IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

IN RE: URETHANE ANTITRUST LITIGATION	**Civil Action No. 04-MD-1616-JWL** **MDL No. 1616**
This Document Relates to All Polyether Polyol Cases	

CLASS PLAINTIFFS' OPPOSITION TO THE DOW CHEMICAL COMPANY'S MOTION FOR JUDGMENT AS A MATTER OF LAW

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INTRODUCTION

As the Court is aware, the recent four week trial focused on whether Dow and its competitors conspired to fix prices and, if so, the injury and damage to the Class. Now that the jury has answered those questions, its verdict is entitled to great deference. *Layne Christensen Co. v. Bro-Tech Corp.*, 871 F. Supp. 2d 1104, 1107 (D. Kan. 2012); *Johnson v. ABLT Trucking* Co., 412 F.3d 1138, 1144 (10th Cir. 2005) ("If there is any plausible theory that supports the verdict, the reviewing court must affirm the judgment."); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986) (Rule 50 judgment improper unless "there can be but one reasonable conclusion as to the verdict"); Fed. R. Civ. P. 50; Fed. R. Civ. P. 61.

Dow moves for judgment as a matter of law or a new trial. In addressing these motions, the Court must consider the record as a whole and disregard all evidence favorable to Dow that the jury was not required to believe. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000). Dow may not re-litigate the facts.

The jury's verdict must stand. The evidence easily supports the jury's findings on the three elements of Plaintiffs' price-fixing claim—(i) conspiracy, (ii) causation (also known as antitrust "injury" or "impact"), and (iii) damages—and Dow offers no plausible argument to the contrary. Indeed, the Court addressed many of the same arguments in its summary judgment ruling, holding that extensive evidence supports Plaintiffs' claim and that "each piece of evidence supports the other, such that a reasonable jury could find that an agreement existed from this testimony taken together." Dkt. No. 2637, at 12; *see also Reeves*, 530 U.S. at 150 (standard for post-trial motions "mirrors the standard" applied at summary judgment "such that the inquiry under each is the same") (internal quotation marks and citations omitted).

Numerous witnesses testified at trial about the existence of an industry conspiracy in which Dow participated—conduct the Supreme Court has described as the "supreme evil of

antitrust." *Verizon Commc'ns v. Law Office of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004); *see also United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 221 (1940) ("Any combination which tampers with price structures is engaged in an unlawful activity . . . . The Act places all such schemes beyond the pale and protects that vital part of our economy against any degree of interference.").

The jury heard evidence, for example, that at least two senior Dow urethane executives, David Fischer and Marco Levi, were central participants in the cartel. Mr. Fischer, Dow's global head of urethanes during the relevant period, engaged in a pattern of collusive conduct with competing executives, including 8-15 price-fixing conversations with his counterpart at Bayer, Larry Stern. These conversations were both secretive and specific, involving discussions of future pricing and exchanged assurances that the competitors would announce and support identical price increases. *See* Part V, *infra*. The jury heard testimony about price-fixing calls from gas station phone booths; price-fixing conversations being held outdoors to avoid listening devices; and a pattern of one-on-one meetings in odd locations and/or calls to home and cell phone numbers just before lockstep industry price increase announcements.

Mr. Fischer did not operate alone. Testimony established that his immediate subordinate at Dow, Mr. Levi, had an explicit price-fixing "agreement" with the competition. With Mr. Fischer's knowledge and support, Mr. Levi engaged in such conduct throughout the years 2000-2003. Like Mr. Fischer, Mr. Levi routinely met or communicated one-on-one with competing executives just before lockstep industry price announcements. Testimony established that others at Dow participated in the conspiracy as well, including Peter Davies (Dow's global head of urethane systems), Bob Wood (Mr. Fischer's boss), and even the former CEO, Mike Parker.

The jury heard testimony that the conspiracy involved senior executives with ultimate pricing authority for all products at issue at Dow and the other urethane manufacturers. The record includes overwhelming proof that these same individuals took great pains to conceal their collusive activity. *See* page 41, *infra*; *compare* Dkt. No. 2637, at 28-30 (summarizing the evidence of secrecy and the conspirators' overall *modus operandi*).

Notwithstanding this and other proof presented at trial, Dow devotes a large portion of its brief to re-litigating the parties' factual contentions on the question of "agreement." Dkt. No. 2809, at 27-44 (hereinafter "Dow Brief"). But the trial has resolved these issues and arguments. The Court properly instructed the jury on the law of conspiracy under the Sherman Act, and Dow has no basis for challenging the jury's verdict. *See* Part V, *infra*.

The jury also found that "Class Plaintiffs have proved by a preponderance of the evidence that the conspiracy caused Class Plaintiffs to pay more for urethane chemicals than they would have paid absent a conspiracy." Dkt. No. 2799, at 1 (Verdict Form, Question 2). Dow argues that the jury relied exclusively on Dr. McClave for this finding, whose analysis Dow says is flawed. Dow Brief, at 2. Dow is wrong on both points. As described below, in addition to Dr. McClave's testimony, other extensive evidence supports the jury's finding of widespread antitrust injury, including: (i) lockstep price announcements applicable to customers nationwide, (ii) a market structure ripe for collusion having widespread impact, (iii) collusion among senior executives with overall pricing authority for all products at issue, (iv) witness testimony concerning widespread impact, (v) documents showing widespread impact, and (vi) Dr. Solow's opinion that all or nearly all customers were injured. Dr. McClave's analysis also was admissible and reliable, as the Court properly held before trial. *See* Dkt. No. 2649. All of this proof supports the verdict on injury. *See* Part II, *infra*.

The jury awarded damages totaling $400,049,039, which Dow challenges as unsupported by the evidence. But consistent with the Court's instructions and the wide latitude afforded the jury in antitrust damage awards, the verdict represents a just and reasonable estimate and falls well within the range of the evidence presented at trial. *See* Part III, *infra*; *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264-65 (1946) ("[T]he jury may make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly. . . . 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."); *Bennett v. Longacre*, 774 F.2d 1024, 1028 (10th Cir. 1985) ("It is a fundamental legal principle that the determination of the quantum of damages in civil cases is a fact-finder's function. The trier of the facts, who has the first-handed opportunity to hear the testimony and to observe the demeanor of the witnesses, is clothed with a wide latitude and discretion in fixing damages, pursuant to the court's instructions, deemed proper to fairly compensate the injured party.").

Dow also contends Plaintiffs affirmatively pursued an "all or nothing" conspiracy claim, and that Plaintiffs could prevail only if the jury found the conspiracy included all producers, products, and years alleged. This too is wrong, both factually and legally. Factually, it is simply untrue that Plaintiffs pursued any such theory. Plaintiffs have always taken the position that the jury could find liability based on a subset of the disputed facts, *as Dow's own pre-trial briefing recognized*. *See* Dkt. No. 2696, at 3 (noting Plaintiffs' position that the "jury has the flexibility to determine that Class Plaintiffs have proved all of their allegations, or only some, and for any portion of the Class Period, and for any of the products at issue, and render a verdict accordingly") (internal quotations and emphasis omitted).

Legally, Dow cites no authority in support of its "all or nothing" argument, and the law is squarely to the contrary. *See* Part I, *infra*. The Court's instructions and the verdict form properly reflect the long-established rule that price-fixing liability can rest on a subset of the conspiracy facts alleged. The ABA model jury instructions, from which the Court's instructions were drawn and which Dow itself cited as authoritative in its pre-trial briefing, apply the same rule. The scope and duration of a conspiracy are questions of fact for the jury. Accordingly, the issue at trial was not whether Plaintiffs proved every conspiracy fact exactly as alleged, but whether the evidence as a whole established that Plaintiffs met their burden of proving a conspiracy. The parties litigated that question fully and fairly and the jury has rendered its verdict.

Dow further claims it was prejudiced unfairly by the general nature of the verdict form and the possibility that the jury could return a less than "all or nothing" result. For example, Dow now says it always believed Plaintiffs' claim was "all or nothing" and that Dow focused its defense almost exclusively on the "beginning and ending" periods of the alleged conspiracy period. The record belies this assertion. Dow is simply trying to manufacture *post hoc* arguments for appeal. *See* Part I.B, *infra*.

The key facts for which Dow ultimately was held liable have been known to all for years. And contrary to Dow's after-the-fact assertions, Dow sought to defend all of Plaintiffs' proof at trial. For example, Dow knew full well it needed to defend the testimony of Stephanie Barbour and Larry Stern, both of whom addressed a subset of the alleged conspiracy period: 2000-2003 in the case of Ms. Barbour and 2000-2002 in the case of Mr. Stern. Dow in fact attempted vigorously to defend against their testimony, for example calling Mr. Stern as its penultimate witness to emphasize his testimony about competition and "no agreement" in the industry during the 2000-2002 subset of the cartel period. Dow's post-trial claim that it focused its defense

almost exclusively on the beginning and ending dates of the conspiracy at the expense of rebutting the key witness testimony that was and always has been at the core of the case cannot be squared with the record. *See* Part I.B, *infra*.

The jury heard the evidence from both sides for all the years at issue, resolved the disputed facts, and rendered its verdict. That is what juries do and what trials are for. Dow cannot be heard to complain post-verdict that it somehow lacked fair notice about the central facts for which it might be and was in fact held liable. *Cf. United States v. Powell*, 469 U.S. 57, 67 (1984) ("with few exceptions . . . once the jury has heard the evidence and the case has been submitted, the litigants must accept the jury's collective judgment").

Dow's remaining arguments—seeking a new trial based on challenges to the Court's verdict form, jury instructions, evidentiary rulings and the constitutionality of joint and several liability—are equally unavailing. Dow faces a heavy burden on each count. *See* Fed. R. Civ. P. 61. In substance, the Court's instructions and verdict form comport in every respect with long-settled antitrust authority and are consistent with those used routinely in price-fixing cases. Where, as here, the Court's instructions as a whole correctly state the governing law, the Court enjoys wide discretion to tailor specific instructions and the verdict form in a reasonable way, which is what the Court did. *See* Part VI, *infra*. The Court enjoys equally wide discretion on evidentiary issues, and the evidentiary rulings about which Dow complains not only fell within the Court's discretion but were correct as a matter of law. *Id.* Finally, Dow's argument on joint and several liability is contrary to settled authority. *See* Part VI.D, *infra*.

For all of these reasons, Dow's motion should be denied.

STANDARD OF REVIEW

Judgment as a matter of law is "improper unless the proof is all one way or so overwhelmingly preponderant in favor of the movant as to permit no other rational conclusion." *Layne Christensen*, 871 F. Supp. 2d at 1107 (quoting *Crumpacker v. Kansas Dept. of Human Resources*, 474 F.3d 747, 751 (10th Cir. 2007)); *see also Anderson*, 477 U.S. at 250 (Rule 50 judgment improper unless "there can be but one reasonable conclusion as to the verdict"); Fed. R. Civ. P. 50.

In resolving Dow's post-trial motions, "the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence." *Reeves*, 530 U.S. at 150 (citations omitted). "Thus, although the court should review the record as a whole, it must disregard all evidence favorable to [Dow] that the jury is not required to believe." *Id.* at 151 (citation omitted).

The Rule 50 standard "mirrors the standard" applied by the Court in deciding summary judgment, *Anderson*, 477 U.S. at 250, "such that the inquiry under each is the same." *Reeves*, 530 U.S. at 150 (internal quotation marks and citation omitted). It follows that where the proof at trial mirrors the proof considered at summary judgment, the Court typically will reach the same conclusion.

"Motions for new trial are not regarded with favor and are only granted with great caution. In considering a motion for new trial, the Court must view the evidence in the light most favorable to the prevailing party, and should not grant the motion unless prejudicial error has occurred or substantial justice has not been done." *Law v. NCAA*, 185 F.R.D. 324, 326 (D. Kan. 1999) (citations omitted); *see also* Fed. R. Civ. P. 61.

ARGUMENT

I. DOW'S "ALL OR NOTHING" ARGUMENT IS MERITLESS

Dow asserts that, to prevail on liability in any respect, Plaintiffs were required to prove the entire five-year conspiracy including all products and all producers exactly as alleged. Dow further claims the jury found a conspiracy of "shorter duration," based on Dow's interpretation of the jury's question during deliberations. Dow is wrong on both issues. Dow cites not a single case in which a court has overturned a jury's verdict in remotely similar circumstances, and the law is to the contrary. Dow's insistence that the Court must look behind the verdict and speculate about the jury's reasoning is both unnecessary and foreclosed by longstanding authority.

A. The Court Properly Instructed the Jury that Plaintiffs Need Not Prove Every Alleged Fact to Prevail

Even if the jury found a shorter conspiracy than the five years Plaintiffs alleged, that affords no basis for disturbing the verdict. The scope and duration of a price-fixing conspiracy are "question[s] of fact for the jury." Dkt. No. 2637, at 19. Consistent with the jury's role as factfinder, the Court's instructions properly explained that liability could be imposed for some but not all conspiratorial "means or methods" alleged, provided Plaintiffs met their overall burden of establishing a conspiracy based on some subset of the conduct at issue:

> It is not necessary that the evidence show that all of the means or methods claimed by the Class Plaintiffs were agreed upon to carry out the alleged conspiracy; nor that all of the means or methods that were agreed upon were actually used or put into operation; nor that all the persons alleged to be members of the conspiracy actually were members. What the evidence must show is that the alleged conspiracy of two or more persons existed, that one or more of the means or methods alleged was used to carry out its purpose, and that Dow knowingly became a member of the conspiracy.

Dkt. No. 2797, at 17 (Instruction No. 14).

> If you find that the alleged conspiracy existed, however, it is no defense that the manufacturers actually competed in some respects with each other or that they did not eliminate all competition between them. Similarly, a price-fixing conspiracy is unlawful even if it did not extend to all products sold by the manufacturers or did not affect all of their customers or transactions.

Id. at 21 (Instruction No. 17).

The Court's instructions mirror the standard instructions used in civil price-fixing cases, which likewise vest the jury with the role of considering the evidence as a whole and determining whether the plaintiffs established a conspiracy involving any of the various participants, means or methods alleged.[1]

The Court's instructions also comport with long-settled antitrust authority, which holds that price-fixing liability can rest on a subset of the factual allegations.[2]

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[1] *See, e.g.*, ABA Section of Antitrust Law, *Model Jury Instructions in Civil Antitrust Cases*, B-4 (2005) (Sherman Act Section 1, Conspiracy, Instruction No. 1: not necessary to show that all alleged means, methods or participants were involved; rather, evidence must show that "the alleged conspiracy of two or more persons existed" and that "one or *more* of the means or methods alleged was used"); *id.* at B-28 ("a price-fixing agreement is unlawful even if it did not extend to all products sold by defendants or did not affect all of their customers"); *In re Univ. Serv. Fund Tel. Billing Practices Litig.*, No. 02-MD-1468-JWL (D. Kan. Nov. 19, 2008), Jury Instruction Nos. 15 and 19 (same instructions) (Dkt. No. 2689-3). Notably, Dow itself cited both the Court's *USF* instructions and the ABA model instructions as authoritative on the very first page of its jury instruction brief. Dkt. No. 2690-3. *See also* Dkt. No. 2689 (Plaintiffs' brief collecting authority supporting proposed jury instructions, including *In re Vitamins Antitrust Litig.*, MDL No. 1285 (D.D.C. June 11, 2003), at Tr. 1351-52, 1358-59 (same instructions) (available at Dkt. No. 2689-4); *In re TFT-LCD (Flat Panel) Antitrust Litig.*, MDL No. 1827 (N.D. Cal. June 28, 2012), at 11 (same instruction on "means or methods") (available at Dkt. No. 2689-5)); *In re Corrugated Container Antitrust Litig.*, 756 F.2d 411, 416-17 (5th Cir. 1985) (approving similar instructions, including "that one or more of the means or methods alleged" could establish conspiracy where "two or more corrugated manufacturers" were involved).

[2] *See, e.g.*, *Socony-Vacuum*, 310 U.S. at 250 ("where an indictment charges various means by which the conspiracy is effectuated, not all of them need be proved"); *United States v. Suntar Roofing, Inc.*, 897 F.2d 469, 476 (10th Cir. 1990) (not necessary under Sherman Act to prove that all alleged conspirators participated in price-fixing scheme; "convictions will stand if there is sufficient evidence in the record from which the jury could have concluded that a

Having correctly instructed the jury on the law, the Court tailored the Verdict Form to the substantive elements of Plaintiffs' claim: (1) conspiracy, (2) impact, (3) fraudulent concealment, and (4) damages. *See, e.g., United States v. Commercial Mech. Contractors Inc.*, 707 F.2d 1124, 1128-29 (10th Cir. 1982) (court enjoys wide discretion on verdict form); 9B Charles Alan Wright, et al., Federal Practice and Procedure: Civil 3d § 2505 (2012) ("Whether a special or a general verdict is to be returned by the jury rests in the sound discretion of the trial court and, as numerous courts have held, as evidenced by the many cases cited in the note below, the exercise of that discretion by the district court is not likely to be overturned on appeal."); *id.* § 2511 (same). As with the jury instructions, the Court's Verdict Form was consistent with both

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conspiracy existed between the appellants and *any* of the [alleged] conspirators") (emphasis added); *United States v. Mobile Materials, Inc.*, 881 F.2d 866, 874 (10th Cir. 1989) (rejecting defendants' argument for all or nothing instruction in antitrust conspiracy case because "the government may prove a narrower scheme than alleged"); *id.* at 873 ("The government need not show that every attempt to rig bids was successful or that every bid on a project was the product of collusion."); *Aspen Highlands Skiing Corp. v. Aspen Skiing Co.*, 738 F.2d 1509, 1522 n.18 (10th Cir. 1984) (rejecting argument that plaintiff in monopolization case was required to establish all factual theories alleged to prevail), *aff'd*, 472 U.S. 585 (1985); *Blankenship v. Herzfeld*, 661 F.2d 840, 846 (10th Cir. 1981) (holding that party could be liable for violating Section 1 even if one of the alleged participants was found not to have participated in the conspiracy); *Cackling Acres, Inc. v. Olson Farms, Inc.*, 541 F.2d 242, 247 (10th Cir. 1976) (affirming antitrust conspiracy verdict where jury found damages for some customers but not others); *Union Carbide & Carbon Corp. v. Nisley*, 300 F.2d 561, 587 & n.12 (10th Cir. 1961) (affirming antitrust verdict in part where verdict reflected damages for a period shorter than alleged); *In re TFT-LCD (Flat Panel) Antitrust Litig.*, MDL No. 1827, 2012 WL 4858836, at *4 (N.D. Cal. Oct. 11, 2012) (stating that jury in direct purchaser class action "was not instructed to and did not make any findings regarding the identity of Toshiba's alleged co-conspirators or the duration of the conspiracy"); *In re Scrap Metal Antitrust Litig.*, No. 1:02 CV 0844, 2006 WL 2850453, at *3 (N.D. Ohio Sept. 30, 2006) (denying defendants' motion for judgment as a matter of law in case in which some conspirators were found liable and others were not); *United States v. Andreas*, 23 F. Supp. 2d 863, 867 (N.D. Ill. 1998) ("Assuming *arguendo* that the evidence produced at trial established that the lysine conspiracy existed for less time than alleged in the indictment, neither of the defendants are entitled to acquittal so long as the illegal conduct proven by the government is a subset of criminal activity consistent with the offense charged in the indictment.").

established antitrust authority and those used in similar matters.[3]

The jury followed the Court's instructions and rendered its verdict in a manner contemplated by the Verdict Form itself, finding that Plaintiffs had established (1) "by a preponderance of the evidence that Dow participated in a conspiracy to fix, raise or stabilize prices for urethane chemicals"; (2) injury to the Class; (3) no overcharge damages prior to November 24, 2000; and (5) total damages of $400,049,039. Dkt. No. 2799. The jury is presumed to have followed the Court's instructions in reaching this result. *See, e.g., North Am. Specialty Ins. Co. v. Britt Paulk Ins. Agency, Inc.*, 579 F.3d 1106, 1114 (10th Cir. 2009); *Youren v. Tintic Sch. Dist.*, 343 F.3d 1296, 1306 (10th Cir. 2003).

In these circumstances—where the Court's instructions and verdict form were consistent with established law and the jury's verdict is supported by the evidence presented at trial—it is not permissible to look behind the verdict and try to ascertain how the jury may have reached its conclusion. *Midwest Underground Storage, Inc. v. Porter*, 717 F.2d 493, 501 (10th Cir. 1983) ("It is well settled that a verdict will not be upset on the basis of speculation as to the manner in which the jurors arrived at it."); *see generally Yeager v. United States*, 557 U.S. 110, 122 (2009) (courts should avoid "speculation into what transpired in the jury room. Courts properly avoid such explorations into the jury's sovereign space, … and for good reason. The jury's deliberations are secret and not subject to outside examination.") (citations omitted).

Accordingly, there is no need for the Court to speculate about the meaning of the jury's

[3] *See* Dkt. No. 2637, at 4 (elements of price-fixing) and 21 (fraudulent concealment); *see also World of Sleep, Inc. v. La-Z-Boy Chair Co.*, 756 F.2d 1467, 1478 (10th Cir. 1985) (antitrust plaintiff must prove "violation, the fact of damage or injury, and measurable damages"); *In re Scrap Metal Antitrust Litig.*, 527 F.3d 571, 532 (6th Cir. 2008) (same); Dkt. No. 2695 (Plaintiffs' brief collecting authority supporting proposed verdict form, including Dkt. No. 2695-4, *In re Vitamins Antitrust Litig.*, Special Verdict (D.D.C. June 13, 2003) and Dkt. No. 2695-5, *In re: TFT-LCD (Flat Panel) Antitrust Litig.*, Special Verdict (N.D. Cal. July 3, 2012)).

note, as Dow suggests. *See United States v. Espinoza*, 338 F.3d 1140, 1148-49 (10th Cir. 2003) ("[W]e also refuse to consider the jury's note to the trial judge as evidence of how the jury arrived at its verdict on Count 1. The jury speaks through its verdict."); *United States v. Lopez*, 252 Fed. App'x. 908, 912 (10th Cir. 2007).[4] Whatever the jury's reasoning may have been concerning the year 1999, the evidence at all events supports the ultimate verdict, through which the jury definitively speaks. *Johnson*, 412 F.3d at 1142 ("Simply put, a general verdict permits the jury to decide who wins.") (internal quotation marks and citation omitted).[5]

For all of these reasons, Dow's "all or nothing" argument is incorrect. It was for the jury, consistent with the Court's instructions, to determine whether Dow participated in a conspiracy and, if so, the extent of injury and damage. That is what the Verdict Form contemplated and is precisely what the jury did. Dow's speculation that the jury may have found a narrower conspiracy based on a subset of the factual allegations does not operate to absolve Dow of liability. "All or nothing" is not the law. Instead, the verdict stands if sufficient evidence supports the jury's determination, which it does.

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[4] The cases cited by Dow do not support its argument. The unpublished opinion in *Audiotext Commc'ns Network v. U.S. Telecom, Inc.*, 156 F.3d 124 (10th Cir. 1998) involved a note from the jury *after* it returned a verdict. *United States v. Ailsworth*, 138 F.3d 843 (10th Cir. 1998) involved a notation on the verdict form itself. Neither case conflicts with the Tenth Circuit's subsequent holding in *Espinoza* that courts should not use jury notes or questions during deliberations to speculate about the manner in which the jury reached its verdict.

[5] The evidence supports a finding of conspiracy not just for 2000-2003, but also for 1999. *See, e.g.*, page 39-40, *infra* (evidence from Swan restaurant and Greenbrier resort indicating that Mr. Wood, Dow's top urethanes executive in 1999, was a conspirator whose denials about the Swan lacked credibility); Exhibit 1, Trial Transcript Excerpts ("Trial Tr."), at 306:14.1-307:22; 309:7.1-16.1; 332:22.1-333:5.1; 333:8.1-334:8 (testimony from Mr. Stern that his predecessor at Bayer, Mr. Kogelnik, was involved in price-fixing); *id.* at 1628:1-1632:25, 1634:17-1639:21 & Trial Ex. 369 (Mr. Kogelnik of Bayer met Mr. Bernstein of BASF in August 1999, followed by phone message stating "Sept Increase—where, who, why"). *Compare* Dkt. No. 2637, at 18-19 ("There is also at least some specific evidence that this conspiracy existed as early as 1999, as cited by plaintiffs.").

B. Dow Suffered No Unfair Prejudice

Dow's assertion that it was prejudiced unfairly by the Verdict Form, or the possibility of a less than "all or nothing" verdict, is equally misplaced. First, Dow has been on fair notice of the key facts at issue for years. *See, e.g.*, *United States v. Caldwell*, 589 F.3d 1323, 1333 (10th Cir. 2009) (conspiracy defendants can be convicted of "narrower scheme" because the general charge "provides sufficient notice to a defendant that she must defend against the smaller conspiracies"). Second, the argument that Dow would have tried its case differently had it known the operative legal standard is disingenuous and inconsistent with the record.

In terms of fair notice, Dow has long known the factual predicate of Plaintiffs' claim. Mr. Stern and Ms. Barbour testified in 2009 and 2010, respectively, and their testimony, as all are aware, focused on the 2000-2003 time period. Furthermore, the Pretrial Order (on which Dow otherwise relies extensively as the definitive statement of the case) details precisely the core factual allegations at issue, including the conspiracy evidence supporting the jury's ultimate verdict. Dkt. No. 2374, at 5-10. There was no surprise about the facts Plaintiffs introduced at trial. The law is clear, moreover, that alleging a longer conspiracy affords fair notice that liability can be imposed for a shorter one.[6]

Dow also wrongly asserts that Plaintiffs elected affirmatively to pursue an "all or nothing" claim. In fact, as Dow's own briefing before trial recognized, Plaintiffs have correctly

[6] *See, e.g.*, *Ailsworth*, 138 F.3d at 848-50 (affirming conviction for conspiracy of shorter duration than alleged); *United States v. Coughlin*, 610 F.3d 89, 105 (D.C. Cir. 2010) ("Nor is it unusual for the circuits to affirm a conspiracy conviction where the conspiracy is initially charged to cover a specified period, but subsequently proved only with respect to a portion of that period.") (collecting cases); *United States v. Allmendinger*, 706 F.3d 330, 339-40 (4th Cir. 2013) (affirming conviction for shorter duration); *United States v. Bowers*, 739 F.2d 1050, 1053 (6th Cir. 1984) (affirming conviction for conspiracy "with fewer people, of shorter duration and in a smaller area than charged"); *cf. United States v. Miller*, 471 U.S. 130, 134 (1985) ("Competent defense counsel certainly should have been on notice that that offense was charged and would need to be defended against.").

stated all along that it was the jury's role to consider the evidence as a whole and determine whether "Plaintiffs have proved all of their allegations, or only some, and for any portion of the Class Period, and for any of the products at issue, and render a verdict accordingly." Dkt. No. 2696, at 3 (internal quotations and emphasis omitted).

The disingenuous nature of Dow's "all or nothing" argument is further underscored by its other pre-trial submissions. At summary judgment, for example, Dow's position was that the evidence was insufficient to support *aspects* of Plaintiffs' claim, Dkt. No. 2403, but Dow never suggested that judgment on a subset of Plaintiffs' theory would resolve the entire case. Similarly, just before trial, Dow relied heavily on the ABA model jury instructions, which as noted state that liability can rest on a subset of the factual allegations. *See* note 1, *supra*. Even during trial, Dow moved for judgment on sales for the year 1999, but said not a word about such a judgment ending the case. Dkt. No. 2785-1, at 22-23. All of these facts demonstrate that Dow either knew or should have known that all or nothing was not the law; that Plaintiffs were not pursuing an all or nothing claim; and that Dow's post-trial assertions, to the effect that its defense was always predicated on an all or nothing theory, are inconsistent with both its own prior positions and the record throughout the litigation.

Dow is simply attempting to manufacture *post hoc* arguments for appeal. Dow now asserts that its entire defense focused on the "beginning and ending points" of the conspiracy in the belief that doing so would defeat Plaintiffs' entire claim. But Dow did not so limit its case at trial. As it did throughout years of litigation, Dow contested every point. It sought to impeach, discredit or explain the incriminating evidence. It sought to convince the jury that it was competing and not conspiring *throughout* the time period. Dow's trial witnesses focused extensively on the years throughout 1999-2003. Trial Tr. at 3207-3219; 3240-3309 (Wood);

3476-3551 (Beitel). Dow's experts focused on those years as well. *Id.* at 4446-4514 (Dr. Elzinga); 4856-4857 (Dr. Ugone). And Dow's penultimate witness was Mr. Stern, called by Dow to testify about fierce competition and "no agreement" *during the years 2000-2002*. *Id.* at 5031-5088. The *post hoc* suggestion that Dow focused entirely on the beginning and ending of the conspiracy cannot be squared with what actually happened at trial.

II. SUFFICIENCY OF THE EVIDENCE – PROOF OF IMPACT

Dow raises several points relating to the element of causation, also known as antitrust "injury" or "impact." Dow Brief, at 15-26. Dow's arguments must be evaluated against the backdrop of the "traditional rule excusing antitrust plaintiffs from an unduly rigorous standard of proving antitrust injury." *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 565 (1981). Because antitrust conspiracies necessarily interfere with the market and often make "but for" market conditions difficult to establish with certainty, the "Court has repeatedly held that in the absence of more precise proof, the factfinder may 'conclude as a matter of just and reasonable inference from the proof of defendants' wrongful acts and their tendency to injure plaintiffs' business, and from the evidence of [prices and other market data], not shown to be attributable to other causes, that defendants' wrongful acts had caused damage to the plaintiffs.'" *Id.* at 565-66 (quoting *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123-24 (1969) (citations omitted)). "Any other rule would enable the wrongdoer to profit by his wrongdoing at the expense of his victim." *Id.* at 566 (quoting *Bigelow*, 327 U.S. at 264).

The standard, then, is whether the proof presented at trial would allow the jury to *reasonably infer* widespread injury caused by the cartel. *See Law v. NCAA*, 5 F. Supp. 2d 921, 927 (D. Kan. 1998) (collecting cases); *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.").

A. Evidence Supports the Verdict

Dow's arguments start with the assertion that Dr. McClave's analysis represents Plaintiffs' *only* material proof of injury, Dow Brief, at 2 and 22, but that is factually incorrect. Plaintiffs introduced six categories of evidence beyond Dr. McClave's testimony from which the jury could permissibly find class-wide injury.

1. Lockstep Pricing

Plaintiffs introduced evidence of coordinated lockstep pricing, proof of which allows a reasonable jury to infer class-wide impact. *See* Dkt. No. 708, at 20; *In re Ethylene Propylene Diene Monomer (EPDM) Antitrust Litig.*, 256 F.R.D. 82, 95 (D. Conn. 2009).

The fact of lockstep industry pricing is undisputed. *See* Trial Ex. 2112 (summary chart of price announcements); Trial Tr. at 264:18-23 (Dow opening statement); 4441:8-4442:6 (Dr. Elzinga). Furthermore, the jury heard evidence that the industry's lockstep price announcements not only were coordinated by the conspirators, but (i) applied across-the-board to all or nearly all customers and (ii) formed the baseline for actual price negotiations. Trial Tr. at 3315:10-3318:5 (Wood); 3495:5-3496:17 (Beitel). As the Court has explained: "This evidence of a standardized pricing structure, which (in light of the alleged conspiracy) presumably establishes an artificially inflated baseline from which any individualized negotiations would proceed, provides generalized proof of class-wide impact." Dkt. No. 708, at 20 (collecting authority).

2. Market Structure

The second category of evidence concerned the structure of the market. There is no dispute that the industry was structurally ripe for a successful price-fixing conspiracy, given the small number of producers, high barriers to entry, fungible commodity products, and other structural factors. Trial Tr. at 2037:18-2048:21; 2070:1-11 (Dr. Solow); 4442:5-6; 4552:9-16; 4599:15-4601:10; 4615:16-22 (Dr. Elzinga). This evidence shows not only motive to conspire

but that any conspiracy likely would have been successful. *See, e.g., id.* at 2037:7-17 (Dr. Solow).

On these facts, a reasonable jury is entitled to conclude that price-fixing, if it occurred, would have a substantial impact on the price of the commodity chemicals at issue, causing widespread injury to the Class of direct purchasers. *See* Dkt. No. 708, at 19 (crediting expert's market structure analysis on element of class-wide impact); *In re EPDM*, 256 F.R.D. at 95 (same); *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 287 F.R.D. 1, 44 (D.D.C. 2012); *In re Linerboard Antitrust Litig.*, 305 F.3d 145, 153-55 (3d Cir. 2002).

3. Conspirators Were Senior Executives With Pricing Authority

Evidence at trial established that the conspirators were senior executives with pricing authority for all basic urethane chemical products at issue. *See* note 15, *infra*. This supports a finding that the conspiracy would have caused significant impact in the marketplace. *See In re Publication Paper Antitrust Litig.*, 690 F.3d 51, 67-68 (2d Cir. 2012) ("the causal link is presumed to be particularly strong when, as alleged here, the agreement is between executives at rival companies, each of whom has final pricing authority") (citations omitted).

4. Trial Testimony

Multiple witnesses testified that the price announcements at issue had widespread impact. For example, both Larry Stern and Stephanie Barbour testified that certain collusive price increases were effective. Trial Tr. at 317:4-318:4 (Mr. Stern's testimony that price increase coordinated at Singapore trade association meeting stuck in the market); 688:10-689:25 (Ms. Barbour's testimony that Mr. Levi's "agreement" with the competition allowed him to "successfully . . . get his prices up"). Dow's own witness, Rick Beitel, testified that approximately 40-50% of the lockstep announcements were fully effective during the alleged

conspiracy period. *Id.* at 3549:15-20. Dr. Elzinga likewise recognized that many of the increases were at least partially effective—that prices went up even if not by the full amount announced. *Id*. at 4634:3-10; 4649:7-4651:9. Bob Wood offered similar testimony that price increases were successful at certain time periods. *Id.* at 3279:4-15.

Other witnesses, including Jean Pierre Dhanis of BASF, testified that certain price increases were announced not to raise prices but rather to keep prices from falling, *id.* at 1368:17-24, and therefore were effective to the extent they did so. Dr. Elzinga likewise testified that cartels can be effective insofar as they keep prices from falling as much as they would absent collusion. *Id.* at 4605:4-17; 4622:15-24.

Considering this testimony in context—for example, in conjunction with the proof that absent collusion market forces would have put downward pressure on prices during the relevant period, *see id.* at 2047:4-2049:19 (Dr. Solow)—the jury was entitled to conclude that the conspiracy had widespread impact, both by raising prices (in the case of certain collusive price announcements) and in stabilizing prices generally over the conspiracy period.

5. Documents

Various trial exhibits established that collusive price increases achieved widespread success. For example, a series of lockstep increases imposed by the industry in 2002—a year at the heart of the conspiracy according to witness testimony—led to average price increases exceeding 10% for all urethane chemicals, exceeding 25% for TDI, and improved margins for producers. Trial Ex. 77 (Stern resume), Trial Ex. 956 (BASF report). Similarly, one Dow document used seven exclamation points to emphasize the success of a price increase. Trial Ex. 1666, at 17 ("Pricing . . . We announced 10 cts on Polyols March 1, We announced 15 cts on TDI March 1, 2002 **Its Working!!!!!!!**") (emphasis in original).

Accordingly, the documentary evidence supports the jury's verdict on the question of causation and impact. *See* Dkt. No. 708, at 22 (crediting Defendants' internal documents as relevant proof of generalized impact); *In re Rail Freight*, 287 F.R.D at 37, 44-45 (class-wide injury shown in part by "defendants' own documents").

6. Dr. Solow's Opinion

Based on his analysis of the structure, conduct and performance of the industry, Dr. Solow testified that if:

> there was a successful price fixing cartel, then the consequences of that cartel were to raise the price to consumers that Dow and the other manufacturers were able to sell . . . the urethane chemicals at a price above a competitive level. And so nearly all of the members of the class were injured because they had to pay these higher prices. Trial Tr. at 2036:14-23.
>
> . . . . And my conclusion is that the prices, the behavior of prices indicates that the firms were in fact able to maintain their prices above a competitive level during this time. *Id.* at 2142:3-6.

In addition, Dr. Solow elaborated on the causal connection between the collusive communications at issue, lockstep price announcements, and impact on the price of urethane chemicals. *See, e.g*, *id.* at 2084:16-18 ("What's important to me is the communication and then the lockstep price announcements – pricing increase announcements that would follow."), and *id.* at 2125:6-10 ("My conclusion is that the 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").

The jury was entitled to credit Dr. Solow's analysis and opinions on the question of widespread impact.

7. Dr. McClave's Opinion

Finally, the jury was entitled to credit Dr. McClave. Dr. McClave is a distinguished and

experienced statistician whose textbooks on statistics and applied econometrics are used to this day in hundreds of colleges and universities. Trial Tr. at 2818:14-2820:11. For decades, Dr. McClave has worked for plaintiffs, defendants and government agencies to evaluate damages using multiple regression analysis in complex antitrust litigation, including dozens of price-fixing cases. *Id.* at 2821:9-2825:1; Trial Ex. 2075 (McClave CV). Dr. McClave was qualified at trial as an expert in statistics and econometrics. Trial Tr. at 2826:13-17.

As Dr. McClave testified, he used standard multiple regression analysis to determine whether and by how much prices were inflated by the alleged cartel. *Id.* at 2829:12-2832:21. Dr. McClave explained the "forecasting" methodology he used to (i) model industry pricing for the competitive 2004-2008 "benchmark" period and (ii) apply that model to the 1999-2003 conspiracy period to estimate the class-wide overcharge. *Id.* at 2830:1-4 ("We used standard statistical and econometric tools that I've used all my life and helped develop actually some of them but, yes, standard statistical tools is what we used.").

Based on this analysis and his overall experience as an antitrust econometrician, Dr. McClave offered the following conclusions at trial:

> I concluded that, in fact, prices were elevated above competitive levels during the period from 1999 to 2003. *Id.* at 2831:6-8.
>
> Secondly, after having concluded that they were elevated, I added up the damages. *Id.* at 2831:18-19.
>
> [And] given the persistence and size of the estimate, 1.125 billion, I concluded that nearly all class members had been impacted or overcharged by the—during that period. *Id.* at 2832:18-21.

Dr. McClave also testified that he conducted this analysis at the "customer level," meaning he estimated overcharges on a customer-specific basis, which were then aggregated to estimate the Class-wide overcharge. *Id.* at 2894:21-2895:9. This method of analysis, which

demonstrated systematic overcharges for individual customers, informed Dr. McClave's opinion that injury was widespread among Class members.[7]

Addressing the specific question of causation, Dr. McClave testified that multiple regression analysis is used to (i) control for relevant market variables, (ii) estimate prices absent collusion, and (iii) allow for a reasonable inference of causation. *Id.* at 2864:24-2868:25; 3145:4-9 (econometric analysis allows "an inference about the cause . . . . It can rule out, and I've ruled out all the competitive factors I can—I can think of, and that's why I answered your question that it's consistent with the cause being a cartel"); *id.* at 3160:3-24 (same). That is precisely why multiple regression models are commonly accepted as relevant and reliable proof of injury in price-fixing cases.[8]

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[7] *See* Trial Tr. at 2895:22-2897:5 ("Q. Did your models show general and systematic overcharges across all customers? A. All other—nearly all customers, yes. Q. Your model actually differentiates among customers, does it not? A. It does. Q. Did your model show general and systematic overcharges across all large customers? A. Yes. Q. All small customers? A. Yes. Q. Did your model show general and systematic overcharges across—geographically across the nation from California to Connecticut? A. It did. Q. Did your models show general and systematic overcharges no matter what kind of transportation or container the product was sold? A. Container was actually a variable in the model and the answer's yes. Q. Did your model show general and systematic overcharges whether the transaction was a large transaction or a small transaction? A. Yes. Q. If I asked you the same questions for the TDI model, I'm going to try to shorten it up here at 4:45 in the afternoon, would your answers be the same? A. Same answers, yes. Q. And same question for the polyols model, if I asked you those same questions for the polyols model, would your answer be the same? A. It would, yes.").

[8] *See also In re EPDM*, 256 F.R.D. at 95 ("In an antitrust suit, plaintiffs will generally use multiple regression analysis to demonstrate that . . . class members paid a higher price than the basic economic principles of supply and demand would otherwise dictate, thus demonstrating collusive behavior was at work."); *In re Rail Freight*, 287 F.R.D. at 65-66 (explaining causation and accepting regression modeling as common proof of impact and damages); *Linerboard*, 305 F.3d at 153-54 (identifying multiple regression analysis as a method of proving impact); Daniel L. Rubinfeld, "*Reference Guide on Multiple Regression*," *Federal Judicial Center: Reference Manual on Scientific Evidence*, at 348 n.90 (3d ed. 2011) ("in a price-fixing antitrust case, the expert can ask what the price of a product would have been had a certain event associated with

Dr. McClave's analysis is thus fully consistent with the basic law of Sherman Act causation, *see Bigelow*, 327 U.S. at 262-64, and supports the jury's verdict on the element of class-wide injury. *See Law v. NCAA*, 5 F. Supp. 2d at 927 ("If there is sufficient evidence in the record to support an inference of causation between the antitrust violation and the injury suffered, the ultimate conclusion as to what the evidence proves is for the jury . . . . [P]laintiffs' burden in proving fact of injury may be discharged by reasonable inferences from circumstantial evidence . . . . As a practical matter, in a class action context, proof of an effective conspiracy to fix prices will include facts which tend to establish—perhaps circumstantially—that each class member was injured.") (collecting cases).

B. The Jury Properly Imposed Liability for Injury Caused by the Conspiracy

Dow contends that Plaintiffs were required to prove not just an "all or nothing" conspiracy but also impact for the entire 1999-2003 period. According to Dow, the jury's finding that Plaintiffs had not proved, by a preponderance, overcharges in 1999 and early 2000 is "fatal" to Plaintiffs' claim as a whole and "to McClave's model." Dow Brief, at 13, 16. Dow is wrong on both counts.

There is no "all or nothing" requirement under the federal antitrust laws. *See* Part I, *supra* (collecting cases). Accordingly, Plaintiffs were not required to prove that the conspiracy was successful in all respects and at all times to establish injury. *See, e.g., Blankenship*, 661 F.2d at 846; *Cackling*, 541 F.2d at 247; *Union Carbide*, 300 F.2d at 587 & n.12; *Scrap Metal*, 2006 WL 2850453, at *3; *see also* Dkt. No. 2979 (Instruction No. 17). To the contrary, antitrust injury is established if direct purchasers were injured by the unlawful conspiracy in any way at

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the price-fixing agreement not occurred. If prices would have been lower, the evidence suggests impact. If the expert can predict how much lower they would have been, the data can help the expert develop a numerical estimate of the amount of damages").

any time. *See* 15 U.S.C. § 15(a) (imposing liability for any injury caused "by reason of *anything* forbidden in the antitrust laws") (emphasis added). The fact of injury remains even if the amount of overcharge established at trial is less than the amount alleged. As the Court has explained, "the issue in the common impact analysis is *the fact*, not the amount, of injury." *See* Dkt. No. 708, at 19 (emphasis in original) (citation omitted). Accordingly, Dow's argument that the jury found the cartel more effective at times and less so at others does not somehow immunize the conspirators from liability for the injury they caused. *See* 15 U.S.C. § 15.

Nor does the verdict invalidate Dr. McClave's analysis. The jury's determination takes into account extensive conflicting proof that fundamentally was the jury's job to weigh. For example, Dow introduced evidence and argument that in Dow's view showed that costs were rising while prices were generally flat during the early years of the conspiracy (at 5282:8-5283:13); that various individual price increases were ineffective over the course of the conspiracy period (at 5280:10-5281:17); that competition was fierce, at times more so than others (at 5263:24-5264:9); and that according to Dow's expert, Dr. Ugone, there was no basis for finding overcharge in the early years of the conspiracy (at 4911:8-4913:18). A reasonable jury could have balanced this evidence against not only Dr. McClave's testimony but also Plaintiffs' extensive non-econometric proof of conspiracy and impact and drawn its own reasonable conclusions about when the conspiracy resulted in overcharges and when it did not.

Put differently, the jury, following the Court's instructions to consider and weigh the evidence as a whole, *see* Dkt. No. 2797 (Instructions 14, 17, 25, 27, 28, 30), may well have considered Dr. McClave's model reliable for the entire 1999-2003 period. But balanced against the other proof of conspiracy, impact and damages, the scales tipped Plaintiffs' way after November 24, 2000, and Dow's way for the preceding period. Such a conclusion in no way

implies that the jury discounted Dr. McClave's model or deemed it unreliable, only that other evidence was relevant as well. Indeed, the verdict demonstrates that the jury *credited* Dr. McClave's analysis by awarding more than $400 million to the Class. The jury was entitled to weigh all the evidence as a whole, including but not limited to the testimony from the parties' respective experts, and render its verdict accordingly. *See also* Part III, *infra* (jury has wide discretion to award less than full damages).

C. Common Proof Established Injury for Individual Class Members

To the extent Dow asserts that the *only* relevant proof of injury is individualized and customer-specific proof for "each and every class member" (Dow Brief, at 15 and 46), the authority collected above holds squarely to the contrary. *See* Part II.A, *supra*. Indeed, if Dow's suggestion were correct, there would be no price-fixing class actions at all. Yet price-fixing claims are recognized as paradigm cases for class resolution, precisely because common (as opposed to customer-specific) proof can be used to establish the claims on a class-wide basis. *See, e.g., Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 625 (1997) ("Predominance is a test readily met in certain cases alleging . . . violations of the antitrust laws."); *Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251, 266 (1972) ("class actions . . . are definitely preferable in the antitrust area"); *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 815 (7th Cir. 2012) ("[I]n antitrust cases, Rule 23, when applied rigorously, will frequently lead to certification."); Dkt. No. 708, at 14 ("it is widely recognized that the very nature of horizontal price-fixing claims are particularly well suited to class-wide treatment"). [9]

[9] At the class certification stage, the cases are legion holding that price-fixing claims, including the element of antitrust injury, can be established using the types of common proof the jury considered here. *See, e.g., In re Rail Freight Antitrust Litig.*, 287 F.R.D. 1 (D.D.C. 2012); *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 267 F.R.D. 291 (N.D. Cal. 2010); *In re EPDM Antitrust Litig.*, 256 F.R.D. 82 (D. Conn. 2009); *In re Scrap Metal Antitrust Litig.*, 527 F.3d 517

The correct question is whether a reasonable jury can infer from the common categories of proof Plaintiffs actually introduced at trial that individual Class members were injured. It is black-letter law, as this Court found in certifying the Class in the first instance, that the categories of common, generalized proof introduced by Plaintiffs in their case-in-chief are those that would allow a reasonable jury to find *individual* injury for named and absent class members alike, establishing causation for the Class as a whole.[10]

D. Extrapolated Damage Customers Were Injured

The same reasoning applies to class members for which damages were "extrapolated." Dow says no injury was shown for this subset of the Class (Dow Brief, at 24), but Dow is mistaken. First, as explained above, Plaintiffs did not rely *solely* on Dr. McClave's analysis to establish antitrust injury for extrapolated damage customers. Instead, several different categories of class-wide proof support the jury's finding of widespread injury, including for customers with "extrapolated" damages. *See* Part II.A, *supra*.

(6th Cir. 2008); *In re Pressure Sensitive Labelstock Antitrust Litig.*, MDL No. 1556, 2007 WL 4150666 (M.D. Pa. Nov. 19, 2007); *In re Polyester Staple Antitrust Litig.*, MDL No. 03CV1516, 2007 WL 2111380 (W.D.N.C. July 19, 2007); *In re Foundry Resins Antitrust Litig.*, 242 F.R.D. 393 (S.D. Ohio 2007); *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, No. M02-1486, 2006 WL 1530166 (N.D. Cal. June 5, 2006); *In re Bulk (Extruded) Graphite Prods. Antitrust Litig.*, No. 02-6030, 2006 WL 891362 (D.N.J. Apr. 4, 2006); *In re Carbon Black Antitrust Litig.*, No. 03-10191-DPW, 2005 WL 102966 (D. Mass. Jan. 18, 2005); *In re Currency Conversion Fee Antitrust Litig.*, 224 F.R.D. 555 (S.D.N.Y. 2004); *In re Universal Serv. Fund Tel. Billing Practices Litig.*, 219 F.R.D. 661 (D. Kan. 2004).

[10] A more technical argument raised by Dow—that Plaintiffs presented no evidence of "purchases" and hence injury for particular Class members, *see* Dow Brief, at 16 n.6, 22—is wrong. Dr. McClave testified at trial that his models incorporated *all* available individual class member transactions and purchases over the relevant period, and that based on his analysis, nearly all individual Class members were injured. Trial Tr. at 2873:21-2876:23 (explaining in detail the extent to which Dr. McClave's analysis incorporated "information about every single sale of the relevant product to every single customer during the relevant period of time"). Dr. McClave's testimony affords ample basis for the jury to find that all or nearly all Class members purchased urethane chemicals and were injured by collusive overcharges. *See* note 7, *supra* (specific testimony on widespread individual injury).

Second, Dow's extrapolation argument reads like a *Daubert* issue Dow wishes it had raised but did not. Extrapolation was not so much as mentioned in Dow's lengthy *Daubert* papers. Accordingly, Plaintiffs were entitled to introduce, and the jury was entitled to rely upon, Dr. McClave's opinions that extrapolated damage customers were overcharged. That Dow now disagrees is irrelevant. The issue has been litigated. Plaintiffs introduced their evidence on injury to extrapolated damage customers; Dow introduced its responsive evidence and arguments; and the jury has resolved the question.

Third, extrapolation is legitimate and reliable. As Dr. McClave explained at trial, various transactions were excluded from the models based on the inherent data limitations in complex, multi-defendant antitrust litigation.[11] Owing to these data issues, Dr. McClave used the standard statistical methodology known as sampling or extrapolation to estimate overcharges for non-modeled transactions and customers:

> I did what statisticians do. We always are working with samples. In my experience I don't ever remember having a data set that was 100 percent of the population. We work with samples that we believe contain reliable data. And if the samples can paint us a picture that is reliable, as these have, these models have, then we use the results of those that we are able to model to estimate, in this case the overcharges, for those that we're not able to model. So we basically take the sample and estimate or extrapolate to the larger population. Q. Is that a standard statistical methodology that you employed? A. Yeah, that's Statistics 101.

Trial Tr. at 2928:2-16.

[11] *See* Trial Tr. at 2926:1-12 ("In every case I have ever worked on we don't get—we don't get an understanding of 100 percent of the data. There are always data that are missing, we can't—for one reason or another we can't understand them. I think we talked yesterday about Lyondell. We got the prices for Lyondell. We got some data for Lyondell, but it was incomplete and we didn't have access to the personnel who had created those databases at Lyondell, so we didn't understand the databases well enough for us to be confident to model them. So that's an example of customers that were not included in these models").

Dr. McClave also testified about the analysis he undertook to estimate damages for urethane Systems transactions. *Id.* at 2929:18-2934:13. In short, he used contemporaneous industry documents and available industry data to estimate the volume of basic chemicals in a given System, then, using a conservative formula, applied the modeled basic chemical overcharge to estimate damages for Systems. *Id.* [12]

As Dr. McClave explained, the damages extrapolation in this case represents "Statistics 101," involving application of the estimated results from a large and reliable sample to those transactions for which the data produced in discovery was incomplete (for example, the incomplete Lyondell data). *Id.* at 2924:18-2929:10. The modeled products represented over 50% of Class sales and approximately one million individual transactions. *Id.* at 2924:18-2927:19. In large part, the manufacturers were responsible for the incomplete or unusable data. To permit Dow to exploit gaps over which Plaintiffs had no control would be inconsistent with the "entire purpose" of the antitrust laws. *King & King Enterprises v. Champlin Petroleum Co.*, 657 F.2d 1147, 1159 (10th Cir. 1981). Notably, Dow's expert, Dr. Ugone, declined to criticize Dr. McClave for excluding incomplete data from his models. Trial Tr. at 4945:23-4946:19. Dr. Ugone further agreed that extrapolation can be an appropriate statistical methodology. *Id.* at 4985:5-10. Based on this testimony, from both Dr. McClave and Dr. Ugone, the jury was entitled to credit Dr. McClave's "extrapolation" methodology as a reasonable and reliable estimate of overcharge for a subset of the Class transactions.

[12] Other evidence supports Dr. McClave's analysis on Systems, which taken as a whole established injury and damages for Systems customers. *See* Trial Tr. at 2134:17-2138:9 (Dr. Solow); 2929:11-2934:13 (Dr. McClave); 691:24-694:10 (collusion involving Dow's global head of Systems, Peter Davies); 1837:8-1838:10 (testimony showing Systems impact caused by collusive price increase ordered by Mr. Bernstein of BASF).

III. SUFFICIENCY OF THE EVIDENCE—TOTAL DAMAGES

Dow also challenges the jury's damage award, claiming it lacks sufficient support in the record. Again, Dow is wrong.

A. Legal Framework

As the Court properly instructed the jury, antitrust damages are subject to a relaxed standard of proof, such that reasonable estimates will suffice:

> You are permitted to make reasonable estimates in calculating damages. It may be difficult for you to determine the precise amount of damage suffered by Class Plaintiffs. If Class Plaintiffs establish with reasonable probability the existence of an injury materially caused by the conspiracy, you are permitted to make a just and reasonable estimate of the damages. There must be a reasonable basis in the evidence for a damages award, but damages need not be determined with absolute mathematical certainty. The amount of damages must, however, be based on reasonable, non-speculative assumptions and estimates. Class Plaintiffs must prove the reasonableness of each of the assumptions upon which the damage calculation is based.

Dkt. No. 2797, at 26 (Instruction No. 20); *see J. Truett Payne*, 451 U.S. at 565-66 ("[D]amage issues in these cases are rarely susceptible of the kind of concrete, detailed proof of injury which is available in other contexts."); *Loeb Indus., Inc. v. Sumitomo Corp.*, 306 F.3d 469, 493 (7th Cir. 2002) (settled law "that in complicated antitrust cases plaintiffs are permitted to use estimates and analysis to calculate a reasonable approximation of their damages.").

The reason for this rule is that "[t]he 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. "To hold differently would be to preclude antitrust plaintiffs from prevailing, even when a *per se* violation of the Sherman Act is present, since there is no absolutely 'sure' way of establishing damages in such cases …. [T]his would defeat the entire purpose of the antitrust laws." *King & King*, 657 F.2d at 1159.

Mathematical precision is not required. *Law*, 5 F. Supp. 2d at 929; *King & King*, 657 F.2d at 1158. Nor is it necessary for plaintiffs to introduce customer-specific overcharge estimates for each individual class-member; in a certified class action, the jury is entitled to award a reasonable approximation of aggregate damages. *See, e.g.*, *Scrap Metal*, 527 F.3d at 534; *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, securities and other class actions").[13]

In short, the jury has wide discretion to award a reasonable estimate of damages. *King & King*, 657 F.2d at 1157 ("There must be reasonable evidence from which a jury can rationally infer the amount of damages."); *Advantor Capital Corp. v. Yeary*, 136 F.3d 1259, 1266 (10th Cir. 1998) (jury is "clothed with a wide latitude and discretion in fixing damages . . . . [T]he amount of damages awarded by a jury can be supported by any competent evidence tending to sustain it.") (internal quotation marks and citations omitted); *United Int'l Holdings, Inc. v. Wharf (Holdings) Ltd.*, 210 F.3d 1207, 1230 (10th Cir. 2000) ("It is within the virtually exclusive purview of the jury to evaluate credibility and fix damages."); *Hynes v. Energy West, Inc.*, 211 F.3d 1193, 1206 (10th Cir. 2000) ("absent an award so excessive or inadequate as to shock the judicial conscience . . . the jury's determination of [damages] is considered inviolate"); *Bennett*, 774 F.2d at 1028 ("It is a fundamental legal principle that the determination of the quantum of

[13] *See also* Alba Conte & Herbert B. Newberg, 3 Newberg on Class Actions § 10.2 (4th ed. 2005) ("Proof of aggregate monetary relief for the class is feasible and reasonable under various circumstances. In fact, the ultimate goal in class actions is to determine the aggregate sum, which fairly represents the collective value of claims of individual class members. The evidentiary standard for proof of monetary relief on a class-wide basis is simple—the proof submitted must be sufficiently reliable to permit a just determination of the defendant's liability within recognized standards of admissible and probative evidence.") (footnote omitted); *id.* at § 10.5 ("Aggregate computation of class monetary relief is lawful and proper . . . . Challenges that such aggregate proof affects substantive law and otherwise violates the defendant's due process or jury trial rights to contest each member's claim individually, will not withstand analysis.").

damages in civil cases is a fact-finder's function. The trier of the facts . . . is clothed with a wide latitude and discretion in fixing damages, pursuant to the court's instructions, deemed proper to fairly compensate the injured party.").

B. Ample Evidence Supports the Damages Award

Under the preceding standards, the evidence quantifying damages at trial—principally the testimony of Dr. McClave—easily supports the jury's damage award.

1. Overcharge Estimate

Dr. McClave's models incorporated approximately one million customer transactions to estimate damages, representing approximately 50% of total class sales and approximately 25% of individual class members. Trial Tr. at 2924:21-2927:19. As Dr. McClave testified, this represented a large (and thus highly reliable) sample for a case of this nature. *Id.*

Dr. McClave summarized the overall results of his analysis as follows for the damage period January 1999 through December 2003:

	% Overcharge	***Approximate Damages***
MDI	15.3%	$ 460 million
TDI	14.3%	$ 186 million
POLYOL	15.7%	$ 339 million
SYSTEMS	7.2%	$139 million
CLASS TOTAL	**13.4%**	**$ 1,125,608,094**

Id. at 2965:6-2966:4.

2. Alternative Estimates

Dr. McClave provided the jury with additional information from which reasonable

damages could have been estimated. For example, to estimate damages for the subset of the conspiracy period not implicated by the issue of fraudulent concealment, and to show that the models could be applied reliably to a subset of the conspiracy period, Dr. McClave offered the following estimate for November 24, 2000, through December 31, 2003, the period ultimately found by the jury as the damage period:

	Damages
MDI	$ 162,676,752
TDI	$ 92,707,528
POLYOL	$ 173,216,865
SYSTEMS	$68,079,341
CLASS TOTAL	**$ 496,680,486**

Id. at 2899:15-2900:12.

Dr. McClave also used a "big board" demonstrative to address the effect on his estimates if the jury were to accept certain technical criticisms raised by Dow's expert, Dr. Ugone. For example, Dr. McClave testified about the results using alternative demand variables suggested by Dr. Ugone, as well as various "robustness" tests performed in response to Dr. Ugone. *Id.* at 2949:4-2964:20. Dr. McClave explained to the jury that, while Dr. Ugone's criticisms would reduce damages somewhat, "even if you start using some of these methodologies [suggested by Dr. Ugone] that are less reliable than the ones I employed, the overcharges or the elevation in price remains highly significant, more than 10 percent in each case." *Id.* at 2964:14-20. In other words, Dr. Ugone's criticisms could be used to reduce Dr. McClave's overcharge estimate by a negligible amount in some cases and by as much as 25% in others, but would not result in a

damages determination of zero.[14]

Based on the foregoing, and the trial record as a whole, the jury had ample basis for its estimate of total class damages. The jury found damages of $400,049,039 for a period after November 24, 2000—a period for which Dr. McClave presented specific estimates of overcharge (by product) totaling $496,680,486. *Id.* at 2899:12-23. As noted, the jury also heard testimony that, even accepting certain Dow criticisms of Dr. McClave's analysis, damages would be reduced by approximately 0-25%, but would remain statistically and economically significant.

A reasonable jury is entitled to accept some but not all criticism leveled by an opposing expert and tailor its award accordingly, within the range of the evidence. *See Scrap Metal*, 527 F.3d at 533-34 ("the fact that the jury chose to assess damages in an amount substantially below that recommended by plaintiff's expert does not mean that the evidence" was insufficient to support the verdict) (internal quotation marks and citation omitted); *Bennett*, 774 F.2d at 1028 ("The jury could have chosen to believe that not all of [plaintiff's] injuries were caused by [the alleged conduct] . . . . We do not and cannot retry factual determinations made by a jury."); *Britt Paulk*, 579 F.3d at 1113 (where "the total damage award was within the range of evidence, the jury's verdict should not be upset based on speculation"); *United Phosphorus Ltd. v. Midland Fumigant, Inc.*, 205 F.3d 1219, 1228 (10th Cir. 2000) (refusing to "speculate as to the jury's deliberations and calculations" where "the jury's [lower] award was well within the range of proof"); *Questar Pipeline Co. v. Grynberg*, 201 F.3d 1277, 1287-89 (10th Cir. 2000) (to upset damage verdict "within a range of the evidence" would "be to impermissibly speculate as to the manner by which jurors arrived at the verdict"); *New York v. Hendrickson Bros., Inc.*, 840 F.2d

[14] For example, if the jury accepted Dr. McClave's damages number ($496,680,486) for the post-November 2000 period and accepted Dr. Ugone's "monthly data" criticism, the jury could have determined damages in the amount it did. *See* Trial Tr. 2961:3-10.

1065, 1077 (2d Cir. 1988) (affirming price-fixing damages where jury awarded approximately half of plaintiff's estimate); *Reazin v. Blue Cross & Blue Shield of Kansas, Inc.*, 663 F. Supp. 1360, 1427 (D. Kan. 1987) (upholding damage award lower than plaintiff's estimate: "The jury clearly understood the strengths and weaknesses of [the] damage evidence, and fully discharged its responsibilities in returning an appropriate damage award.").

IV. SUFFICIENCY OF THE EVIDENCE—CAUSATION

In a cursory subsection, Dow closes its discussion of injury and damages by repeating the argument that Dr. McClave's models cannot show causation. *See* Dow Brief, at 26. For the reasons explained above, the jury (i) considered extensive non-econometric proof supporting its verdict on class-wide causation and injury and (ii) was permitted to draw a *reasonable inference* of class-wide causation and injury based on Dr. McClave's statistical models. *See* page 21, *supra*.

V. SUFFICIENCY OF THE EVIDENCE—AGREEMENT

A. Legal Framework

Dow's separate argument that it is entitled to judgment as a matter of law because Plaintiffs failed to prove agreement is a repeat of its summary judgment argument and misapprehends settled law under the Sherman Act. Contrary to Dow's suggestions, the legal standard for establishing a price-fixing conspiracy (or "agreement") bears little resemblance to the proof required for establishing a commercial contract. Instead, because price-fixing is unlawful and often conducted in secret, antitrust conspiracies need not be formal or in writing, and indeed can be entirely unspoken. Long-settled Supreme Court and Tenth Circuit authority provides clear guidance on the nature of proof required to support the jury's finding of "conspiracy" and the Court's instructions properly reflect this established precedent. *See* Dkt. No. 2797, at 15-22 (Instructions No. 14-18). For example:

***American Tobacco v. United States*, 328 U.S. 781, 809-10 (1946)**: "No formal agreement is necessary to constitute an unlawful conspiracy." Instead, a "conspiracy in violation of the Sherman Act may be found in a course of dealing or other circumstances as well as in any exchange of words. Where the circumstances are such as to warrant a jury in finding that the conspirators had a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement, the conclusion that a conspiracy is established is justified." (citations omitted).

***Socony-Vacuum*, 310 U.S. at 179**: informal "gentlemen's agreement" violates the Sherman Act.

***United States v. Parke, Davis & Co.*, 362 U.S. 29, 44 (1960)**: "whether an unlawful combination or conspiracy is proved is to be judged by what the parties actually did rather than by the words they used." (citation omitted).

***United States v. General Motors Corp.*, 384 U.S. 127, 142-43 (1966)**: "it has long been settled that explicit agreement is not a necessary part of a Sherman Act conspiracy—certainly not where, as here, joint and collaborative action was pervasive in the initiation, execution and fulfillment of the plan."

***Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 771 (1984):** "A §1 agreement may be found when the conspirators had a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement." (citations and internal quotation marks omitted).

***Brown v. Pro Football, Inc.*, 518 U.S. 231, 241 (1996)**: "Antitrust law also sometimes permits judges or juries to premise antitrust liability upon little more than uniform behavior among competitors, preceded by conversations implying that later uniformity might prove desirable, or accompanied by other conduct that in context suggests that each competitor failed to make an independent decision." (collecting cases; citations omitted.)

***King & King*, 657 F.2d at 1152**: "Illegal price fixing includes informal and indirect, as well as formal and direct, agreements to exchange price information or fix prices."

***Suntar Roofing*, 897 F.2d at 474**: "[I]t is not necessary that the persons charged meet each other and enter into an express or formal agreement, or that they stated in words or in writing what the scheme was or how it was to be effected. It is sufficient to show that they tacitly came to a mutual understanding to [violate the Sherman Act]. The agreement may be shown by a concert of action by members who participate with knowledge of the common purpose. Direct proof of a conspiracy may not be available, and the common purpose and plan may be disclosed only by the circumstances and acts of the members, such as their course of dealings."

Based on this authority, the framework for analyzing a cartel agreement is not whether the participants entered into a formal "all years, all products, all producers" type of contract, as Dow erroneously suggests, but rather whether it comports with the established meaning of the term "conspiracy" under the Sherman Act. The leading treatise, for example, categorically rejects the concept of agreement Dow advocates:

> It is equally clear that there will be an agreement for antitrust purposes even though the challenged arrangement falls short of forming a contract because, for example, the parties declare an intention not to be legally bound, each party reserves the right to abandon the venture at will and without notice, offer and acceptance are not fully in accord, or the understanding is too vague to allow a court to enforce it (even if it were not illegal). This conclusion needs no elaborate citations here because it is implicit in virtually all the cases inferring agreement from conduct, as discussed in this chapter.

Areeda & Hovenkamp, *Antitrust Law* § 1404 (3d ed. 2009).

Dow's position is extreme. For example, it argues that efforts among horizontal competitors to "coordinate[] . . . their announcements of price increases" and take "steps to try to make certain that those price increases stuck as much as possible" represent "a far cry from the restraint of trade targeted by the Sherman Act." Dow Brief, at 30. This assertion is unaccompanied by any authority, which is not surprising considering that price coordination among horizontal competitors is recognized uniformly as the quintessential Sherman Act violation. *See, e.g., Socony-Vacuum*, 310 U.S. at 221; *Trinko*, 540 U.S. at 408; *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 647 (1980). The Court should reject Dow's position as inconsistent with settled law and the purposes of the Sherman Act.

B. Evidence Supports the Verdict

The evidence presented at trial from which the jury could find a classic price-fixing conspiracy was overwhelming.

1. Stephanie Barbour

Ms. Barbour testified that her senior executive colleagues at Dow, Marco Levi and David Fischer, were involved in price-fixing for urethane chemicals. Marco Levi, for example, admitted to her that "he had met with the competition, and that there was an agreement [with BASF and Bayer] to make sure that these price increases stuck." Trial Tr. 689:18-690:21. When asked what "personal knowledge" she had "about an agreement to fix prices with respect to MDI" in particular, she responded, "[t]he conversations that I had from various other members of [Dow's] polyurethanes business." *Id*. at 805:25-806:6. Ms. Barbour also testified that on "more than ten" occasions between 2000 and 2003, she attended meetings in which Mr. Levi and Mr. Fischer discussed Mr. Levi's efforts to coordinate pricing with Dow's competitors. *See id.* at 707:11-709:17, and 689:18-690:25; *compare* Dkt. No. 2637, at 10. And Dow's global head of urethane systems, Peter Davies, threatened to call her a "liar" if she ever disclosed his collusive conversations with BASF regarding the price of MDI and Polyols. Trial Tr. at 722:8-21, 691:24-694:10; *compare* Dkt. No. 2637, at 10-11. Ms. Barbour's testimony alone shows that Dow's involvement extended to all products at issue: Polyols and TDI (for which Mr. Fischer and Mr. Levi were responsible), as well as MDI and Systems (for which Mr. Fischer and Mr. Davies were responsible). It is also "sufficient by itself" to allow a reasonable jury to find that Dow participated in a conspiracy during the relevant period. Dkt. No. 2637, at 12.

2. Larry Stern

Mr. Stern, whose testimony corroborates Ms. Barbour, testified that participants in the cartel included his counterparts at Dow (David Fischer), BASF (Bill Bernstein), and Huntsman (Tony Hankins). *See, e.g.*, Trial Tr. at 325:25-327:10; 328:4-329:5; 330:12-331:6; 331:20.1-333:10.1 (Fischer); 312:2-313:14; 355:18-356:2; 357:18-359:7.1 (Bernstein); 312:2-7; 313:19-

314:19; 318:5.1-8.1; 320:5.1-322:14.1 (Hankins); *compare* Dkt. No. 2637, at 13. At the time, these four individuals were among the highest ranking executives in the industry, with pricing responsibility for all products at issue.[15] Mr. Stern testified that he engaged in numerous future pricing discussions throughout 2000-2002 with Messrs. Fischer, Bernstein and Hankins, including 8-15 such discussions with Mr. Fischer of Dow. Trial Tr. at 330:16-331:6. The conversations described by Mr. Stern were both secretive (see page 41, *infra*) and specific, including discussion of "future pricing, their companies' intent to raise prices, and the need for competitors to support their price increases—conversations that [Mr. Stern] testified should not have occurred." Dkt. No. 2637, at 13.

Examples included using prepaid calling cards at gas station pay phones to coordinate specific price increases with Mr. Fischer, during which Mr. Stern "talked specifically about Bayer's intention to raise both polyol and TDI prices," and Mr. Fischer responded that Dow intended "to raise prices similar to those" of Bayer. Trial Tr. at 327:20.1-329:5. As a result, Mr. Stern left "believing that Dow would, in fact, either support or lead further price increase attempts." *Id.* at 328:21-23. That represents the very definition of illegal collusion. On a different occasion, Mr. Stern and Mr. Fischer walked outside a Bayer meeting facility to discuss raising prices and avoid being overheard by listening devices. *Id*. at 333:22-334:8.

Mr. Stern had similar conversations with Mr. Bernstein of BASF and Mr. Hankins of Huntsman, including at a trade association meeting in Singapore. *Id.* at 312:2.1-314:19. For example, Mr. Stern met one-on-one with Mr. Bernstein in a conference room and stated "that Bayer had determined to increase the price of MDI probably in the range of 6 to 8 cents per

[15] Trial Tr. at 292:19-20.1 (Stern); 965:23-966:7 (Fischer); 1597:12-1598:16 (Bernstein); 4337:23-4339:18 (Hankins).

pound," to which Mr. Bernstein replied that BASF "had an intention to raise prices in a similar range." *Id.* at 312:16.1-313:1. Mr. Stern also met with Mr. Hankins at an airport hotel to discuss raising prices and share confidential Bayer pricing documents, which Mr. Stern asked Mr. Hankins to destroy after using. *Id.* at 320:5-323:7. Mr. Stern testified about similar discussions during rounds of golf with two senior Dow executives—Bob Wood and Dow's then-CEO, Mike Parker—during which the group addressed "future pricing," "raising prices," and prices at specific large customer accounts. *Id.* at 335:11-337:19.

Considered in context, and based on the Court's instructions on the proper legal standard for "agreement" or "conspiracy" under the Sherman Act, a reasonable jury could rely on Mr. Stern's testimony in finding that Dow—and Mr. Fischer in particular—participated in a textbook price-fixing conspiracy. *See, e.g., United States v. Suntar Roofing, Inc.*, 709 F. Supp. 1526, 1530 (D. Kan. 1989) (sufficient evidence to support *criminal* conviction on similar facts), *aff'd,* 897 F.2d 469 (10th Cir. 1990).

3. Robert Kirk

Mr. Kirk, a former Bayer employee, testified that in a private meeting over drinks, Mr. Fischer told him Dow intended to raise urethane chemical prices, to which Mr. Kirk responded that Bayer had supported such increases in the past. Trial Tr. at 1307:3-1308:1; *compare* Dkt. No. 2637, at 13. The conversation described by Mr. Kirk was "unthinkable" under Dow's antitrust policy, *see* Trial Tr. at 1452:21-1453:1 (Carbone), and made Mr. Kirk very uncomfortable. *Id.* at 1307:3-6 (Kirk).

Mr. Kirk's testimony corroborated Ms. Barbour and Mr. Stern, affording the jury ample basis for finding that David Fischer of Dow was an individual involved in a pattern of price-fixing conduct whose denials lacked veracity.

4. Michelle Blumberg and Gerald Phelan

These two "Bayer employees have also provided direct evidence of a price-fixing agreement," Dkt. No. 2637, at 11, further corroborating the testimony of the other witnesses about the existence of an industry cartel. *See* Trial Tr. at 548:2-25 (Blumberg); 606:23-607:14 (Phelan). Ms. Blumberg testified that when Wolfgang Friedrich, Bayer's global head of MDI, said he had "already talked to the competition" about pricing in the U.S. market, she asked "isn't that illegal?" to which Mr. Friedrich (who was based in Germany) replied "not in this country." *Id.* at 548:2-25. Mr. Phelan testified that Mr. Friedrich had an "understanding" with Bayer's competitors, of which Dow was one, and accordingly insisted on being firm with customers because conditions were ripe for a price increase. *Id.* at 606:23-607:14; 611:20-620:19. A reasonable jury could credit this testimony as direct evidence of the existence of an industry cartel, and probative evidence as to Dow's participation.

5. Ed Dineen and Bob Wood

Mr. Dineen, a former Lyondell executive, testified about collusive conduct at the highest levels of the industry as early as February 1999. *Id.* at 1384:1-1392:25. According to Mr. Dineen, Bob Wood of Dow (at the time Dow's top urethanes executive) invited Mr. Dineen to dinner at the Swan Restaurant in Brussels to meet with Jean Pierre Dhanis, BASF's global head of urethanes. During the private dinner, Mr. Dhanis attempted to coordinate an industry price increase, seeking assurances that Dow and Lyondell would participate. *Id.* at 1388:9-1392:1. After the fact, Mr. Dhanis falsified his expense report for the dinner. *Id.* at 1399:8-1402:17. At trial, in a shift from his deposition testimony, Mr. Wood recalled the Swan dinner but denied any recollection of the price discussions. *Id.* at 3366:16-3368:24 (impeaching Mr. Wood on this incident). Notably, however, Mr. Wood (i) had previously dined at the Swan with Mr. Dhanis;

(ii) was the person who invited Mr. Dineen to the meeting; (iii) did not attempt to stop or otherwise repudiate the collusive pricing conversation; (iv) made a statement to Mr. Dineen after leaving the dinner ("Were you comfortable with all of that?") that a reasonable juror could view as an effort to probe Mr. Dineen's willingness to engage in the collusive conduct discussed by Mr. Dhanis; (v) never reported the Swan discussion to anyone at Dow, including Dow's lawyers; and (vi) never told others at Dow to stay away from Mr. Dhanis. *Id.* at 3366:16-3372:9 (Wood); 1393:1-18 (Dineen). Furthermore, Dow, BASF and Lyondell announced a lockstep price increase two weeks after the February 1999 dinner. *Id.* at 3386:6-3387:9 (Wood).

6. Dr. John Solow

Plaintiffs' expert economist, Dr. Solow, testified that the economic structure, conduct and performance of the urethanes industry indicated a successful price-fixing conspiracy, covering all products, years and producers at issue. *Id.* at 2034:25-2036:6; 2133:20-2134:12. For example, the industry structure was ripe for successful collusion; prevailing economic conditions (i.e., declining prices and margins and excess capacity) provided a strong motive to collude; and the conduct of Dow and other industry participants was precisely the type economists have observed in their study of cartels. *See id.* at 2037:2-2038:1; 2045:21-2048:14; 2035:13-21. Dr. Solow also testified that the conspiracy was effective in stabilizing industry prices and causing widespread overcharges in the marketplace. *Id.* at 2036:7-23.

7. Dr. Kenneth Elzinga

Dow's expert economist, Dr. Elzinga, agreed with Dr. Solow that the structure of the industry was ripe for collusion, and that tough economic times can motivate collusion. *Id.* at 4552:9-16; 4599:25-4600:4. He agreed that price increase announcements can be used by cartels to stabilize prices and keep them from falling. *Id.* at 4605:4-17. He agreed that Dow and other

producers typically announced price increases in lockstep, and that many of the industry's announcements were at least partially successful in raising market prices. *Id.* at 4441:24-4442:6; 4634:3-10; 4649:7-4651:9. He agreed that, notwithstanding the evidence of "competition" on which he relied to support his opinions, it is possible for collusion to co-exist with competition. *Id.* at 4570:16-4571:6. He testified that, in reaching his opinions, he did not consider the testimony of conspiracy witnesses such as Mr. Stern and Ms. Barbour (at 4586:10-21; 4591:5-14), but agreed that if the jury were to believe the testimony of these witnesses, it could properly find the existence of a cartel. *Id.* at 4597:4-4598:17. He agreed, moreover, that secrecy is a hallmark of price-fixing. *Id.* at 4605:25-4606:6.

Finally, as noted above, Dr. Elzinga agreed that when competitors talk to each other directly to discuss their mutual pricing intentions—as Mr. Stern testified he did on numerous occasions with Dow, BASF and Huntsman—"[t]hat would be a cartel." *Id.* at 4619:21-4620:4.

8. Secrecy

The jury considered the same evidence of secrecy detailed by the Court in its summary judgment opinion, which "shows that the conspirators met and communicated privately and in secret in discussing pricing and otherwise attempted to conceal activities relating to price-fixing." Dkt. No. 2637, at 28-29; *see* Trial Tr. at 306:7-307:10 (pay phone calls and walks outside to avoid listening devices); *id.* at 320:5-323:5 (meeting at airport hotel and document destruction); *id.* at 355:23-357:17 (coffee shop meetings to talk in confidence); *id.* at 722:8-21 (Mr. Davies of Dow warning Ms. Barbour he would call her a "liar" if she disclosed his collusion with BASF); *id.* 1400:8-1402:17 (falsified expense report); *id.* at 1627:19-1748:23; 1757:19-1796:24; 1797:17-1857:25 (pattern of one-on-one calls and off-site meetings just before price increase announcements, including repeated calls and meetings involving Mr. Fischer of

Dow and Mr. Bernstein of BASF).

Because price-fixing is "of course covert," *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 663 (7th Cir. 2002), this evidence shows the participants' intent to conspire and strongly supports the jury's conclusion on the element of conspiracy. *See* Dkt. No. 2637, at 16; *In re EPDM Antitrust Litig.*, 681 F. Supp. 2d 141, 176 (D. Conn. 2009); *see generally Blumenthal v. United States*, 332 U.S. 539, 557 (1947) ("Secrecy and concealment are essential features of successful conspiracy."); Trial Tr. 4606:22-4607:14 (same, per Dr. Elzinga).

9. Circumstantial Corroboration

The testimony summarized above is corroborated by extensive circumstantial proof, including phone records, travel records, and incriminating documents. For example, Mr. Stern's testimony is supported by evidence showing a pattern of one-on-one calls and meetings among the same key executives—Mr. Fischer of Dow, Mr. Bernstein of BASF, and Mr. Hankins of Huntsman—close in time to lockstep industry price announcements for all products at issue.

As just one example, the jury heard evidence concerning Mr. Bernstein's "8 phone calls" (Trial Tr. at 1728:22-1730:19; 1733:19-23) to Mr. Hankins of Huntsman in March 2001, a series of calls Mr. Bernstein made just before and after he stated in an email that he was trying to "determine what Huntsman's response will be" to an industry price increase. *Id*. at 1720:5-1724:17; Trial Ex. 395. Mr. Bernstein insisted he had simply used a "poor choice of words" in the email, would never contact a competitor to discuss pricing, and was merely trying to contact customers to gather information on Huntsman. *Id.* at 1723:19-1724:17. But when confronted with his actual phone records, which showed eight calls to Huntsman surrounding the email, Mr. Bernstein could not identify a single customer call. *Id.* at 1724:19-1739:1. Given this evidence—including Mr. Bernstein's demeanor when confronted with the incriminating email

and phone records—a reasonable jury could find that Mr. Bernstein was a conspirator whose denials lacked credibility.

The jury heard evidence that Mr. Bernstein engaged in a similar pattern of secretive conduct and communication with Mr. Fischer of Dow, including regular one-on-one meetings in odd locations and/or calls to home and cell phone numbers just before price announcements. *Id.* at 1846:8-1847:25 (driving two hours for 6:30 a.m. one-on-one meeting a few days before price increase); 1784:6-1785:12 (Sunday night call from Fischer to Bernstein's home number the day before Dow announced TDI and Polyols price increase); 1568:1-7, 1546:22-1547:6 (3 calling card calls from Bernstein to Fischer's cell phone on same day Dow announced MDI price increase); Trial Ex. 379, at 4 (Bernstein handwritten note: "Call Dow – Prices not up in August"). *Cf. United States v. Consolidated Packaging Corp.*, 575 F.2d 117, 128 (7th Cir. 1978) (affirming convictions for price fixing: "In the evidence a pattern can be discerned in the similar activities of the conspirators.").

Mr. Levi of Dow, another alleged participant in the cartel, engaged in a similar pattern of conduct—meeting and communicating routinely with his counterparts at BASF, Bayer and Lyondell, close in time to industry price increase activity. For example, the jury heard evidence that on August 5, 2002, Mr. Levi of Dow used his cell phone to call BASF and Lyondell. Trial Tr. at 2625:14-2626:8. The next day, August 6, Mr. Levi met one-on-one with his counterpart from Bayer, who traveled hundreds of miles to meet Mr. Levi for lunch at a hotel in Lucerne, Switzerland. *Id.* at 2632:18-2634:25. That very same day, August 6, 2002, Dow announced a price increase for Polyols and TDI, the products for which Mr. Levi was responsible. *See* Trial Ex. 2112. This evidence corroborates Ms. Barbour's testimony.

To summarize the extensive evidence of phone records and price announcements,

Plaintiffs introduced Rule 1006 exhibits showing the close temporal connection between lockstep price announcements and the calls among alleged conspirators. *See* Trial Ex. 2112 (price increases); Trial Ex. 2111 (phone records). The phone records were connected not just to price increases, but also to incriminating documents. For example, the jury heard evidence that on March 9, 2003, just after a flurry of afternoon and early evening calls among relevant actors at Dow, BASF and Huntsman, Huntsman circulated an internal email at 8:52 p.m. stating that "we appear to have support from our competition" for a price increase. Trial Tr. 2102:9-2103:9 (Dr. Solow); Trial Ex. 2111 (phone records); Trial Ex. 666, at 19-20 (Huntsman email).

* * * * *

Given the mountain of evidence, Dow cannot possibly satisfy its burden to show that the proof "all" or "overwhelmingly" points to no conspiracy. *See Layne Christensen Co.*, 871 F. Supp. 2d at 1107; Dkt. No. 2637, at 12 ("each piece of evidence supports the other, such that a reasonable jury could find that an agreement existed from this testimony taken together").

C. Dow's Arguments are Unavailing

Dow's argument on the conspiracy evidence is nothing more than a recasting of points already rejected by the Court at summary judgment. For example, Dow argues that "there is no direct evidence of any agreement on pricing at all, save for a second-hand report of an alleged agreement between some TDI suppliers in 2003." Dow Brief, at 32. The Court's summary judgment opinion held that at least the following evidence was direct: much of Ms. Barbour's and Ms. Blumberg's testimony and Mr. Phelan's testimony about an "understanding" on prices. *See* Dkt. No. 2637, at 10-11. The Court noted that other testimony of Ms. Barbour and Ms. Blumberg may also have been direct, but held that the testimony that was clearly direct evidence was "sufficient by itself to create a question of fact for trial concerning the existence of an agreement." *Id.* at 12.

Dow also emphasizes the fact that Mr. Stern and other witnesses denied participating in any "agreement" to fix prices. *See* Dow Brief, at 31-36. But "whether an unlawful combination or conspiracy is proved is to be judged by what the parties actually did rather than by the words they used." *United States v. Parke, Davis & Co.*, 362 U.S. 29, 44 (1960). In other words, it was not for Mr. Stern (or any other fact witness) to define the legal meaning of the terms "agreement" or "conspiracy" for the jury, as the Court properly explained at trial. Trial Tr. at 2155:2-2156:10 (explaining to the jury that the Court's instructions would govern the "legal concept" of agreement and that legal meaning "may or may not mirror" the way in which a particular witness used the term); *id.* at 2307:20-2308:3 (same, regarding Mr. Stern's testimony).[16]

The fact that no single witness offers direct evidence of conspiracy for all five years and for all four products provides no basis to overturn the jury's verdict. Dow Brief, at 32 ("No witness provides any direct evidence to support any price fixing agreement spanning five years, all products and all suppliers."). The evidence must be considered as a whole, *Reeves*, 530 U.S. at 150, and judgment as a matter of law is "improper unless the proof is all one way or so overwhelmingly preponderant in favor of the movant as to permit no other rational conclusion." *Layne Christensen*, 871 F. Supp. 2d at 1107 (internal quotation marks and citation omitted).

Dow's arguments relating to the circumstantial evidence presented at trial are equally unavailing. Dow Brief, at 38-44. Dow already raised its *Matsushita* arguments at summary

[16] Testimony from Dow's own liability expert, Dr. Elzinga, underscored the extent to which the *conduct* Mr. Stern described represented a textbook price-fixing agreement. *See* Trial Tr. at 4619:21-4620:8 ("Q. And there wouldn't be oligopolistic interdependence if Coke . . . picked up the phone and called Pepsi and said, well, what will you do if I raise my price by 9 cents? That would not be oligopolistic interdependence, would it? A. Certainly wouldn't be if Pepsi responded and said if you go up 10 cents, I'll go up 10 cents. ***That would be a cartel.*** Q. That would be terrible. That would be bad for society, wouldn't it? A. It would be bad for consumers certainly.") (emphasis added).

judgment and the Court addressed them, stating in part that "the Court, in examining class plaintiffs' evidence of a conspiracy, must determine whether that evidence is ambiguous, in the sense that it is equally consistent with collusion and competition, or whether a reasonable jury could find that a conspiracy existed, either from direct evidence or from circumstantial evidence that creates a reasonable inference of a conspiracy (or from a combination of the two)." Dkt. No. 2637, at 7-8. The Court answered this question in the affirmative, identifying eight types of circumstantial evidence from which a reasonable jury could infer a conspiracy. *Id.* at 12-18.

The jury considered that evidence, together with the direct evidence presented by Plaintiffs and the evidence presented by Dow, and rendered its verdict. The Court instructed the jury that it should not conclude that there was a conspiracy based on conscious parallelism, *i.e.*, what Dow now calls: "lawful oligopolistic coordination." Dow Brief, at 39. Instruction No. 15 addressed these issues specifically, stating *inter alia:*

- "Such evidence that the manufacturers may have engaged in identical or similar business practices does not alone establish an agreement to fix prices because such practices may be consistent with lawful, ordinary, and proper competitive behavior in a free and open market."
- "[The Sherman Act] does not prohibit independent behavior even if such behavior is similar or identical to that of competitors . . . ."
- "A business may even copy the prices of a competitor or follow and conform exactly to the price policies and price changes of its competitors."
- "[A] business does not violate the Sherman Act by taking some action in the hope or belief that its competitors will follow, so long as it has not reached an agreement with its competitors."
- "You should consider all of the evidence as a whole in determining whether any similarity or identity of prices or conduct resulted from the independent business judgment of the individual manufacturers freely competing in the open market, or whether it resulted from an agreement between two or more of them."

Dkt. No. 2797, at 18-19.

Simply put, the jury was instructed that it *could* determine that the behavior of Dow and its conspirators resulted from "lawful oligopolistic coordination" if not convinced by Plaintiffs' evidence of conspiracy. But the jury plainly found more than just independent parallel behavior, and Dow cannot show that all the evidence points the other way.

Dow's other argument relating to circumstantial evidence is that "the circumstantial evidence overwhelmingly featured in Class Plaintiffs' case was precisely the type of evidence that has been found to be insufficient to support an inference of collusion, *i.e.*, communications among competitors about 'pricing.'" Dow Brief, at 40. Dow again misstates the law. Dkt. No. 2637, at 12-13 (surveying evidence of future pricing conversations that "at least support[] the inference of a price-fixing agreement"); page 34, *supra* (collecting cases); *In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 366 (3d Cir. 2004) (denying summary judgment, citing evidence that competitor "assured me that they were fully supportive of the price increase proposition"); *id.* at 374 ("Discussions to increase prices and [defendant]'s knowledge of those discussions blanket him with antitrust liability."); *Fears v. Wilhelmina Model Agency, Inc.*, No. 02 Civ. 4911 (HB), 2004 WL 594396, at *4 (S.D.N.Y. Mar. 23, 2004) (denying summary judgment where defendants discussed current and future pricing at trade association meetings); *In re Medical X-Ray Film Antitrust Litig.*, 946 F. Supp. 209, 213-14, 218-19 (E.D.N.Y. 1996) (denying summary judgment, where executive met and "exchanged pricing information" with competitor at trade association meetings).[17]

[17] The cases cited by Dow are readily distinguishable. Dow Brief, at 40 (citing *Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan, Inc.*, 203 F.3d 1028, 1034 (8th Cir. 2000); *Mitchael v. Intracorp, Inc.*, 179 F.3d 847, 859 (10th Cir. 1999); *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 125 (3d Cir. 1999); *Krehl v. Baskin-Robbins Ice Cream Co.*, 664 F.2d 1348, 1357 (9th Cir. 1982)). In *Blomkest*, summary judgment was entered where the evidence indicated discussions of past but not future pricing. *See Blomkest*, 203 F.3d at 1033-34 ("*Subsequent* price

Finally, Dow raises the issue of cartel monitoring and "policing." Dow Brief, at 29-30. Dow first suggests evidence of cartel monitoring and policing is somehow a required element of a price-fixing claim (it is not), then argues from this flawed premise that Plaintiffs' evidence is insufficient. Putting aside the legal fallacy, Dow is wrong about the facts. The jury considered substantial record evidence of cartel monitoring and policing. Having reviewed that evidence, Dr. Solow described specific examples at trial,[18] and testified as follows:

> Q. Did you see enough examples of policing in this industry to satisfy yourself that there was the type of policing of collusion that showed the existence of a cartel?
>
> A. Yes, I think that this is part of the broad – the overall pattern of evidence that leads me to conclude that there's a cartel here.

Trial Tr. at 2124:5-11.

The record, in short, includes ample evidence of cartel policing.

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verification evidence on particular sales cannot support a conspiracy for the setting of a broad market price [at a future date]." (emphasis in original). Summary judgment was entered in *Mitchael* because the evidence failed to demonstrate that the alleged price-fixing (*i.e.*, the capping or reduction of chiropractic fees) was actually discussed at the defendants' meetings. *Mitchael*, 179 F.3d at 853. In both *Baby Food* and *Krehl*, summary judgment was entered where the inter-defendant pricing discussions were merely a "sporadic" exchange of "snippets" of pricing information among "low-level" employees with no pricing authority. *See Baby Food*, 166 F.3d at 125-26, 137; *see also Krehl*, 664 F.2d at 1357. In contrast, the record here is replete with evidence of specific future pricing discussions among senior executives with pricing authority, which occurred with remarkable frequency during the relevant period.

[18] Dr. Solow testified about the Firestone incident, where BASF's global head of urethanes, Mr. Dhanis (a price-fixer according to witness testimony), made a call to Bayer, immediately after which Mr. Friedrich of Bayer (also a price-fixer according to witnesses) berated his own sales staff for taking Firestone business from BASF. *See* Trial Tr. at 2118:3-2120:25. Another example described by Dr. Solow occurred when BASF called Mr. Davies of Dow directly to complain about Dow's low pricing. *Id.* at 2123:5-24. Dr. Solow also discussed Trial Exhibits 941 and 579, in which Mr. Bernstein of BASF wrote a handwritten note stating "Call Dow – Prices not up in August," shortly after which an internal Dow document stated that Dow would go after Bayer for *not* supporting a price increase, but would stay away from BASF, which was supporting the increase. As Dr. Solow explained, such evidence indicated both collusion and policing. *Id.* at 2120:1-2121:23.

VI. DOW'S MOTION FOR NEW TRIAL SHOULD BE DENIED

In alternative to its request for judgment as a matter of law, Dow seeks a new trial under Rule 59(a) arguing various errors. Dow Brief, at 44-64. A new trial based upon an error of law, however, is unwarranted unless that error affected the substantial rights of the parties. *King v. Emerson Elec. Co.*, 837 F. Supp. 1096, 1098 (D. Kan. 1993) (Lungstrum, J.); Fed. R. Civ. P. 61 ("At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights.").

None of the Court's rulings was erroneous, let alone prejudicial to Dow's substantial rights. The Court should deny Dow's request for a new trial.

A. Dow's Claim That the Essential Contours of the Conspiracy Cannot Be Ascertained from the Verdict Is Meritless

Asserting that "the essential parameters of any conspiracy found by the jury cannot be ascertained from the verdict," Dow Brief, at 45, Dow claims that the verdict raises questions about how the jury reached its result, and that the Court erred in declining to seek clarification from the jury regarding its verdict. But the law does not require the jury to explain its reasoning when it returns a verdict.[19]

A district court is "under no obligation to require the jury to return special verdicts or to answer special interrogatories. The decision whether to do so [is] within the court's discretion." *Martinez v. Union Pac. R.R. Co.*, 714 F.2d 1028, 1032 (10th Cir. 1983); *see also* page 10, *supra* (citing 9B Wright & Miller, *Federal Practice and Procedure:* Civil 3d § 2505 (collecting authority on this point)). Here, as explained above, the structure of the verdict form reflected a

[19] Dow invokes the Seventh Amendment's right to trial by jury and the Due Process Clause, claiming that "another fact finder" may not permissibly make findings regarding the contours of the conspiracy. Dow Brief, at 45. The jury's verdict raises no constitutional issues, however, as there is no need for any other factfinder to examine the jury's unambiguous verdict.

proper exercise of the Court's discretion, was fully consistent with the typical practice in a price-fixing case, and comports with the established legal rule that a jury is permitted to return a liability verdict based on a subset of relevant conspiracy allegations. *See* Part I.A, *supra*.

Dow also argues that the jury verdict itself is ambiguous, posing a number of questions that it claims "cannot be ascertained from the verdict." Dow Brief, at 45. But Dow is not entitled to a particularized set of answers that reflect all of the jury's reasoning, nor was the Court required to direct the jurors to make specific factual findings on the verdict form. Consistent with the elements of Plaintiffs' claim under section 1 of the Sherman Act, it is sufficient that the jury found that Dow participated in a price-fixing conspiracy that injured Class members and resulted in damages in excess of $400 million. *See* Dkt. No. 2799.[20]

The Court also correctly declined Dow's request to question the jury about its verdict. With limited exceptions not pertinent here, the Federal Rules of Evidence expressly preclude inquiry into the kinds of questions Dow poses in its brief. "During an inquiry into the validity of a verdict . . . a juror may not testify about . . . the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict . . . ." Fed. R. Evid. 606(b)(1). "The values sought to be promoted by excluding the evidence include freedom of deliberation, stability and finality of verdicts, and protection of jurors against annoyance and

[20] The cases cited by Dow are inapposite, as they concern verdicts in which a jury's damages determination was ambiguous. There is no such ambiguity here, where the jury awarded a precise amount of damages on the single antitrust claim. *See Unit Drilling Co. v. Enron Oil & Gas Co*, 108 F.3d 1186, 1191-93 (10th Cir. 1997) (ordering a new trial where the verdict was ambiguous with respect to whether damages included or excluded a set-off reflected in a separate verdict form); *Fox Motors, Inc. v. Mazda Distrib. (Gulf), Inc.*, 806 F.2d 953, 960-61 (10th Cir. 1986) (ordering a retrial on damages where verdict was ambiguous insofar as it did not distinguish between damages for two separate claims); *see also Resolution Trust Corp. v. Stone*, 998 F.2d 1534, 1548 (10th Cir. 1993) (approving of questioning of jury regarding possible ambiguity in whether certain damages figures should be summed).

embarrassment." Fed. R. Evid. 606(b) advisory committee's note (citing *McDonald v. Pless*, 238 U.S. 264 (1915)). Dow does not even suggest that the jurors were subject to some impermissible outside influence or identify circumstances that would warrant a departure from the general rule insulating the jury from questioning regarding the manner in which it reached its verdict.

Dow also contends that "the distribution of the aggregate damages found by the jury would be akin to an impermissible fluid recovery." Dow Brief, at 46. But this is not a case of fluid recovery. *See Scrap Metal*, 527 F.3d at 534 (defendant "confuses the concept of fluid recovery with aggregate damages"). "Fluid recoveries" refer to situations in which injured class members are unknown and unknowable, such that a damage award, if any, is distributed to other individuals or entities with similar interests, for example using *cy pres* awards. *Id.*; *NASDAQ*, 169 F.R.D. at 525 ("Fluid recovery refers to the distribution of unclaimed or unclaimable funds to persons not found to be injured but who have interests similar to those of the class.").

These circumstances are not present here. First, each member of the Class has been identified with particularity, its sales records tabulated with specificity, and its individual injury estimated by Dr. McClave and incorporated into his overall estimate of damages presented at trial. *See* note 10, *supra*. In this situation, there will be no "fluid recovery." *See NASDAQ*, 169 F.R.D. at 526 ("Damages in an antitrust class action may be determined on a classwide, or aggregate, basis, without resorting to fluid recovery where the computerized records of the particular industry, supplemented by claims forms, provide a means to distribute damages to injured class members in the amount of their respective damages.").[21]

[21] Dow cites *Windham v. American Brands, Inc.*, 565 F.2d 59 (4th Cir. 1977) in support of its fluid recovery argument, but *Windham* was a different case decided in an era before

Second, as explained above, Plaintiffs introduced common evidence at trial from which a reasonable jury could find widespread *individual* injury for named and absent class members alike, and the verdict indicates that the jury found this evidence persuasive. *See* Part II, *supra*. Accordingly, unlike a "fluid recovery" situation in which injured persons are unknowable and no injury is or can be shown for that reason, Plaintiffs here have met their burden of proving actual injury. *See Scrap Metal*, 527 F.3d at 534. Finally, to the extent Dow's argument is aimed at the allocation of damages among Class members, Dow does not have standing to object to any such allocation or distribution. *See Uselton v. Commercial Lovelace Motor Freight, Inc.*, 9 F.3d 849, 854 (10th Cir. 1993) ("To have standing, one must be aggrieved by the [fee award] order"); 3 Newberg on Class Actions § 10.24 ("[D]efendants have no standing [to contest distribution] because the defendant, who paid its judgment, was not the rightful owner of the unclaimed portion of the judgment deposited in the escrow account.").

B. Dow's Challenges to the Jury Instructions and Verdict Form Are Meritless

Dow challenges several instructions that the Court gave (or chose not to give). Here, Dow simply disagrees with the manner in which the Court exercised its discretion. A Court's instructions to the jury are proper where, "in light of the entire record . . . they fairly, adequately

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modern tools were available for identifying class members and estimating injury. The plaintiffs in *Windham* were unable to develop any workable formula for calculating class damages. *See* 565 F.2d at 70. Here, in contrast, Plaintiffs introduced expert damage analysis of the type widely accepted in modern antitrust litigation—analysis that was admissible and relevant for all the reasons described above. *Windham* has been distinguished on this basis in more recent antitrust cases within the Fourth Circuit. *See DeLoach v. Phillip Morris*, 206 F.R.D. 551, 559 (M.D.N.C. 2002) ("The court is dealing with a very different situation almost 25 years later. Class actions of this magnitude have become commonplace, and scientific methods exist to address the difficulties attendant in proving impact and damages to thousands of class members."). Another case cited by Dow, *Dumas v. Albers Med., Inc.*, No. 03-0640-CV-W-GAF, 2005 WL 2172030 (W.D. Mo. Sept. 7, 2005), involved inability to even identify the class members at issue. That is not a concern here at all.

and correctly state the governing law and provide the jury with an ample understanding of the applicable principles of law and factual issues confronting them." *Coletti v. Cudd Pressure Control*, 165 F.3d 767, 771 (10th Cir. 1999) (internal quotation marks and citation omitted). The "trial judge is not required to give any particular instruction as long as the ones given correctly state the law and adequately cover the issues presented." *See United States v. Scott*, 37 F.3d 1564, 1577 (10th Cir. 1994). Instructions need not be "flawless"; rather, they must ensure that the jury was not "misled in any way" and that "it had an understanding of the issues and its duty to decide those issues." *Coletti*, 165 F.3d at 771 (internal quotation marks and citation omitted). The Court's instructions amply satisfy that standard.

1. The Court Did Not Err in Rejecting Dow's "All or Nothing" Instruction

Dow objects to the Court's Instruction No. 12 and the verdict form because they did not "provide[] guidance to the jury about what action to take if the jury found something 'less' or 'other' than what Class Plaintiffs alleged." Dow Brief, at 49. For reasons already explained, the law does not require the jury to make specific factual findings regarding each factual element of the conspiracy or else return a verdict for Dow. As a result, the Court was well within its discretion to decline to instruct the jury as such. And for the same reasons, the Court appropriately declined to question the jury about specific facts relating to its verdict and the conspiracy period.[22]

[22] Dow misinterprets the jury's note, asserting that it shows that the jury was "struggling with [the] issue" whether it was required to find the precise conspiracy alleged in order to hold Dow liable. Dow Brief, at 50–51. The note suggests no such thing. Instead, it sought clarification on a particular instruction. Trial Tr. at 5313:14-5314:18. In any event, the Court need not and should not speculate about the note, because a jury speaks through its verdict. *See* page 12, *supra*.

2. The Court's Antitrust Conspiracy Instructions Correctly State Controlling Law.

Dow challenges several aspects of the Court's instructions with respect to what constitutes an antitrust conspiracy. The Court's instructions were correct.

Definition of Agreement. Dow contends that the Court, in Instruction No. 14, did not provide "adequate guidance about the definition of 'agreement'" because the Court failed to instruct the jury that an agreement is "a meeting of the minds that requires two or more parties to make a conscious commitment to a common scheme." Dow Brief, at 51. Contrary to Dow's assertions, Instruction No. 14 reflects a correct statement of the law. It explains that an "agreement" exists only where two or more "parties *knowingly* worked together to accomplish a *common purpose*," where they "enter into an agreement that they will act together for some unlawful purpose," and Dow is liable only if it "knowingly became a member of that conspiracy." *See* Dkt. No. 2797, at 15-16 (Instruction No. 14) (emphases added). In short, Instruction No. 14 used language substantially similar to the language proposed by Dow, and Dow offers no explanation how the Court incorrectly stated the law. *See also* page 34, *supra* (collecting cases consistent with instructions).

Dow also claims that the jury could have "interpreted [Instruction No. 14] to mean that no agreement at all is required to find a conspiracy." Dow Brief, at 52. This argument is also wrong. The Court's instructions make abundantly clear that agreement was required for a finding of liability. *See, e.g.*, Dkt. No. 2797, at 15 (Instruction No. 14) ("The Class Plaintiffs must prove . . . that Dow knowingly became a member of that conspiracy," which is "an agreement by two or more persons to accomplish some unlawful purpose.").

Evidence of Competition. Dow argues that the Court erred in instructing the jury that, where there is an illegal conspiracy, "it is no defense that the manufacturers actually competed in

some respects with each other." Dow Brief, at 53 (objecting to Instruction No. 17). Dow cites no law in support of its contention, and controlling Supreme Court precedent is directly to the contrary. *See, e.g.*, *Socony*, 310 U.S. at 220 ("the fact that sales on the spot markets were still governed by some competition is of no consequence").

Tends to Exclude. Dow argues that the Court erroneously declined to instruct the jury on the "tends to exclude" standard articulated in *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984), and *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). Dow Brief, at 53-54. The Court's instructions, however, are fully consistent with *Monsanto* and *Matsushita*. *See, e.g.*, Dkt. No. 2797, at 15-18, 35 (Instructions 14, 15, 28).

As the Court correctly recognized in its summary judgment opinion, the "tends to exclude" formulation simply means "that the evidence, as a whole, must tip the scales, such that a reasonable jury could find in favor of the plaintiff." *See* Dkt. No. 2637, at 7; *see also Eastman Kodak Co. v. Image Technical Servs. Inc.*, 504 U.S. 451, 468 (1992) (*Matsushita* "did not hold that if the moving party enunciates *any* economic theory supporting its behavior, regardless of its accuracy in reflecting the actual market, it is entitled to summary judgment. *Matsushita* demands only that the nonmoving party's inferences be reasonable in order to reach the jury, a requirement that was not invented, but merely articulated, in that decision.") The Court's instructions properly incorporate that basic standard. *See* Dkt. No. 2797, at 35 (Instruction No. 28).

The Court likewise captured the substance of *Matsushita* and *Monsanto* in its conspiracy instructions. *See id.* at 15-16 (Instruction 14 and 15) (explaining standard for proving "agreement to accomplish a common purpose" and properly instructing jury that similar, parallel or other independent conduct does not establish conspiracy); *compare Monsanto*, 465 U.S. at

764, 768 (equating "tends to exclude the possibility of independent" action standard with standard that the evidence must "reasonably tend[] to prove that the [conspirators] had a conscious commitment to a common scheme designed to achieve an unlawful objective" or circumstances "must reveal a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement.") (internal quotation marks and citation omitted). In short, the Court's instructions accurately reflect the law of Sherman Act conspiracy. *See also* page 34, *supra* (collecting additional cases). In these circumstances, the additional language on which Dow insists would have been unnecessary and redundant. *See United States v. Duff*, 76 F.3d 122, 126 (7th Cir. 1996) ("redundant" instructions "should be omitted. Jury charges are too long as it is. People comprehend things better when the instructions are short and direct.").

The formulation offered by Dow also would have confused the jury—a point demonstrated by Dow's own briefing throughout this case. Dow itself misapprehends the "tends to exclude" standard, insisting it means Plaintiffs must exclude *any* possibility of independent conduct for any given piece of evidence. *See* Dkt. No. 2785-1, at 5 (arguing that plaintiffs must "present evidence *excluding* the possibility of independent action") (emphasis Dow's). That is wrong. *See Eastman Kodak*, 504 U.S. at 468; *see generally* Dkt. No. 2436, at 90-96 (Plaintiffs' summary judgment brief, collecting cases). Had the Court included Dow's proposed language, allowing Dow to argue incorrectly that Plaintiffs must *exclude* an possibility of independent action, there would have been serious risk of jury confusion on Plaintiffs' burden of proof.

3. The Court Did Not Err In Its Rulings on Dow's Document Retention

Dow contends that it is entitled to a new trial because the Court erred by permitting Class Plaintiffs to refer to Dow's destruction of documents in their opening statement and by declining to instruct the jury on issues relating to Dow's document destruction and retention practices.

Dow Brief, at 55-57. Dow also appears to challenge the Court's denial of its motion to exclude the testimony of Arthur Eberhart. *Id.* at 56. The Court's decisions were consistent with the law and appropriate. *See, e.g.*, Dkt No. 2772.

Plaintiffs were entitled to present evidence of Dow's failure to preserve critical documents as part of the cover-up of the conspiracy, and the Court properly permitted Plaintiffs to present such evidence. *See United States v. Curtis*, 635 F.3d 704, 717 (5th Cir. 2011) ("[A]cts of concealment" are "circumstantial evidence of the conspiracy's existence") (internal quotation marks and citation omitted). Plaintiffs' references in their opening statement to Dow's disposition of the files of Mr. Fischer and Ms. Barbour were fully consistent with the admissible evidence presented at trial without timely objection from Dow.[23] Moreover, that the destruction of documents occurred in 2004, after the conspiracy ended, has no bearing on whether the jury could have considered it as evidence of the conspiracy. "Evidence of a conspirator's post conspiracy activity is admissible if probative of the existence of a conspiracy or the participation of an alleged conspirator, 'even though they might have occurred after the conspiracy ended.'" *United States v. Fields*, 871 F.2d 188, 197 (1st Cir. 1989) (quoting *Anderson v. United States*, 417 U.S. 211, 219 (1974)). Dow cites no authority to support its claim that the evidence is irrelevant, and there is extensive authority to the contrary.[24]

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[23] *See, e.g.*, Trial Tr. 1513:9-14, 1515:25-1516:9, 1516:25-1518:3 (Eberhart) (snapshot images of Fischer and Wood computers were not retained). A complete recitation of the relevant evidence is available in Class Plaintiffs' Opposition to Dow's Motion for Corrective Jury Instructions Or, In The Alternative, for Leave to Add to Its Witness List, Dkt. No. 2772, at 2-4.

[24] *See, e.g.*, *In re Copper Antitrust Litig.*, 436 F.3d 782, 791 (7th Cir. 2006) (evidence that, in violation of its record retention policy, defendant destroyed documents relevant to fraudulent concealment claims); *Ahcom Ltd. v. Smeding*, No. C-07-1139 SC, 2009 WL 102851, at *4 (N.D. Cal. Jan. 14, 2009) (permitting the parties to "raise the issue of document retention or destruction at trial" and noting that the "jury will then have the opportunity to decide not only

To the extent Dow argues that Plaintiffs improperly argued spoliation to the jury, Dow is just wrong. *See* Dow Brief, at 55-57. Plaintiffs made clear on numerous occasions that they would not argue that Dow or its lawyers engaged in spoliation, and they never did so. *See, e.g.*, Dkt. No. 2772, at 1, 8.

The Court also properly declined to instruct the jury "that the application of Dow's record retention policy to the records of Ms. Barbour, Mr. Fischer and Mr. Wood was standard and routine, and not improper or illicit." Dow Brief, at 57. Dow's requested instruction would have usurped the role of the jury, because it would have required the Court to resolve a number of disputed factual issues. For example, determining whether Dow was on notice of price-fixing activities in the polyurethanes division prior to the departures of Messrs. Wood and Fischer, would have required weighing the credibility of several witnesses, including Ms. Barbour and Messrs. Schefsky, Fischer, Wood, and Levi. It also would have required the Court to conclude (among many other things) that Ms. Barbour's testimony was not reliable or did not provide a sufficient basis for Mr. Schefsky to communicate her concerns to Dow's management. Those were factual issues for the jury. *See Uhlig LLC v. Shirley*, Civ. A. No. 6:08-cv-01208-JMC, 2012 WL 2923242, at *19-20 (D.S.C. July 17, 2012) (declining to provide requested instruction because it would have "required excessive explanation and would have required the court to comment on the weight of the evidence").

Finally, the Court correctly denied Dow's motion to exclude the testimony of Arthur Eberhart. As the Court correctly held during trial, Dow waived this argument by failing to make any objections to Plaintiffs' designations of Mr. Eberhart's testimony until the afternoon before

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what the course of dealing between [the parties] was, but also whether the companies' respective document retention policies are relevant to that issue").

the testimony was set to be presented at trial. *See* Trial Tr. at 1108:15-22. Moreover, Mr. Eberhart's testimony was relevant to whether Dow attempted to conceal its participation in the price-fixing conspiracy. *See id.* at 1108:8-15.

4. The Court Did Not Err By Declining to Give an Instruction Related to the 2004 Investigation

Dow claims that it was prejudicial error for the Court not to instruct the jury "that any references to the 2004 investigation should play no part in the jury's consideration of the case." Dow Brief, at 57-58. The Court's refusal to give the instruction was entirely justified, and certainly does not constitute an abuse of discretion.

As an initial matter, Dow itself attempted to inject evidence relating to the 2004 investigation into the trial by purporting to waive (partially) a privilege it had, up until the eve of trial, asserted over the entire 2004 investigation. The Court properly declined to let Dow change course and precluded Dow from presenting evidence relating to the 2004 investigation after it had benefited from the assertion of privilege. *See* Trial Tr. at 4053:16-18 ("Dow, because of having relied on the privilege and secured a favorable ruling from Judge O'Hara, is not in a position to go that direction."). The Court also precluded Plaintiffs from presenting evidence relating to the 2004 investigation: "[I]f the plaintiffs attempt to make something out of the [2004] investigation, I will not let them either." *Id.* at 4054:12-16. Plaintiffs did not do so.

Moreover, Dow does not even identify the allegedly offending testimony that might call for a curative instruction, or identify any statement made by Plaintiffs in support of its claim that Plaintiffs argued improper concealment of the 2004 investigation. Dow Brief, at 58. Near the end of trial when the Court declined to give an instruction about the 2004 investigation, the Court recognized the absence of the issue from the record: "all the jury is going to think happened here" is that Lynn Schefsky, in an entirely different investigation, looked into Ms.

Barbour's complaints and "found them to be without merit." Trial Tr. at 4053:21-25.

In these circumstances, the Court's refusal to instruct the jury on the 2004 investigation was not an abuse of discretion. *See Zokari v. Gates*, 561 F.3d 1076, 1090 (10th Cir. 2009) ("the refusal to give a particular instruction" is only improper where it was "an abuse of discretion") (internal quotation marks and citation omitted). In fact, given that no evidence relating to the 2004 investigation was presented at trial, Dow's requested instruction likely would have led to jury confusion and prejudiced Plaintiffs. *See id.* (an unwarranted instruction "runs the risk of suggesting that the trial judge has adopted the party's view") (internal quotation marks and citation omitted).

C. Dow's Challenge to the Court's Ruling on Larry Stern's Immunity Agreement is Meritless

Renewing an argument it made in a motion *in limine*, Dow seeks a new trial because the Court prohibited Dow from introducing evidence relating to Larry Stern's immunity agreement with the Department of Justice ("DOJ"). *See* Dow Brief, at 59-60; *see also* Dkt. Nos. 2565, 2634, 2668. Dow's argument fails for at least three reasons. First, Dow has waived the portion of its argument not presented to the Court at the *in limine* stage. Second, the Court's *in limine* ruling was correct. Third, even assuming that the Court erred in excluding evidence of the immunity agreement, that exclusion did not affect the essential fairness of the trial.

Before trial, Plaintiffs requested an *in limine* ruling excluding evidence of Mr. Stern's immunity agreement with DOJ. In opposition, Dow made the conclusory argument that Mr. Stern's agreement with the Government gave him an incentive to lie. *See* Dkt. No. 2634, at 4-6. As Plaintiffs pointed out, however, evidence of the agreement had "no bearing on [Stern's] credibility," and if anything, the agreement made Stern look *more* credible because it required him to tell the truth in order to maintain immunity. Dkt. No. 2668, at 3-4. At the *limine*

conference, the Court asked Dow to identify evidence of the conditions DOJ had imposed on Stern in exchange for immunity, and Dow stated it had none. *See* Transcript of Motion in *Limine* Conference, *In re Urethane Antitrust Litigation*, No. 04-1616, at 52-53 (D. Kan. Jan. 9, 2013) ("*Limine* Tr."). Now, after trial, Dow belatedly references (at 61) general documents that describe the Antitrust Division's leniency program and asserts that these documents provide the "logical connection" the Court found wanting at the *limine* conference. *Limine* Tr. at 54. But because Dow did not present this evidence to the Court before trial, it has waived any argument based on it after trial. *See Alexander v. Riga*, 208 F.3d 419, 434 (3d Cir. 2000) (post-trial request for injunction was "waived by the failure of counsel to raise the issue of injunctive relief prior to the conclusion of trial"); *De Puy Inc. v. Biomedical Eng'g Trust*, 216 F. Supp. 2d 358, 370-77 (D.N.J. 2001) (argument in post-trial motion for judgment as a matter of law that expert's damages estimate should have been excluded because it was not supported by the evidence was waived; movant had "ample opportunity" to object before trial, failed to do so, and thus was precluded from arguing for exclusion after trial).

Even if the Court were to consider Dow's new arguments, however, the website and speech relied on by Dow, *see* Dow Brief, at 61 n.27, merely reflect general policies and shed no light on the specifics of Mr. Stern's immunity agreement with DOJ. Thus, they have no bearing on the Court's two evidentiary rationales precluding reference to the immunity agreement: (1) there is no logical connection between the immunity agreement and Stern's credibility, and (2) "any minimal probative value would be substantially outweighed by the threat of undue prejudice, delay, and confusion." *Limine* Tr. at 54-55. The Court's initial exclusion of this evidence was a proper exercise of its discretion, and there is no basis for a new trial. *See In re Static Random Access Memory (SRAM) Antitrust Litig.*, No. 4:07-md-1819-CW, MDL No. 1819,

2011 WL 1219238, at *1 (N.D. Cal. Jan. 12, 2011) (holding that a leniency agreement that requires truthful testimony "does not provide a proper basis for impeachment").

Finally, even assuming evidence of the immunity agreement should have been admitted, its exclusion in no way warrants a new trial. A new trial is warranted only if an error is so "prejudicial" that it "affect[s] the essential fairness of the trial." *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 553 (1984). Impeachment evidence of marginal value to the jury's evaluation of the credibility of a witness—such as the evidence Dow belatedly identifies here—does not alter the trial's "essential fairness."

D. Dow's Challenge to the Constitutionality of Joint and Several Liability Is Meritless

Lastly, Dow argues that the imposition of joint and several liability was unconstitutional, both facially and as applied. Dow's argument is at odds with bedrock principles of antitrust law. The concept that participants in a conspiracy are held jointly and severally liable for the conduct of all co-conspirators dates back four centuries. *See* William L. Prosser, "Joint Torts and Several Liability," 25 Cal. L. Rev. 413, 414 (1937) ("The earliest cases [at common law] . . . . [involved] a common purpose, with mutual aid in carrying it out; in short, there was a joint enterprise, so that 'all coming to do an unlawful act, and of one party, the act of one is the act of all of the same party being present.'") (quoting *Sir John Heydon's Case*, 11 Co. Rep. 5, 6 (1613)). Consistent with these principles, literally scores of courts have held participants in antitrust conspiracies jointly and severally liable for the damages caused by their illegal activities. *See, e.g., Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 646 (1981) (citing *City of Atlanta v. Chattanooga Foundry & Pipeworks*, 127 F. 23, 26 (6th Cir. 1903), *aff'd*, 203 U.S. 390 (1906)) (observing that in civil antitrust actions there has been a "judicial determination that defendants should be jointly and severally liable"); *Standard Indus., Inc. v. Mobil Oil Corp.*, 475 F.2d 220,

222, 232 (10th Cir. 1973) (affirming a joint and several judgment entered against price-fixing defendants); *Paper Sys. Inc. v. Nippon Paper Indus. Co.*, 281 F.3d 629, 632–34 (7th Cir. 2002) (rejecting argument that *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), created an exception to the imposition of joint and several liability on antitrust conspirators); *Pinney Dock & Transp. Co. v. Penn Central Corp.*, No. C80-1733, 1982 WL 1828, at *10 (N.D. Ohio Feb. 2, 1982) (rejecting the defendant's argument that a settling third-party defendant had to be joined in part because the plaintiff could receive complete relief as antitrust violators are held jointly and severally liable); *see also Zenith Radio Corp. v. Hazeltine Research., Inc.*, 401 U.S. 321, 346-47 (1971) (holding that in antitrust cases, each jointly liable defendant is released by a settlement agreement only if the plaintiff intends to release it); Prosser, 25 Cal. L. Rev. at 429–30 ("It is settled definitely that all who act in concert will be liable for the entire result. . . . Those who actively participate in the wrongful act, by cooperation or request, or who lend aid, encouragement or countenance to the wrongdoer, or approval to his acts done for their benefit, are equally liable with him." (footnotes omitted)).

Likewise, courts have refused to find that joint and several liability violates the Due Process Clause in the context of other federal statutes. *See, e.g.*, *United States v. Alcan Aluminum Corp.*, 315 F.3d 179, 188–90 (2d Cir. 2003) (collecting CERCLA cases) ("[H]olding Alcan jointly and severally liable under CERCLA for the cleanup costs incurred . . . does not result in . . . a deprivation of its right to due process."); *United States v. Production Plated Plastics, Inc.*, 61 F.3d 904, at *4 (6th Cir. 1995) ("[T]he district court's conclusion that the Defendants functioned as one entity was clearly permissible, based on the evidence. Thus, the court did not abuse its discretion and violate the Due Process Clause when it imposed joint and several liability on the Defendants for the civil penalty.").

Dow identifies not a single case holding that the imposition of joint and several liability in a conspiracy case violates due process. In view of the well-settled authority imposing joint and several liability on price-fixing co-conspirators, Dow's unsupported claim that it lacked notice that it would be held jointly and severally liable for its violations of the antitrust laws has no credibility. Plaintiffs are not required to plead legal theories, including joint and several liability. *SEC v. Whittemore*, 659 F.3d 1, 10 (D.C. Cir. 2011) (holding that joint and several liability could be imposed even though it was not requested in the complaint because the "allegations in the complaint made clear that the Commission claimed [the] defendants acted in concert in executing a single fraudulent scheme"); *see Zokari*, 561 F.3d at 1084 ("[A] complaint need not set forth the plaintiff's legal theories.").

Further, the failure to plead for a specific kind of relief is not a bar to its recovery. *See In re Universal Serv. Fund Tel. Billing Practices Litig.*, 02-MD-1468-JWL, 2009 WL 435111, at *15 (D. Kan. Feb. 20, 2009) (allowing claim for pre-judgment interest despite its omission from pretrial order) ("Rule 54(c) specifically provides that a party should be granted the relief to which it is entitled, even if such relief has not been requested in the pleadings"), *aff'd*, *619* F.3d 1188 (10th Cir. 2010); Wright & Miller, Federal Practice and Procedure: Civil 3d § 1255 ("Nor is the court limited by the demand for judgment if a deviation seems appropriate at any point after the interposition of the pleading.").

Moreover, Dow *was* on notice, because joint and several liability has been the law for four hundred years; because *multiple* pleadings in the case referred to Dow's joint and several liability (*e.g.*, Dkt. Nos. 204-1, 2035, and 2138); and because the pretrial order, which superseded the pleadings, expressly referenced joint and several liability. Finally, and for these reasons, Dow cannot point to any action it would have changed during discovery had the words

"joint and several liability" appeared in the class's complaint.

Dow's assertion that "due process generally limits awards vastly disproportionate with actual effects of the defendant's own conduct" is equally unavailing. Dow Brief, at 64.[25] The authority on which Dow relies concerns the imposition of punitive damages under state law and is clearly inapposite.[26] Indeed, the Tenth Circuit has rejected an argument that a jury verdict in an antitrust case was "grossly excessive." *Aspen Skiing*, 738 F.2d at 1526. In addition, the constitutional concern with punitive damages—that they may be disproportionately large as to actual damages—has no bearing on an antitrust price-fixing cases brought under federal law. Joint and several liability is designed to discourage conspiracies and to properly compensate the victims, because the victims suffer harm from the conspiracy as a whole, not just the acts of individual participants. *See Hess Oil Virgin Is. Corp. v. UOP, Inc.*, 861 F.2d 1197, 1209–10 (10th Cir. 1988) (stating that the purpose of joint and several liability is "full compensation to the injured plaintiff," with any risk of unfairness borne by the defendant); *Coats v. Penrod Drilling Corp.*, 61 F.3d 1113, 1124–25 (5th Cir. 1995) (en banc) (stating that joint and several liability arose out of two rationales, namely that those acting "in concert" should be jointly liable and that "a tortfeasor should be responsible for all consequences stemming from his actions, regardless of the fortuitous circumstance that others may also have contributed to the injury").

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[25] Dow mischaracterizes the record, asserting that it played a "relatively limited role" in the conspiracy. Dow Brief, at 64. In fact, the evidence at trial showed that Dow was a key participant in the price-fixing conspiracy, with senior Dow executives David Fischer and Marco Levi serving as ringleaders and other high-ranking Dow executives Bob Wood, Peter Davies and Mike Parker being involved as well.

[26] *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 412 (2003) (rejecting a $145 million punitive damages award in insurance litigation where compensatory damages summed to $1 million); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 562–63, 585–86 (1996) (overturning $2 million in punitive damages on $4,000 of compensatory damages on a civil fraud claim).

CONCLUSION

Plaintiffs respectfully request that the Court deny Dow's motions for judgment on the verdict and as a matter of law, or for a new trial.

Dated: March 22, 2013

Respectfully submitted,

/s/ Robert W. Coykendall
Robert W. Coykendall, #10137
Roger N. Walter, #08620
Morris, Laing, Evans, Brock & Kennedy, Chtd.
Old Town Square
300 North Mead - Suite 200
Wichita, KS 67202
Tel: (316) 262-2671
Fax: (316) 262-5991

Class Plaintiffs' Liaison Counsel

Allen D. Black
Roberta D. Liebenberg
Donald L. Perelman
Gerard A. Dever
Matthew Duncan
Fine, Kaplan and Black, R.P.C.
One South Broad Street, 23rd Floor
Philadelphia, PA 19107
Tel: (215) 567-6565
Fax: (215) 568-5872

Richard A. Koffman
Christopher J. Cormier
Sharon K. Robertson
Laura Alexander
Cohen, Milstein, Sellers & Toll P.L.L.C.
1100 New York Avenue, N.W.
Suite 500, West Tower
Washington, DC 20005
Tel: (202) 408-4600
Fax: (202) 408-4699

Class Plaintiffs' Co-Lead Counsel

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that on this 22nd day of March, 2013, I caused the foregoing Class Plaintiffs' Opposition to the Dow Chemical Company's Motion for Judgment As a Matter of Law to be electronically filed with the clerk of the court by using the CM/ECF system which will send a notice of electronic filing to all counsel who have registered for receipt of documents filed in this matter.

/s/ *Gerard A. Dever*
Gerard A. Dever