No. 13-3215
[ORAL ARGUMENT NOT YET SCHEDULED]

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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IN RE: URETHANE ANTITRUST LITIGATION

_____

On Petition for Appeal from the United States District Court for the District of Kansas

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BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PETITIONERS URGING REVERSAL

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CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America is a nonprofit corporation organized under the laws of the District of Columbia. It has no parent company and has issued no stock.

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to this Circuit's Rule 28(a)(1), amicus curiae certifies:

(A) Parties and Amici. Except for the following, all parties, intervenors, and amici appearing before the district court are listed in the Opening Brief of Petitioners: Amicus curiae Chamber of Commerce of the United States of America.

(B) Rulings Under Review. References to the rulings at issue appear in the Opening Brief of Petitioners.

(C) Related Cases. Amicus curiae is aware of no related cases pending in this Court or any other Court. The class certification order at issue in this case was previously before this Court on a petition to appeal pursuant to Rule 23(f) of the Federal Rules of Civil Procedure. *In re Urethane Antitrust Litig.*, No. 08-602 (10th Cir. Sept. 2, 2008). This Court denied the petition. *Id.*

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INTRODUCTION AND INTEREST OF AMICUS[1]

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation, representing 300,000 direct members, and indirectly representing more than three million businesses and trade and professional organizations of every size, sector, and geographic region. One of the Chamber's most important functions is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files amicus curiae briefs in cases that present issues of vital concern to the Nation's business community.

Because class certification is one of those issues, the Chamber has a substantial interest in the questions presented in this case. Those questions are governed by the Supreme Court's teachings in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011) ("*Wal-Mart*") and *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013) ("*Comcast*"), but were decided below in a manner that contravenes those teachings. The Chamber participated as an amicus in both *Wal-Mart* and *Comcast* to protect the interests of its members, who are frequent targets of class actions and who thus bear the substantial burdens that improper class certification inevitably imposes. For the same reason, the Chamber also participated as an amicus in *In re*

[1] All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part; no party or its counsel made a monetary contribution intended to fund the preparation or submission of this brief; and no person other than amicus curiae, its members, or its counsel made a monetary contribution intended to fund its preparation or submission.

Rail Freight Fuel Surcharge Antitrust Litigation, 725 F.3d 244, 253 (D.C. Cir. 2013) ("*In re Rail Freight*"), which applied *Wal-Mart*'s and *Comcast*'s teachings and in so doing vacated the district court's improper decision to certify the class. Given the Chamber's well-established history of participating in cases that clarify the standards for class certification under Rule 23, it has an evident interest in advocating for the proper application of those standards in this context—a rare antitrust case that went to trial after class certification.

PERTINENT FACTS

The plaintiffs in this case sued The Dow Chemical Company and four other manufacturers alleging that they conspired over a six-year period to fix the prices for urethane chemical products and to allocate customers, both in violation of the Sherman Act, 15 U.S.C. § 1. Plaintiffs sought class certification on the basis that they could show both antitrust impact and damages resulting from these two theories of liability on a classwide basis.

At the certification stage, the defendants introduced unrebutted evidence that prices in the urethane chemical products industry were negotiated individually, and therefore that impact and damages could only be determined on an individualized basis. Despite acknowledging the pertinent market facts, the district court certified the class. Defendants unsuccessfully sought interlocutory review under Rule 23(f).

Faced with joint-and-several liability and potentially billions of dollars in damages, three defendants (BASF, Bayer, and Huntsman) settled.[2] Dow forged ahead. Plaintiffs retained a new expert, Dr. James McClave, who constructed a statistical regression model that he claimed could (i) prove impact—specifically, that "virtually all" class members were overcharged by defendants' conduct—and (ii) calculate damages for all injured class members. Dow moved to exclude Dr. McClave's testimony, arguing that his regression model was fundamentally flawed. The district court denied the motion.

Before trial, Dow also moved to decertify the class. Dow argued that, even if it was admissible evidence, Dr. McClave's model was incapable of showing injury and damages on a classwide basis, and that certification was no longer permissible in light of the Supreme Court's recent decision in *Wal-Mart*. The district court deferred consideration of the motion, and the parties proceeded to trial.

At trial, plaintiffs introduced evidence of a price-fixing conspiracy but abandoned their customer-allocation theory. Dr. McClave, however, based his impact and damages testimony on his regression models, which assumed *both* the price-fixing *and* customer-allocation conspiracies. Dr. McClave's models, moreover, found impact in the form of (and calculated damages on the basis of)

[2] After declaring bankruptcy, Lyondell settled without any payment on liability. AA0428-37.

certain "overcharges" that he found to exist for approximately 25% of the class. For the remaining 75%, he *assumed* the same overcharges as those he claimed to have found for the first 25%, and then used what he called "extrapolation" to find injury and damages as to most of the 75% for which he expressly did not analyze specific overcharges. Dr. McClave's use of the term "extrapolation" was itself a concession that, at least as to the 75% of customers, his results were speculative.[3]

Critically, Dr. McClave's model did not find that each class member suffered injury or damages. His model showed that at least 7% of class members for whom he modeled damages had zero or negative damages. Appellant's Br. at 35-36. On the other hand, as a matter of mathematics, Dr. McClave assumed that *every one* of his extrapolated transactions was subject to an overcharge as a result of the alleged conspiracy. *Id.* at 15, 19, 34-35.

The jury ultimately found liability (including injury) and awarded damages of over $400 million, which the district court trebled.

After trial, Dow renewed its motion for decertification. Dow argued that Dr. McClave's use of extrapolated damages calculations prevented plaintiffs from proving impact and damages as to all class members "in one stroke." *Wal-Mart*, 131 S. Ct. at 2551. Dow also challenged Dr. McClave's model under the

[3] To "extrapolate" means "to project, extend, or expand into an area not known or experienced so as to arrive at a usually conjectural knowledge of the unknown area." *See Extrapolate Definition*, Merriam-Webster.com, http://www.merriam-webster.com/dictionary/ extrapolate?show=0&t=1386951357 (last visited Dec. 13, 2013).

intervening decision in *Comcast*, showing that it mismatched liability and damages because Dr. McClave assumed the existence of both a price-fixing conspiracy and a customer allocation conspiracy, while the jury's verdict was based on only price-fixing.

The district court denied Dow's motions. It suggested that Dow had not challenged the admissibility of Dr. McClave's testimony on these same grounds at trial and suggested that such a challenge was a prerequisite to Dow's challenging the use of Dr. McClave's model for class-certification purposes.

SUMMARY OF ARGUMENT

I. The district court's certification decision—and its refusal to decertify—violated three central and independent legal principles that (among other things) govern the use of statistical models in class litigation: *first*, a class cannot be certified if a defendant must forfeit its right under the Rules Enabling Act—which is designed to protect litigants' "substantive right[s]"—to maintain its defenses as to individual class members, *Wal-Mart*, 131 S. Ct. at 2561; *second*, a properly certified class must be able to prove "in one stroke," *id.* at 2551, that all class members were impacted; and *third*, if a plaintiff attempts to rely on a statistical model to show impact and damages on a class-wide basis, its impact/damages model must match its ultimate theory of liability. *See, e.g.*, *Comcast*, 133 S. Ct. at 1433.

Here, the certification decisions violated the first principle by effectively preventing the defendant from contesting antitrust impact and damages as to all class members—particularly the 75% of class members whose injury was simply assumed by Dr. McClave's model, and whose putative damages he "extrapolated" from the other 25% of class members. Those decisions also violated the second principle, both because Dr. McClave's analysis showed that some portion of class members—even of the 25% he claimed to have actually analyzed—were *not* injured, and because his "extrapolation" methodology introduced a forbidden "second stroke" into the certification analysis. And those decisions violated the third principle because of the mismatch between Dr. McClave's injury/damages analysis—which assumed price-fixing *and* customer-allocation conspiracies—and plaintiffs' ultimate proof of liability, which rested upon alleged price-fixing alone. Thus, the district court's decision deprived Dow of its substantive right under the Rules Enabling Act, as explained in *Wal-Mart* and *Comcast*, to defend itself against each plaintiff's unique claims in "individualized proceedings." *Wal-Mart*, 131 S.Ct. at 2561.

II. Enforcement of these principles in this case is particularly important, given the drag that improperly certified class actions impose on the entire economy. The high costs of class action litigation are passed along to consumers in the form of higher prices. And defendants faced with the burdensome costs of class action litigation may be forced to reduce operations, curtail capital

investment, and in extreme cases, forego entering new markets and developing new products—all of which will result in lower employment.

Such costs can be warranted only if courts faithfully apply Rule 23's requirements to certification (or decertification) motions. Indeed, as this case illustrates, the pressure to enter an unjustified settlement becomes enormous whenever a defendant is forced to go to trial against a certified class. It is thus essential to the strength of our Nation's economy—and to all who invest or are employed in it—that the requirements articulated in Rule 23, as interpreted in *Wal-Mart* and *Comcast,* be rigorously and faithfully applied, both in the initial certification decision, and on any subsequent motion for decertification.

ARGUMENT

I. The District Court's Certification Decisions Violated Three Core Legal Principles Governing The Use Of Statistical Models In Class Litigation.

Wal-Mart and *Comcast* clarified three critical legal principles governing class certification and, specifically, the use of statistical models in certification decisions. First, under Rule 23, "a class cannot be certified on the premise that [a defendant] will not be entitled to litigate its statutory defenses to individual claims." *Wal-Mart,* 131 S. Ct. at 2561. Accordingly, a class cannot be certified—or maintain its certification—based on a statistical model that fails to account for relevant differences among individual class members. Second, the plaintiff seeking certification must provide common evidence of injury that will resolve that

question "in one stroke." *Id.* at 2551. *Comcast* additionally requires that any statistical model of injury must demonstrate with "evidentiary proof" that *all* members of the class were injured. *Comcast*, 133 S. Ct. at 1432. Third, "any model supporting a plaintiff's damages case" that is used as a basis for certification under Rule 23 "must be consistent with its liability case." *Id.* at 1433.

These independent requirements are all necessary to ensure that classes are certified only where permitted by Rule 23. Yet, as we now show, the district court in this case violated all three of these core principles. Because each of these violations was an error of law, the pertinent standard of review as to each is *de novo*. *See, e.g.*, *Carpenter v. Boeing Co.*, 456 F.3d 1183, 1187 (10th Cir. 2006); *Wallace B. Roderick Revocable Living Trust v. XTO Energy, Inc.*, 725 F.3d 1213, 1217 (10th Cir. 2013). And the district court's certification decisions should be reversed on any or all of these bases.

A. Statistical Models that Fail Fairly to Account for Relevant Differences Among Individual Class Members Cannot Satisfy Rule 23(b)(3)'s "Predominance" Requirement.

Summarizing *Wal-Mart*, the D.C. Circuit has recently observed that "Rule 23 not only authorizes a hard look at the soundness of statistical models that purport to show predominance—the rule commands it." *In re Rail Freight*, 725 F.3d at 255. That command is reinforced by the Rules Enabling Act, which reflects underlying due process concerns and "forbids [courts from] interpreting Rule 23 to 'abridge, enlarge or modify any substantive right.'" *Wal-Mart*, 131 S.

Ct. at 2561 (quoting 28 U.S.C. § 2072(b)); *accord Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613 (1997). If courts permitted class plaintiffs to rely on statistical models to prove classwide impact and damages when there are material differences among class members—like the "Trial by Formula" rejected in *Wal-Mart*, 131 S. Ct. at 2561—defendants would thereby forfeit a "substantive right," namely, the right to effectively defend against every distinct claim. *Id.*

1. Under the Clayton Act—which governs private litigation of substantive claims under both the Sherman and Clayton Acts—impact, or "antitrust injury," is an essential element of a plaintiff's federal antitrust claim. *See* 15 U.S.C. § 15(a) (limiting recovery to "any person . . . *injured* in his business or property") (emphasis added). Therefore, to establish antitrust liability, plaintiffs bear the burden of showing not only the alleged violation—i.e., the defendant's alleged act—but also "injury" to their "business or property" before they can recover. *Cohlmia v. St. John Med. Ctr.*, 693 F.3d 1269, 1280 (10th Cir. 2012).

This burden of proof applies whether a plaintiff proceeds as an individual or as part of a class. Indeed, "proof of injury to . . . *each class member* is critical for the determination of defendants' liability to any individual." *Shumate & Co. v. Nat'l Ass'n of Sec. Dealers, Inc.*, 509 F.2d 147, 155 (5th Cir. 1975) (emphasis added). It follows that, to satisfy Rule 23's requirements, any statistical model used to establish the elements of an antitrust claim on a classwide basis must account for potentially relevant differences among class members as to the fact and

mechanism of injury. Otherwise use of the model would violate a defendant's "substantive right" to "litigate its statutory defenses to individual claims." *Wal-Mart*, 131 S. Ct. at 2561.

2. Here, the complexities and economic realities of the marketplace in which the alleged conspiracy took place precluded a showing of classwide impact by a single statistical model. Undisputed evidence shows that there is no baseline market price for chemicals in the polyurethanes industry. *See* Appellant's. Br. at 2. Rather, individual purchasers negotiate extensively over price and other terms. *Id.* The district court recognized these economic realities, finding that the market comprises "myriad [] products, pricing structures, individualized negotiations and contracts." Appellant's Br. at 6; AA0413. It also found that "sales of the basic chemicals were characterized by individual negotiations, variations in contractual relationships and the like." AA0409.

In a case like this, involving a complex industry in which customers negotiate individual agreements that directly affect price and non-price terms, antitrust injury is almost always individualized—and liability cannot be shown in one stroke. As a prominent treatise puts it, "[w]hen transaction prices are negotiated, the actual price paid will be determined at least in part by the negotiating styles of the customers. As a result, proof of antitrust injury is bound to be individualized." 2A, Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* § 398(c), at 423

n.14 (2013). In such a market, therefore, predominance is impossible to establish. And therefore, consistent with *Wal-Mart* and *Comcast*, certification in such a market is erroneous as a matter of law. The district court's refusal to decertify the class in this case can and should be reversed on this basis alone.

3. Even if predominance *could* be established here on the basis of a statistical model, Dr. McClave's model was inadequate for that purpose. That is because, as to the majority of purchasers in the class (75%), Dr. McClave did not conduct any genuine modeling at all. Instead, Dr. McClave determined their antitrust impact and damages by "extrapolating" from his analysis of the impact and damages of the remaining 25% of purchasers. *See supra* at 5-6. Dr. McClave simply assumed that *all* customers for whom he extrapolated damages suffered antitrust impact and damages equal to the "average" customer he modeled. The district court thus allowed plaintiffs to establish impact and damages for *three-quarters* of the class by extrapolation—that is, without even requiring proof of impact for any one of them, let alone all class members "in one stroke." *Wal-Mart*, 131 S. Ct. at 2551.

Dr. McClave's model also violated a core principle of *Comcast*, which demands that plaintiffs come forward with "evidentiary proof" that will "plausibly show[]"any claim elements relied upon to establish the existence of common issues—in this case both impact and damages. 133 S. Ct. 1432, 1436 n.6. But here, the record conclusively shows the *absence* of "evidentiary proof" in Dr.

McClave's model on the common issues of impact and damages. His model purported to directly assess impact and damages for only one-quarter of the class, and offered only "arbitrary . . . measurements" and extrapolation, *id.*, for the remaining three-fourths. Accepting Dr. McClave's model as establishing predominance even though it speaks to only 25% of the putative class "would reduce Rule 23(b)'s predominance requirements to a nullity." *Comcast*, 133 S. Ct. at 1433. This defective methodology should have "shred[ded] the plaintiffs' case for certification." *In re Rail Freight*, 725 F.3d at 252.

Indeed, in that respect, Dr. McClave's model is analogous to the model used by the plaintiffs in *Wal-Mart* in their effort to bridge the gap among putative class members who experienced different treatment, lived in different parts of the country, or were otherwise dissimilarly situated. 131 S. Ct. at 2550. Here, as in *Wal-Mart*, the plaintiffs' expert "extrapolat[ed] the validity and value of the untested claims"—i.e., the 75% of claims subject to extrapolation—"from the sample set," i.e., the 25% for which damages were calculated. *Wal-Mart*, 131 S. Ct. at 2550. But *Wal-Mart* rejected the plaintiffs' statistical methodology as a basis for class certification because the defendant would have been forced to abdicate its "statutory right" to "litigate its statutory defenses to individual claims." 131 S. Ct. at 2561.

So too here. Allowing the class plaintiffs to prove injury and damages through a classwide "Trial by Formula"—as Dr. McClave's model required—

violated the Rules Enabling Act (and the due process principles that underlie it) because it necessarily "abridged" the defendant's "substantive right" to fully litigate its defenses. *Id.* at 2561; *see also, e.g.*, *Jacob v. Duane Reade, Inc.*, – F.R.D. –, 2013 WL 4028147, at *10 (S.D.N.Y. Aug. 8, 2013) ("[R]eading [*Wal-Mart*] and *Comcast* together, . . . there are due process implications for defendants, which render the so-called 'trial by formula' approach, whereby representative testimony is utilized to determine damages for an entire class, inappropriate where individualized issues of proof overwhelm damages calculations."). For example, it would have been effectively impossible for Dow to take discovery of absent class members to refute the extrapolated impact determinations. It would likewise have been impossible for the jury to determine liability when faced with the countless mini-trials that *Wal-Mart* would require.[4]

Accordingly, when given the "hard look" that Rule 23 "commands," *In re Rail Freight*, 725 F.3d at 255, extrapolation is not a valid basis for class

[4] Indeed, the facts here are even more egregious than those in *Wal-Mart*. First, the trial plan proposed in *Wal-Mart* would have allowed Wal-Mart to present individualized defenses—and the court to adjudicate those defenses—in "randomly selected sample cases." *Id.* at 2550. Here, there were no individual adjudications. Second, the district court's plan in *Wal-Mart* was to select sample cases for trial "at random," in an attempt to rid the trial-by-formula of the unfairness that would result if plaintiffs were permitted to present only their strongest claims to the jury. *Id.* Here, the district court made no attempt to provide even these inadequate protections. On the contrary, it allowed plaintiffs to prove impact and damages for many transactions of a major purchaser and all systems transactions by extrapolation, even though Dr. McClave did not model any of these transactions. *See* Appellant's Br. at 15, 37-40.

certification. It violates *Wal-Mart*'s core legal principle that plaintiffs cannot proceed under Rule 23 if to do would "abridge" a defendant's "substantive right" to fully litigate its defenses as to each class member. *Wal-Mart*, 131 S. Ct. at 2561. It also allows class plaintiffs to skirt the Clayton Act's mandate by recovering antitrust damages without first establishing *proof* of individual injury.

B. Any Statistical Model Purporting To Establish Classwide Injury Must Show That *All* Members Of The Class Were Injured, In The Same Way.

Though Dr. McClave's model supposedly finds and measures impact on a classwide basis, what it actually shows is that *at least* seven percent of the class members he modeled, *see supra* at 4, suffered no antitrust injury at all. This admission also should have "shred[ded] the plaintiffs' case for certification." *In re Rail Freight*, 725 F.3d at 252.

That is because, as decisions interpreting *Wal-Mart* and *Comcast* have confirmed, to establish predominance "[t]he plaintiffs must . . . show that they can prove, through common evidence, that *all* class members were in fact injured by the alleged conspiracy." *Id.* (emphasis added). Absent such a showing, "individual trials are necessary to establish whether a particular [plaintiff] suffered harm from the price-fixing scheme" at all. *Id.* Moreover, courts must first make this assessment at the class certification stage, before trial, because it is the only way to ensure that plaintiffs can carry their ultimate burden of proving antitrust injury—a key element of liability—"in one stroke." *Wal-Mart*, 131 S. Ct. at 2545,

2551. And of course that assessment must be repeated if a defendant moves to decertify the class.

Because the Clayton Act requires each plaintiff to prove that it was injured by the defendant's allegedly anticompetitive conduct, a statistical model that relies on extrapolation to show impact and calculate classwide damages cannot justify certification—especially where, as here, there are distinct, identifiable differences among class plaintiffs' actual claims. Indeed, one of the preeminent shortcomings of an extrapolation model is that it *assumes* the same or similar impact across the class, which in turn subverts the required proof that class members in fact "suffered the same injury." *Wal-Mart*, 131 S. Ct. at 2551. A model that assumes what it must demonstrate—i.e., that all plaintiffs were injured by the defendant's conduct—has no probative value. And again, forcing a defendant to defend against dissimilar claims in a Rule 23 trial where it will not have the right to defend against each plaintiff's unique claims through "individualized proceedings" violates the defendant's "substantive right[s]." *Id.* at 2561.

In short, when plaintiffs rely on extrapolated calculations to prove antitrust impact, they cannot prove injury to all class members "in one stroke." *Id.* at 2550. Accordingly, the district court's decision to allow the plaintiffs to establish predominance on the basis of extrapolations from a small subset of the class requires reversal. Dr. McClave's extrapolation methodology was simply incapable of establishing that all class members were injured, or that they were injured in the

same way. And in any event, his conclusion that a portion of the class members were *not* injured foreclosed certification under *Wal-Mart* and *Comcast.*

C. The Abandonment of a Foundational Element of Plaintiffs' Liability Case Requires Decertification.

The district court's certification decision also violated *Comcast's* holding that a plaintiff's "model purporting to serve as evidence of damages in [a] class action" "must measure only those damages attributable" to the plaintiffs' liability theory. 133 S. Ct. at 1433. *Comcast* thus prohibits "a mismatch between the injury and the remedy," *Duane Reade, Inc.*, 2013 WL 4028147, at *10, or, for that matter, a "mismatch" between the injury and the alleged violation. By so doing, *Comcast* precludes plaintiffs from playing a game of "bait and switch" in which the evidence they present at trial—and the statistical model they use to support that evidence—depart dramatically from the liability theory they advance as a basis for certification. And if the plaintiffs' case at trial departs from that theory, the consequence is plain: decertification is required.

1. In *Comcast*, the plaintiffs attempted to prove classwide impact and damages through a regression model built by the same Dr. McClave who testified here. Because the plaintiffs there had originally advanced four legal theories of antitrust impact, Dr. McClave built his regression model on all four theories. But the district court held that only one of those theories could be proved with classwide evidence. *Comcast*, 133 S. Ct. at 1426, 1431-32. Dr. McClave's model

thus "failed to measure damages resulting from the" only "particular antitrust injury on which petitioners' liability . . . [was] premised." *Id.* at 1433. And that, the Court held, meant that continued certification in *Comcast* was improper. *Id.* at 1435.

2. Here, Dr. McClave's initial report estimated damages based on two theories of liability: a price-fixing conspiracy and customer allocation conspiracy. Dr. McClave thus constructed his "common impact" and damages model on the assumption that plaintiffs would prove that the defendant conspired to allocate certain customers. *See* Appellant's Br. at 44. Yet at trial "[n]either side presented any evidence . . . of any illegal customer allocation." Dkt. 2879 at 9. Plaintiffs' failure to pursue this theory and offer supporting evidence at trial thus resulted in Dr. McClave's repeating the very error for which he was chastised in *Comcast*: failing to provide a model that matched the purported impact and damages to "the wrong" that the jury found. *Comcast*, 133 S. Ct. at 1434.

Her too, under *Comcast*, the plaintiffs' abandonment of one of the theories on which Dr. McClave built his damages/impact model—i.e., a conspiracy as to *both* pricing and customer allocation— fatally undermined the plaintiffs' argument that Dr. McClave's model established predominance. Without evidence of a customer allocation conspiracy, Dr. McClave's damages/impact model in this case failed to match the plaintiffs' liability model—and was thus unable to support the district court's initial finding of predominance: "no predominance, no class

certification." *In re Rail Freight*, 725 F.3d at 253. Accordingly, under *Comcast*, plaintiffs' later abandonment of the customer allocation theory retroactively rendered the earlier class certification invalid, and therefore required decertification.

This is true, moreover, whether or not Dr. McClave's model was the linchpin of the district court's initial class certification decision: The core principle of *Comcast* is that plaintiffs' case for liability, both in theory and as shown by the evidence, must match its impact and damages model "at trial," *id.* at 1433. But here it clearly did not match.

Given that the trial evidence confirmed that certification was improper, it was incumbent upon the district court to decertify the class. Indeed, the Federal Rules permit courts to "alter[] or amend[]" class certification decisions "before final judgment." Fed. R. Civ. P. 23(c)(1)(C); *see also DG ex rel. Stricklin v. Devaughn*, 594 F.3d 1188, 1201 (10th Cir. 2010) (district court "possesses the discretion . . . [to] decertify the class altogether prior to final judgment"). Thus, "a district court's order denying or granting class status is inherently tentative," *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 n.11 (1978), "and subject to change," *In re Zurn Pex Plumbing Prods. Liab. Litig.*, 644 F.3d 604, 613 (8th Cir. 2011), "in light of subsequent developments in the litigation." *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 160 (1982). And *Wal-Mart* and *Comcast* establish that the court has a duty to do so if it becomes clear that the plaintiffs' proof at trial

departs from the basis on which certification has been granted. *E.g.*, *Comcast*, 133 S. Ct. at 1433 (stating that Rule 23's requirements apply equally "at trial").

3. The district court discounted these problems on two grounds, neither of which is plausible. First, it stated that "Dow did not provide[] any expert opinion . . . to show that Dr. McClave's method was unreliable." *Id.* But this turns class-action precedent on its head. As the defendant, Dow never had the burden to show that the plaintiffs' evidence failed to meet Rule 23's requirements. Rather, the burden always falls on the plaintiffs to show that their damages model establishes predominance, even when "the issue . . . comes before the Court on *Defendants'* motion." *Spagnola v. Chubb Corp.*, 264 F.R.D. 76, 92 (S.D.N.Y. 2010) (emphasis added).

Second, the district court stated that, because "Dow did not seek to exclude Dr. McClave's testimony on this basis before trial," he "was . . . permitted to testify that such members did suffer impact and damages." Dkt. 2879 at 5. But that ignores the fact that Rule 702's admissibility hurdle is distinct from Rule 23's predominance inquiry. Thus, even assuming Dr. McClave's expert testimony were admissible, it could be and was insufficient to satisfy plaintiffs' burden under Rule 23. The court thus erred by conflating the two inquiries and assuming that Dr. McClave's testimony—once admitted and heard by the jury—was unimpeachable, even for the purposes of Rule 23.

Comcast, moreover, directly addressed this point when it held that the defendant's decision there not to "make an objection to the admission of Dr. McClave's testimony under the Federal Rules of Evidence . . . does not make it impossible for them to argue that the evidence failed to show that the case is susceptible to awarding damages on a class-wide basis." *Comcast*, 133 S. Ct. at 1431 n.4 (quotation omitted). Nor can the district court's view be reconciled with *Wal-Mart*, which *requires* decertification if the plaintiffs fail to establish predominance (or Rule 23's other requirements) at *any* later point in the litigation. 131 S. Ct. at 2561. Nor does it comport with the plain language of Rule 23, which contemplates that a court may determine *after* trial—such as on defendant's motion to decertify—that an expert's trial testimony failed to establish predominance. *See* Fed. R. Civ. P. 23(c)(1)(C) (permitting court to "alter[] or amend[]" class certification "before final judgment"). Thus, the admissibility *vel non* of Dr. McClave's testimony does not alter the plaintiffs' burden to show that Rule 23's requirements are met.

In sum, in its treatment of Dr. McClave's model, the district court violated three principles governing the use of statistical models in certifying class actions: (1) the model must fairly account for differences among class members; (2) it must establish that all class members were injured by the defendant's challenged conduct; and (3) it must be consistent with the remainder of the plaintiffs' case, both during pretrial proceedings and at trial. For each of these independent

reasons, the district court's decision to certify a class, and its decision not to decertify it after trial, must be reversed.

II. Strict Adherence to Rule 23's Requirements Is Essential to Ensure that Class Actions Do Not Impose Unwarranted Burdens on the National Economy

Considerations of judicial administration compel the same result. Here, the defendant bucked the overwhelming trend in which defendants settle class actions once certification is granted, to avoid the substantial costs and potentially catastrophic risks associated with litigating a class action to verdict. In trying this case, moreover, Dow asserted its due process and other rights at every turn. This case therefore presents an extremely rare opportunity—in the context of an appeal from a class action tried to a jury verdict—to address how lower courts should apply the core principles of *Wal-Mart* and *Comcast* at trial and when deciding motions for decertification. Indeed, faithful adherence to those principles is essential to ensure that class actions do not impose substantial, unjustified burdens on the national economy.

A. The Ruling Below Will Exacerbate the Problem of Defendants Being Effectively Forced to Settle Meritless Claims.

Perhaps most important, careful adherence to these principles is necessary to prevent the socially undesirable assertion and settlement of meritless claims.

1. Class certification is almost invariably followed by settlement. *See* Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*,

51 Duke L.J. 1251, 1292 (2002) ("[E]mpirical studies . . . confirm what most class action lawyers know to be true: almost all class actions settle."). Even the Advisory Comments to Rule 23 expressly recognize the enormous risks—and attendant settlement pressure—that a class-certification decision imposes on defendants. *See* Fed. R. Civ. P. 23(f) Advisory Comm.'s Notes to 1998 Amendments ("An order granting certification . . . may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability."). Most notably, "certification 'generate[s] unwarranted pressure to settle nonmeritorious or marginal claims.'" *In re Rail Freight*, 725 F.3d at 252 (quoting *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 168 (3d Cir. 2001)).

Indeed, "[c]ertification of a large class may so increase the defendant's potential liability and litigation costs that he may find it economically prudent to settle and abandon a meritorious defense." *Coopers & Lybrand*, 437 U.S. at 476; *accord In re Lorazepam & Clorazepate Antitrust Litig.*, 289 F.3d 98, 102 (D.C. Cir. 2002) ("[T]he grant of class status can put substantial pressure on the defendant to settle independent of the merits of the plaintiffs' claims.").

2. These coercive-settlement problems are magnified in the antitrust arena. Antitrust defendants risk not only damages arising from their own conduct, but also joint-and-several liability *and* treble damages.

Moreover, the sheer cost of litigating an antitrust class action is particularly pronounced because these cases are "arguably the most complex action[s]" for a defendant to litigate. *In re Linerboard Antitrust Litig.*, 296 F. Supp. 2d 568, 577 (E.D. Pa. 2003). Given that defendants may incur many of these costs after a certification decision, including costs associated with taking "testimonial evidence" and conducting "extensive discovery," Manual for Complex Litigation § 30, at 519 (4th ed. 2004), the pressure to settle becomes even more immense after a class is certified. *See, e.g.*, *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559 (2007) (recognizing the "potentially enormous expense of discovery").

Faced with these staggering costs, many defendants—especially in antitrust actions—will have no practical option but to settle before trial.

3. The financial risks of class-action litigation—including antitrust litigation—are magnified still further when courts allow *dissimilar* plaintiffs to create for a jury the false impression that they have proven liability "in one stroke." *Wal-Mart*, 131 S. Ct. at 2551. And that risk becomes particularly acute in antitrust class actions if the plaintiff class is permitted to rely on aggregate-impact "extrapolations" of the kind Dr. McClave performed.

Indeed, a statistician can use regression software to run many hundreds (even thousands) of different model permutations with different variables and benchmark periods, and then see the damages figure that each model generates. Such results-oriented data mining can always be manipulated to generate a

favorable model that produces both adequate statistical fit and damages for plaintiffs.

Plaintiffs, moreover, without providing a basis in the evidence, can often frame the agreement among the alleged conspirators simply as an agreement to keep prices as high as possible, *see, e.g.*, App. 862, then point the jury to actual prices above the modeled, so-called "competitive" prices as confirmation of the conspiracy. *See, e.g.*, App. 925. They can then ask the jury, again without basis in the evidence, to ignore the periods in which the model fails to show overcharges as times when the conspiracy participants cheated. *See, e.g.*, App. 873-74. And where this is allowed—as it was below—antitrust liability is driven entirely by manipulated modeling, not by underlying economic and market realities.

4. The fact that most class actions settle before trial does not reduce the importance of policing district courts' procedures in class actions that, like this one, *do* proceed to trial. *See* Robert H. Mnookin & Robert B. Wilson, *Rational Bargaining and Market Efficiency: Understanding Pennzoil v. Texaco*, 75 Va. L. Rev. 295, 295 (1989). The opposite is true: Litigants "bargain with the knowledge that if they cannot strike a deal, a court ultimately may impose a resolution." *Id.* Thus, "the rules and procedures used inside of court" may "substantially affect[] the bargains reached outside the court." *Id.*

Accordingly, if the effect of class certification is to preclude examination at trial of the weaknesses in the plaintiffs' individual claims, or even to preclude the

defendant from presenting individualized defenses, the case's "blackmail" value will skyrocket. *See, e.g.*, *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) (finding that the rate of "blackmail settlements" likely will increase exponentially once a district court certifies a class). Correlatively, the defendant's bargaining position will crumble, and settlement pressure will, in almost all cases, become overwhelming. *See* Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 103 (2009) ("If a cohesive class can be created through . . . savvy crafting of the evidence," then "[t]he law [will] run a considerable risk of unleashing the settlement-inducing capacity of class certification based simply on the say-so of one side.").

Moreover, if class certification comes to be viewed as a way to preclude at trial strong defenses to weak individual claims, the sheer number of class actions will surely increase. Indeed, when class trials become "a roll of the dice" capable of "determin[ing] the outcome of an immense number of separate claims," *Thorogood v. Sears, Roebuck and Co.*, 624 F.3d 842, 849 (7th Cir. 2010), defendants face an increased risk of a catastrophic judgment—which in turn dramatically increases plaintiffs' settlement leverage.

Courts thus should strictly adhere to *Wal-Mart*'s and *Comcast*'s teachings to give defendants a fair chance to defend against class actions before certification, during trial, and after trial.

B. Improper Class Actions Levy a Substantial and Unjustified Burden on the National Economy

Beyond the unfairness they visit upon individual defendants, improperly certified class actions impose a drag on the entire economy. The high costs of class action litigation are, at least in part, "passed along to the public," *SEC v. Tambone*, 597 F.3d 436, 453 (1st Cir. 2010), most recognizably in the form of higher prices to consumers. In addition, defendants faced with the burdensome costs of class action litigation may be forced to reduce operations, curtail capital investment, and in extreme cases forego entering new markets and developing new products—all of which will curtail employment.

These risks infect not just businesses that are currently defending against class actions; it infects virtually *all* businesses. Indeed, the prospect of excessive liability may cause businesses to alter their operations in ways that deprive consumers of the benefits of lawful, procompetitive conduct. Even worse for consumers is that they may end up footing the bill for the economic toll that class actions take. As the Supreme Court has noted, the costs associated with class actions are paid by both consumers and "innocent investors for the benefit of speculators and their lawyers." *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 739 (1975) (quoting *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833, 867 (2d Cir. 1968)).

For all these reasons, it is essential to the strength of our Nation's economy—and to all who invest or are employed in it—that the requirements articulated in Rule 23, as interpreted in *Wal-Mart* and *Comcast,* be rigorously and faithfully applied.

CONCLUSION

The judgment of the district court should be reversed and the class decertified.

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Respectfully Submitted.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations set forth in Fed. R. App. P. 29(d) and 32(a)(7)(B)(i), because this brief contains 6433 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that, on December 13, 2013, I electronically filed the foregoing with the Clerk of Court for the U.S. Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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