow's contrary suggestions. *See* Cert-Op. 34 (AA0424) ("Defendant's arguments that Quabaug's prices were insulated from the alleged conspiracy, by virtue of its contract pricing, is factually inaccurate."); AA1683-85 (BASF in August 2002 "preparing their customers for a January [2003] increase" because "contracts expire[d]" in December 2002); AA1707-30 (Bayer stating "[m]any accounts committed until January with contracts, best time for increase Apr 01, 2002"); 6/27/2008 Beyer Reply Aff. ¶¶ 149-51 & Ex. 4 (expert analyzing 260 contracts and discerning no effect on cartel's ability to raise prices class-wide).

actually paid overcharges and 99.9% of sales were to these customers. AA2441, 2445. This included a $45,584 overcharge of Quabaug, which Dow cites as a customer that negotiated and switched suppliers. SA3507-08. Dow did not cross-examine McClave about "damages calculations for individual class members," and did not attempt to "discover and present evidence of all the individualized transactions." Dow-Br. 33.

Individualized negotiations in price-fixing cases may bear on damages, but such questions rarely defeat predominance of the claim as a whole, *e.g.*, *Scrap Metal*, 527 F.3d at 535-36, and the district court properly concluded that they do not here, Cert-Op 22-24 (AA0412-14). First, as noted, McClave provided compelling proof of damages by modeling approximately one million *actual* transaction prices, thereby accounting for individual negotiations. Second, Dow did not request individualized damages determinations in the controlling pretrial order—making a strategic choice to seek a favorable verdict with class-wide preclusive effect. *See* Amendment Order 1-2 (AA0553-54); Pretrial-Order 20-21 (AA0467-68). Dow cannot now unwind that choice and the adverse result by recasting its same damages arguments as going to injury.

Common questions thus *did* in fact predominate at trial. Decertification is a "drastic step," especially late in litigation. Newberg § 7:37; *Woe by Woe v. Cuomo*, 729 F.2d 96, 107 (2d Cir. 1984) ("extreme step"). At the pretrial stage, courts may

be concerned about exerting "hydraulic pressure" on defendants toward settling potentially meritless claims. But Dow did not settle. It went to trial seeking a class-wide verdict—and the jury found the Plaintiffs' claims meritorious. After the jury has spoken, the overriding concern is that decertification could exonerate the price-fixer and "depriv[e] [prevailing parties] of the fruits of their victory." Federal Practice & Procedure § 1785.4. Moreover, Dow's arguments for decertification require reevaluating the weight of the evidence (thus raising Seventh Amendment concerns). As Dow's failure to contest Rule 23(b)(3) superiority reflects, class treatment was the most fair and efficient means of managing the litigation. The same evidence would support liability in 2,400 individual proceedings, but the costs of those proceedings likely would deter the vast majority of purchasers from bringing suit. Neither Dow nor Plaintiffs have identified a single price-fixing case decertifying on predominance grounds after a demonstrably manageable trial resulted in a class-wide verdict supported by common proof. Quite simply, decertification here would be unprecedented. *See Scrap Metal*, 527 F.3d at 535-36 (rejecting post-trial certification challenge).

B. Certification Was Consistent With *Wal-Mart*

Dow argues that *Wal-Mart* requires decertification because (1) it has a right to show in individualized proceedings that individual class members suffered no injury; and (2) McClave used extrapolation to estimate damages for some customers. The

district court properly rejected iterations of those arguments (now reframed as *Wal-Mart* defects) as untimely, emerging "on the eve of trial" when they "could have been raised at least a year before trial." Op. 2-3 (AA0523-24) (collecting cases denying as untimely decertification motions made three months, two months, and four days before trial, respectively). Reconsideration at that late juncture—with Dow having gone to the brink of trial seeking a class-wide defense judgment and having disclaimed any intention of seeking decertification just months earlier (SA515)—"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." Op. 2-3 (AA0523-24). In any event, even if Dow's arguments were preserved, they are meritless. *Wal-Mart* is at bottom a decision about commonality. Here, Dow concedes commonality, as there were numerous common issues that drove the litigation: Dow's own conspiracy was the glue that holds this case together.

1. Dow Was Not Deprived of Individualized Defenses

Wal-Mart provides no support for decertification. Plaintiffs there brought a Rule 23(b)(2) case alleging that Wal-Mart discriminated on a company-wide basis against all 1.5 million female employees at every store. Such a claim requires "some glue holding the alleged *reasons* for all those decisions together." 131 S. Ct. at 2552. The paradigmatic "glue" would be a coordinated nationwide policy, such as a biased

testing procedure. *Id*. But Wal-Mart's policy was to "*allo[w] discretion* by local supervisors over employment matters"—"just the opposite of a uniform employment practice." *Id*. at 2554. The plaintiffs nevertheless planned to show that Wal-Mart's policy of delegating discretion had a disparate impact in a class proceeding under Rule 23(b)(2). *Id*. at 2554-55, 2561. This approach could not be squared with substantive Title VII law, however. The combination of "delegated discretion" plus disparate impact is *"not enough"* to establish liability; liability turns on each supervisor's subjective, individualized intent. *Id*. at 2555.

Wal-Mart also rejected a novel use of Rule 23(b)(2) to adjudicate backpay claims. Plaintiffs sought to have a special master adjudicate a "sample set" of claims under Rule 23(b)(2), with damages awarded to the class based on that sample. *Id*. at 2561. But those claims were by definition *uncommon* and the Court rejected this "novel project" to circumvent Rule 23(b)(3)'s safeguards—this "Trial by Formula." *Id*. The Court emphasized that damages claims instead "belong in Rule 23(b)(3)." *Id*. at 2557-60.

Wal-Mart is inapposite. First, there is no dispute that commonality is satisfied: Dow and its co-conspirators agreed to fix prices class-wide. Second, many courts have recognized that the antitrust laws do not resemble Title VII's "detailed remedial scheme" where liability cannot be proven without addressing inherently

individualized statutory defenses.[6] Rather, it is well-settled that both the existence of a price-fixing conspiracy and fact of injury are susceptible to common proof. The district court's determination was no abuse of discretion, particularly given the extensive common evidence of class-wide impact credited by the jury. Third, this case was certified under Rule 23(b)(3), and was litigated accordingly.

Indeed, it is not certification but *decertification* that would upend settled price-fixing law and practice. Dow and its amicus launch a remarkable broadside attack on antitrust class actions, arguing that in any market where "'transaction prices are negotiated'… predominance is impossible to establish." Chamber Br. 10-11; *see also* Dow-Br. 31-32 (decertification is required even post-trial when there is "evidence that individual class members negotiated away announced price increases"). That position contravenes Rule 23(b)(3)'s plain text, which requires that common questions "predominate" over individualized questions—not that there be no individualized questions at all. *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1196 (2013). It likewise contravenes decades of caselaw holding

[6] *E.g., In re: High-Tech Emp. Antitrust Litig.*, ___ F. Supp. 2d ___, 2013 WL 5770992, at *49 n.22 (N.D. Cal. Oct. 24, 2013) (distinguishing *Wal-Mart* on this basis); *accord In re TFT-LCD (Flat Panel) Antitrust Litig.*, 2012 WL 253298, at *5 (N.D. Cal. Jan. 26, 2012); *In re High-Tech Emp. Antitrust Litig.*, 289 F.R.D. 555, 583-84 (N.D. Cal. 2013); *Donovan v. Philip Morris USA, Inc.*, 2012 WL 957633, at *27-28 (D. Mass. Mar. 21, 2012); *United States v. City of New York*, 276 F.R.D. 22, 37 (E.D.N.Y. 2011); *In re Evanston Nw. Corp. Antitrust Litig.*, 2013 WL 6490152, at *6 n.6 (N.D. Ill. Dec. 10, 2013).

that common questions almost always predominate in commodity price-fixing cases, including in industries where pricing is individually negotiated. *See supra* n.4 (collecting cases). And it would transform predominance from "a test readily met" in price-fixing cases, *Amchem*, 521 U.S. at 625, to an impossibility in virtually every market. *Wal-Mart* provides no support for that radical position, and Dow's other authorities are off-point.[7]

2. There Was a Trial With Overwhelming Common Evidence of Class-Wide Liability, Not a "Trial By Formula"

Dow attacks McClave's use of extrapolations as producing the "Trial by Formula" *Wal-Mart* foreclosed. Dow-Br. 27-28. This argument "rest[s] entirely on a selective quotation from *Wal-Mart* … and must be rejected." *In re Deepwater Horizon*, 739 F.3d 790, 810 (5th Cir. 2014). This case does not remotely resemble the novel effort in *Wal-Mart* to shoehorn damages claims into Rule 23(b)(2). This is a Rule 23(b)(3) case, and *Wal-Mart* found it "clear that individualized monetary claims belong in Rule 23(b)(3)." 131 S. Ct. at 2558. Dow's criticisms of McClave's

[7] *See In re New Motor Vehicles Canadian Export Antitrust Litig.*, 522 F.3d 6, 27 (1st Cir. 2008) (remanding *pretrial* certification of "novel and complex" theory of the impact on *indirect* purchasers of restraining grey-market imports from Canada); *Robinson v. Tex. Auto. Dealers Assoc.*, 387 F.3d 416, 423 (5th Cir. 2004) (impact of itemizing a tax on a customer's receipt, rather than charging the same tax without itemization, could not be proven on a class-wide basis); Areeda & Hovenkamp § 398 n.14 (discussing *Robinson* in a footnote).

methodology would have been properly raised in a *Daubert* motion or on cross-examination. Dow did neither.

They are also wholly unfounded. Extrapolation is central to statistics, as it allows "an inference to be drawn using available, although incomplete, information." Areeda & Hovenkamp § 394; *see also* David H. Kaye & David A. Freedman, *Reference Guide on Statistics*, Reference Manual on Scientific Evidence 211, 217 (3d ed. 2011) ("Inferences from the part to the whole are justified when the sample is representative."). Extrapolation is frequently used to estimate damages, including in price-fixing cases. *See* SA5502; *see generally Manpower, Inc. v. Ins. Co. of Pa.*, 732 F.3d 796, 806-08 (7th Cir. 2013). And it is necessary where, as here, defendants produce incomplete or partially unusable data. *See* SA3535 (McClave); SA5552-54 (Ugone) (declining to criticize McClave for extrapolating damages when "there's not enough data points to do an analysis"). McClave modeled one million representative transactions to estimate damages caused by Dow's price-fixing conspiracy. SA3531-61. His methodology "rests upon a reliable foundation," *Scrap Metal*, 527 F.3d at 529-30, and Dow has not marshaled "any relevant precedent" or "expert opinion" to the contrary. Op. 5 (AA0526).

McClave's testimony further confirms the predominance of common questions. McClave found that *99.9%* of cartel sales were made to overcharged customers; he estimated zero overcharges for only 2% (14 of 686) of modeled class

members.[8] AA2441. The overcharges covered all products, producers, regions, and customers large and small. SA3592-603. Accordingly, it was reasonable for McClave to apply his average overcharge estimates to non-modeled transactions. SA3535 ("That's Statistics 101.").

Moreover, it is "generally irrelevant" to certification whether a small number of claims may "fail on the merits if and when damages are decided," as common questions still overwhelmingly predominate. *Messner*, 669 F.3d, at 823, 826; *see also id*. at 826 (failure on merits of 2.4% of class members "is certainly not significant enough to justify denial of certification"); *DG ex rel. Stricklin*, 594 F.3d at 1201; *Kohen v. Pacific Inv. Mgmt. Co.*, 571 F.3d 672, 677 (7th Cir. 2009); *In re Deepwater Horizon*, 739 F.3d at 810-11. Nor is Dow prejudiced by including in the class a few purchasers who contributed zero dollars to Dow's liability. Indeed, Dow's position would mean, absurdly, that cartels could shield themselves from the

[8] Dow derives its 7% figure, Dow-Br. 36, by excluding from the denominator class members whose damages were modeled *in part* from the denominator. Dow also asserts that McClave did "not disput[e]" that only 192 customers had damages calculated with no extrapolation. Dow-Br. 36 n.6. In fact, McClave called that figure "meaningless and misleading" and stated that the correct number of modeled customers is 686. AA2445 ¶ 13 & n.9. Even if 7% is the correct figure, common issues would still predominate. *See Messner*, 669 F.3d at 824-26.

paradigmatic tool of private enforcement simply by taking steps to avoid overcharging a single purchaser.[9]

McClave also reliably estimated damages for Lyondell and systems purchasers. Dow's own expert "understood" that Lyondell data was missing due to Lyondell's bankruptcy. SA5553-54. McClave used the most reasonable alternative: overcharge estimates for the same product (TDI) during the same timeframe. This was plainly proper. "The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created." *Bigelow*, 327 U.S. at 265.

McClave tried "if anything, to understate the overcharge" for systems by applying the lesser of the basic chemical overcharges (that for Polyols) to the average volume of basic chemicals in a system. SA3540. Dow asserts that McClave "undertook no statistical analysis" to link systems prices to basic chemical prices, Dow-Br. 38, but McClave provided ample *non-statistical* foundation for his opinion, including internal documents "showing that the defendants viewed their price increase for basic chemicals [as] helping them increase systems prices." Cert-Op. 22 (AA0412); *see also* SA3537-40 (McClave); SA2741-43 (Solow) (systems

[9] The 2% figure also does not undermine the reasonable inference of class-wide injury, including for non-modeled class members. Both McClave *and* the non-McClave evidence of class-wide impact supported that inference. McClave's vast data set was a solid foundation for estimating damages for non-modeled customers.

customers were in fact injured); SA4445 (Davies) (basic chemical pricing "obviously" impacts systems pricing); *Linerboard*, 305 F.3d at 153 (certifying class where cartel manipulated price of primary input used in finished products). McClave's damages estimates support predominance and have nothing to do with *Wal-Mart*.

C. Certification Was Consistent With *Comcast*

The district court properly rejected Dow's *Comcast* arguments. At bottom, *Comcast* is a predominance opinion driven by the highly unusual facts and posture of that case. Unlike in *Comcast*, common issues overwhelmingly predominated here. Dow's arguments about "customer allocation," *Daubert*, and the verdict finding liability for part (but not all) of the conspiracy period are wholly meritless.

1. Extensive Evidence Including McClave's Trial Testimony Provided the Causal Link That Was Missing in *Comcast*

Comcast found two unusual but related errors in a pretrial certification order. First, notwithstanding the need for a "rigorous analysis" of the Rule 23 factors including when that analysis overlaps with an inquiry into the merits, the lower courts "refus[ed]" to do "precisely that." 133 S. Ct. at 1432–33. Second, when the Court itself conducted that inquiry, it revealed that plaintiffs had no evidence supporting a "just and reasonable" inference of "damages resulting from the particular antitrust injury" that remained at issue, and plaintiffs had conceded that such proof was necessary for certification. *Id*.

Comcast was a complex monopolization case, and plaintiffs initially raised four theories of antitrust impact. Plaintiffs used the same damages expert used here, and his model did not distinguish the effects of the four theories. The district court subsequently found that three of the four theories were unsuitable for class treatment; it kept only the theory that Comcast reduced competition from "overbuilders," "companies that build competing cable networks in areas where an incumbent cable company already operates." *Id*. at 1430-31. After this narrowing, the model became outdated. For example, the plaintiffs had alleged unlawful restraint of satellite competition as one theory of impact, and the model's damage "benchmark" was limited to counties with high satellite competition. *Id*.; *see also Behrend v. Comcast Corp.*, 264 F.R.D. 150, 181-83 (E.D. Pa. 2010). But after the district court concluded that the satellite competition theory could not proceed on a class-wide basis, there was no longer any reason to limit baseline counties to those with robust satellite competition. Given the outdated benchmark, the excluded theories of antitrust impact may well have inflated the model's damages estimates. *Comcast*, 133 S. Ct. at 1434. Indeed, record evidence suggested that the model's estimates were, in fact, inflated for precisely this reason: It identified damages in thirteen counties where there was no restraint of "overbuilding" competition. *See Behrend v. Comcast Corp.*, 655 F.3d 182, 217–18 (3d Cir. 2011) (Jordan, J., dissenting). Due to the lack of other

common proof of damages and plaintiffs' concession that certification depended on it, the result was decertification.

Comcast is inapposite in posture and substance. First, unlike *Comcast* where the lower courts failed to evaluate the merits as needed before certification, the district court here made no such mistake, Cert-Op. 17-18 (AA0407-08), and *the jury* evaluated the merits definitively. The jury heard Dow's arguments about causation and damages, ultimately finding that Dow's conspiracy caused the damages awarded at trial. The Seventh Amendment mandates deference to the jury and consideration of all the evidence supporting the verdict, which extends far beyond McClave. *Bazemore*, 478 U.S. at 401; *Continental Ore*, 370 U.S. at 699; *Reeves*, 530 U.S. at 133. Second, unlike in *Comcast* where there was no evidence supporting an inference of class-wide impact or damages, here there was extensive evidence of class-wide impact and damages—which the jury evaluated. Indeed, McClave himself testified that Dow's cartel caused the impact and damages he estimated. McClave testified that Dow's price-fixing conspiracy "impacted nearly every class member because prices during the alleged conspiracy period exceeded those that would have prevailed absent that conspiracy," and those "competitive prices were determined from an analysis of prices during a post-conspiracy benchmark period." Op. 9 (AA0530). Dow had every opportunity to argue that "the impact on plaintiffs could have resulted from some other wrongdoing," *id*., outside of Plaintiffs'

evidence and arguments presented to the jury, but Dow and its expert never once did so.

Dow criticizes McClave's initial report, but that report "was not in evidence at trial." *Id*. *Comcast* provides no warrant for decertifying post-trial on the basis of non-record speculation. In any event, McClave's analysis measured the "result[s] of the wrong" here. 133 S. Ct. at 1434. Plaintiffs always alleged that Dow participated in a single-industry cartel that caused class-wide overcharges. *See* First Am. Compl. ¶¶ 1-2 (AA0368) ("Plaintiffs allege a conspiracy ...."); *id*. ¶ 45 ("this conspiracy"); Pretrial-Order 4 (AA0451) ("a conspiracy"); id. at 5 ("[t]he conspiracy"). McClave in turn built a model to determine whether class members were injured by the conspiracy and, if so, to estimate damages. AA2078. McClave modeled prices for the same products sold by the same defendants during a non-conspiracy period; applied that "competitive" model to the cartel period to predict competitive prices; and used the difference between actual and predicted prices to estimate damages caused by the cartel. This is a "well accepted" and "fundamental" methodology supporting a just and reasonable estimate of damages caused by a cartel. SA5537 (Ugone); SA2919-20 (Solow); Areeda & Hovenkamp § 392d; *Bigelow*, 327 U.S. at 262-64; *In re Linerboard Antitrust Litig.*, 497 F. Supp. 2d 666, 671-72 (E.D. Pa. 2007); *EPDM*, 256 F.R.D. at 95. And *Comcast* expressly disclaimed an intent to alter "substantive antitrust law." 133 S. Ct. at 1433.

Dow's arguments about "customer allocation" have no bearing on predominance or the reliability of McClave's model. Unlike in *Comcast*, McClave's model here did not have an outdated "benchmark." There was no "customer allocation" benchmark. The benchmark addressed the entire market and compared pricing during a competitive period to pricing during the conspiracy period. Underscoring how baseless this argument is, Dow did not even assert in its *Daubert* motion that there was a "customer allocation" issue. That is because there was—and is—no such problem.

Furthermore, unlike in *Comcast* where the evidence suggested that the model's estimates may well have been inflated by other theories of antitrust impact, *id*. at 1434, here the trial record forecloses Dow's arguments as baseless in fact. Plaintiffs presented the jury with evidence of a price-fixing conspiracy and ample evidence of class-wide impact, including—but not limited to—McClave's model. The jury considered all the evidence and Dow's counterarguments, and found Dow liable while crediting McClave in awarding damages. Dow could have argued to the jury that McClave overstated damages because the conspirators also engaged in a second conspiracy and the model captured the impact of both sets of misconduct. But Dow never made such an argument in its *Daubert* filings, expert reports, or cross-examination. At trial, "[n]either side presented any evidence … of any illegal

customer allocation." Op. 9 (AA0530).[10] To the contrary, Dow maintained that it engaged in no wrongdoing whatsoever. Having failed to persuade the jury, Dow cannot now claim that the model was unreliable because there were actually two conspiracies. *Id*. Quite simply, McClave's model was reliable evidence of class-wide impact and damages. And along with the other extensive evidence, it confirms the district court's predominance finding and amply supports the verdict.

2. McClave's Testimony Was Properly Admitted Under *Daubert*

McClave's testimony was reliable and properly admitted. *See Truck Ins. Exch. v. MagneTek, Inc*., 360 F.3d 1206, 1210 (10th Cir. 2004) ("substantial deference" to district court's *Daubert* rulings). Dow argues that McClave's analysis was "results-driven," Daubert-Op. 10 (AA0497), but Dow's own expert disagreed. *See* SA6328 (Ugone) ("I'm not accusing him … of deliberately doing something just to inflate damages."). The district court, moreover, properly held that Dow's criticisms about McClave's selection of variables and 2004 as a baseline year "go to the weight of McClave's opinions, not their admissibility." Daubert-Op. 17 (AA0504). "Vigorous cross-examination, presentation of contrary evidence, and

[10] Plaintiffs initially identified "customer allocation" as one type of cartel conduct encompassed by their cartel claim, along with many others. *E.g.*, First Am. Compl. ¶ 45 (AA0378-79). In the Pretrial Order, Plaintiffs made clear that their cartel claim encompassed any cartel conduct revealed in discovery, *see* Pretrial-Order 4-10 (AA0451-57), but did not identify "customer allocation" as an example. That is because, after nine years of discovery, there was no evidence of such conduct distinct from the price-fixing conspiracy proven at trial.

careful instruction on the burden of proof" are the proper means of addressing such issues—not exclusion. *Daubert v. Merrill Dow Pharms.*, 509 U.S. 579, 596 (1993).

There was extensive foundation for McClave's use of TDI exports to estimate demand. Daubert-Op. 16 (AA0503); *see also* Daubert Br. 28-30 (SA6309-6311). Dow's documents recognized exports as an important driver for TDI demand. Daubert-Op. 16 (AA0503). Solow underscored that TDI exports—accounting for 40% of domestic production—"were significant drivers of price" because "domestic demand was flat or falling," while "TDI exports proved to have a positive and statistically significant relationship with price." *Id*. at 15. TDI exports had a p-value over 99% and the model's resulting R-values were "very high." SA3520-30. Dow asserts that McClave should have included domestic TDI demand and that doing so would have led to nonsensical results. Dow-Br. 46-49. But "[n]ormally, failure to include variables will affect the analysis' probativeness, not its admissibility." *Bazemore*, 478 U.S. at 400; *see also Manpower*, 732 F.3d at 808 (Supreme Court and Circuits have confirmed this "on a number of occasions"). It is standard to exclude variables that "fai[l] to demonstrate a sensible statistical relationship to price." AA2085.[11]

[11] Dow's criticism of 6- and 12-month moving averages is equally meritless. Both are economically sensible and McClave chose the data with the superior fit. AA2085. This "makes sense." Daubert-Op. 20. And Dow's criticisms, if accepted,

McClave's selection of 2004 as a baseline year was also proper. Dow's expert refused to criticize this choice, SA6327 (Ugone), and Dow "has not offered any expert evidence suggesting that McClave made this decision in an improper way," Daubert-Op. 11 (AA0498). McClave studied the data and found that 2004 prices were more consistent with competition than collusion. *Id.* The final model confirmed that choice, as it accurately predicted prices from 2004 through 2008. This choice also corresponds with Plaintiffs' allegations, based on discovery, that the conspiracy ended in 2003. Pretrial-Order 3-4 (AA0450-51); *see* Daubert-Op. 10 (AA0497) (describing "lack of witness testimony supporting a conspiracy in 2004, the departure of key players … from their companies, [and] public knowledge in 2004 of a government investigation"). Admitting McClave's testimony was proper.

3. McClave Did Not Predict Overcharges Where None Could Exist

Dow argues that the jury's verdict—finding Dow liable for participating in a successful price-fixing conspiracy from November 2000 through December 2003 but not before—requires decertification and judgment in Dow's favor because McClave identified overcharges before and after November 2000. Dow-Br. 50-53. Dow has provided no authority supporting this argument, and "the absurdity of its premise—that Dow could escape liability for an illegal antitrust conspiracy because

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only serve to reduce damages: "the overcharges or the elevation in price remains highly significant, more than 10 percent." SA3571.

plaintiffs alleged a longer conspiracy than that found by the jury—convince[d]" the district court not to "create new law by adopting Dow's position." Op. 5 n.4, 10 (AA0526, 0531). A verdict will not be overturned when a jury finds, based on the evidence, that a conspiracy was narrower or shorter than alleged. *E.g.*, *United States v. Caldwell*, 589 F.3d 1323, 1333 (10th Cir. 2009); *United States v. Coughlin*, 610 F.3d 89, 105 (D.C. Cir. 2010); *United States v. Neighbors*, 590 F.3d 485, 498 (7th Cir. 2009).

Dow asserts that "the models were *identical* in both periods," and there was "no basis in the evidence" for the jury to find liability for only part of the time. Dow-Br. 52. Dow made the same argument to the jury at trial—that a finding of no liability for 1999 means "no model, case over," SA5897—and the jury rejected it on the merits. Again, ample non-McClave evidence supported that determination. "[T]hat 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 … liability with respect to another period." Op. 14 (AA0535). Indeed, Dow moved for summary judgment specifically for the period before July 2000 because that "was the first increase to take place after Mr. Stern took over at Bayer." SJ-Op. 18-19 (SA18-19); *see also* SA3814-26; SA3847-916; SA4082-158; SA5053-121; SA5463-64 (Dow arguments that there was competition at different times). The district court acknowledged that the evidence of an effective conspiracy

in 1999 was weaker, but found there was enough evidence for the jury to decide. SJ-Op. 19 (SA19). The two time periods were demonstrably different, and Dow should be estopped from arguing that they were "identical."

In re Rail Freight Fuel Surcharge Antitrust Litigation, 725 F.3d 244 (D.C. Cir. 2013), is inapposite. *Rail Freight* was a Rule 23(f) decision that remanded for reconsideration because class certification rested solely on a model when it was clear *ex ante* that the model detected injury for a category of plaintiffs "where none could exist." *Id*. at 248, 252. Dow has never argued that there is a similar category of plaintiffs here.

Dow asserts a "similar" problem occurred because McClave identified overcharges for a period where the jury found that none existed. Dow-Br. 50-51. But that differs fundamentally from the concern in *Rail Freight*, and the jury made no such finding. The jury found that Plaintiffs carried their burden of proof for part (but not all) of the alleged conspiracy period. Amendment Order 4 (AA0556). The verdict was reasonable, as the jury could have found that, before November 2000, Plaintiffs' evidence on conspiracy or the non-econometric proof of impact was insufficient. The jury found on the merits that Plaintiffs carried their overall burden of proof after November 2000 but not before. Nothing about this balancing—quintessentially the role of the jury—casts any doubt on certification or McClave's reliability, particularly when the jury *credited* his analysis in awarding damages for

the post-November 2000 period. *Johnson v. Michelin Tire Co.*, 812 F.2d 200, 203 n.2 (5th Cir. 1987) ("the jury has the liberty to accept or reject in whole or in part the expert testimony and the jury's conclusion should not be tampered with on appeal"). Indeed, McClave's model may have shown pre-November 2000 overcharges because the conspiracy was operational yet not proved.[12] There is nothing remarkable—let alone reversible—about having an expert introduce a damage estimate consistent with extensive proof of collusion occurring throughout a conspiracy period, and then having the jury find that the plaintiffs carried their burden for only part of the alleged timeframe. That does not defeat the rest of the verdict or certification; this is a common occurrence commonly upheld.

III. The Jury's Damages Award Is Supported By Sufficient Evidence And Consistent With The Seventh Amendment

Finally, the jury's $400,049,039 award was supported by ample evidence. This Court provides great deference to jury verdicts, *e.g.*, *Escue v. N. Okla. Coll.*, 450 F.3d 1146, 1157 (10th Cir. 2006), and it is within the jury's "virtually exclusive purview" to fix damages. *United Int'l Holdings, Inc. v. Wharf (Holdings) Ltd.*, 210 F.3d 1207, 1230 (10th Cir. 2000); *Advantor Capital Corp. v. Yeary*, 136 F.3d 1259, 1266 (10th Cir. 1998) (jury is "clothed with a wide latitude and discretion in fixing

[12] Additional evidence of a successful pre-November 2000 conspiracy included the meetings at the Greenbrier and The Swan and subsequent lockstep price increases, communications regarding price increases, SJ-Op. 14 (SA14), and Stern's predecessor's recommendation that Stern sweep his office for bugs, SA881-82.

damages"). Dow cites *Bigelow*, but *Bigelow* emphasizes that in antitrust cases a jury may make any "just and reasonable estimate of the damage based on relevant data"—including before-and-after evidence similar to that used here. 327 U.S. at 264. Any other rule would "preclude antitrust plaintiffs from prevailing, even when a per se violation of the Sherman Act is present." *King & King Enters. v. Champlin Petroleum Co.*, 657 F.2d 1147, 1159 (10th Cir. 1981); *see also J. Truett Payne*, 451 U.S. at 567 ("relaxed damages rules" in antitrust).

Here, ample evidence supports the jury's damages estimate. McClave's forecasting models estimated net damages of $496,680,486 from November 24, 2000 through December 31, 2003. The jury's $400,049,039 figure "could reasonably have been reached in a number of ways," including by "accept[ing] one or more" of Dow's arguments. Op. 15-16 (AA0536-37). For example, McClave testified that, accepting Ugone's criticisms about demand variables and robustness tests, "the overcharges or the elevation in price remains highly significant, more than 10 percent in each case"—that is, overall overcharges might be reduced approximately 25%. SA3556-71. The jury reduced the estimate by approximately 20%. That is a quintessential judgment for the jury. *See* Op. 15-16 (AA0536-37); *Russo v. Ballard Med. Prods.*, 550 F.3d 1004, 1018 (10th Cir. 2008) (affirming where, "[a]s is often the case, the jury found the truth to lie somewhere in between the extremes suggested by the evidence received at trial, returning an award that

represented 53% of the damages [plaintiff] sought"); *Scrap Metal*, 527 F.3d at 533-34 (affirming award smaller than expert testimony); *accord Medcom Holding Co. v. Baxter Travenol Labs., Inc.*, 106 F.3d 1388, 1400-01 (7th Cir. 1997); *Tuf Racing Prods., Inc. v. Am. Suzuki Motor Corp.*, 223 F.3d 585, 591 (7th Cir. 2000).

Dow's Seventh Amendment rights were not violated by the class-wide aggregate verdict. Dow-Br. 64-65. Dow's arguments primarily repackage its request for special interrogatories identifying which companies conspired, which products were covered, and when the conspiracy started and stopped. Dow-Br. 65-66 n.10. The verdict form is a matter committed to the "sound discretion of the trial court." Federal Practice & Procedure § 2505; *see also United States for Use & Benefit of Fed. Corp. v. Commercial Mech. Contractors, Inc.*, 707 F.2d 1124, 1129 (10th Cir. 1982); *Martinez v. Union Pac. R.R.*, 714 F.2d 1028, 1032 (10th Cir. 1983). Dow still has "not identified any authority requiring such specific jury interrogatories." Op. 19 (AA0540).

Dow now also argues that the verdict needed to be customer-by-customer for all 2,400 class members. Dow-Br. 65. The district court correctly rejected this argument as untimely, as Dow did not request individualized damage determinations in the Pretrial Order, its proposed verdict form, or its dilatory motion to decertify. Amendment Order 2 (AA0554); *see also* Pretrial-Order 21-22 (AA0468-69). Moreover, Dow is wrong on the merits. "The use of aggregate damages calculations

is well established in federal court and implied by the very existence of the class action mechanism itself." *In re Pharm. Indus. Avg. Wholesale Price Litig.*, 582 F.3d 156, 197 (1st Cir. 2009); *In re NASDAQ Market-Makers Antitrust Litig.*, 169 F.R.D. 493, 525-26 (S.D.N.Y. 1996) ("aggregate judgments have been widely used in antitrust … class actions"). The jury found class-wide injury based on overwhelming common evidence, AA0514-15, and McClave's aggregate figures were the arithmetic sum of his reasonable estimates for each class member. SA3501-04, 4430.

More fundamentally, because the judgment fixed liability against Dow for a sum certain, Dow has no "interest in the distribution of damages among the class." Dow-Br. 65. "When aggregate damages for the class are awarded, the litigation is ended from the defendant's standpoint except for payment of the judgment or appeal therefrom." 3 Newberg on Class Actions § 10:17 (4th ed. 2002). Dow "has no interest in how the class members apportion and distribute a damage fund among themselves." *Allapattah Servs., Inc. v. Exxon Corp.*, 333 F.3d 1248, 1258 (11th Cir. 2003); *accord Boeing Co. v. Van Gemert*, 444 U.S. 472, 481 n.7 (1980); *Six (6) Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1307 (9th Cir. 1990). And "all class members are bound by the judgment," Dow-Br. 66, because it has preclusive effect class-wide. *See Cooper v. Fed. Reserve Bank of Richmond*, 467 U.S. 867, 874 (1984).

There is no basis for the extraordinary do-over Dow requests. If anything, it is Dow's position that would give rise to Seventh Amendment problems. Dow urges this Court to reevaluate the weight of McClave's testimony in isolation while overlooking substantial other common evidence of an effective price-fixing conspiracy, without regard to the deferential standard the Seventh Amendment mandates.

CONCLUSION

For the reasons set forth above, this Court should affirm the judgment below.

STATEMENT OF COUNSEL AS TO ORAL ARGUMENT

Because of the important issues presented, counsel thinks oral argument may be helpful to the court.

Respectfully submitted,

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s/William R. Levi
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