**No. 13-3215**

**UNITED STATES COURT OF APPEALS**
**FOR THE TENTH CIRCUIT**

IN RE URETHANE ANTITRUST LITIGATION

CLASS PLAINTIFFS,

*Appellees*

On Appeal from the United States District Court for the District of Kansas
The Honorable John W. Lungstrum
D.C. No. 2:04-md-1616-JWL

# OPPOSITION TO REHEARING AND REHEARING *EN BANC*

ROBERTA D. LIEBENBERG
DONALD L. PERELMAN
GERARD A. DEVER
MATTHEW DUNCAN
FINE, KAPLAN
AND BLACK, RPC
One South Broad Street
23rd Floor
Philadelphia, PA 19107

PAUL D. CLEMENT
*Counsel of Record*
CANDICE C. WONG
WILLIAM R. LEVI
BANCROFT PLLC
1919 M Street NW
Suite 470
Washington, DC 20036
(202) 234-0090
pclement@bancroftpllc.com

*Counsel for Class Plaintiffs*

*Additional counsel on inside cover*

October 24, 2014

RICHARD A. KOFFMAN
KIT A. PIERSON
CHRISTOPHER J. CORMIER
SHARON K. ROBERTSON
LAURA A. ALEXANDER
COHEN MILSTEIN SELLERS
& TOLL, PLLC
1100 New York Avenue NW
Suite 500, West Tower
Washington, DC 20005

JOSEPH GOLDBERG
FREEDMAN BOYD HOLLANDER
GOLDBERG URIAS & WARD, P.A.
20 First Plaza
Suite 700
Albuquerque, NM 87102

MICHAEL J. GUZMAN
REBECCA A. BEYNON
MICHAEL N. NEMELKA
KELLOGG, HUBER, HANSEN,
TODD, EVANS & FIGEL, PLLC
1615 M Street NW
Suite 400
Sumner Square
Washington, DC 20036

ROBERT W. COYKENDALL
ROGER N.WALTER
MORRIS, LAING, EVANS, BROCK
& KENNEDY, CHARTERED
300 North Mead
Suite 200
Wichita, KS 67202

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## INTRODUCTION

This case involves a conspiracy to fix the prices of billions of dollars of commerce and a classic use of Rule 23. The underlying claims involve an executive-level price-fixing conspiracy, long understood both to be "the supreme evil of antitrust" and to implicate issues well-suited for class treatment. *Verizon Commc'ns v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 408 (2004).

Dow does not seriously dispute its participation in the unlawful conspiracy, focusing instead on avoiding the jury's verdict through class decertification. Importantly, however, this case proceeded through a four-week jury trial. Unlike many class action disputes that arise in an interlocutory posture, here there is no need to speculate whether common issues will predominate or class litigation will prove workable. The actual trial confirmed that common issues and common evidence *in fact* overwhelmingly predominated over any individual issues and that the class action was manageable. Plaintiffs introduced days of common proof concerning the conspiracy, antitrust impact, and damages. Dow responded with common proof of its own as it unsuccessfully sought class-wide exoneration. And based on extensive common proof, the jury rendered a class-wide verdict that (1) senior Dow executives participated in a multi-year price-fixing conspiracy for commodity urethane chemicals, (2) the class was injured by the cartel, and (3) class damages totaled $400 million.

With the benefit of this extensive trial record, four federal judges have considered Dow's belated decertification arguments, and all four have found Dow's arguments wanting. In its petition, Dow presses two challenges to the Panel's unanimous decision. First, Dow accuses the Panel of adopting a presumption of class-wide antitrust impact that other circuits have rejected. But the Panel did no such thing. Instead, the Panel correctly affirmed the district court's evidence-based conclusion that impact was a common issue. The Panel noted that some courts have permitted an inference of impact from the existence of a cartel and emphasized that, here, the district court relied on a concrete *evidentiary showing* of class-wide impact caused by the cartel. This is not a case where it is necessary to rely on naked inferences or presumptions of impact, as there was ample common proof of class-wide impact and no abuse of discretion by the experienced district court in crediting that common proof.

Second, Dow continues to suggest that *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011) and *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013) require decertification of the class. But as the Panel explained, to the extent Dow even preserved these arguments, *Wal-Mart* and *Comcast* have no relevance. *Wal-Mart* was a commonality case, and Dow concedes commonality is satisfied by the common evidence of a nationwide price-fixing scheme, which, along with common evidence of class-wide impact and damages, provides the "'glue'" that was missing

in *Wal-Mart*. Op. 12. Nor, as the Panel held, did this case involve the kind of novel "'Trial by Formula'" criticized in *Wal-Mart*, where individual Title VII claims would have been resolved without any trial on liability at all. Op. 18. *Comcast* is even less relevant. *Comcast* reversed a pre-trial class certification ruling that failed to adequately consider the merits. Here, Dow seeks decertification after a full merits trial that underscored the predominance of common issues. That the jury awarded less damages than plaintiffs sought does not provide any basis for decertification.

The Panel's decision creates no conflict with Supreme Court authority or circuit split. The class was properly certified, the Panel properly held that the district court acted within its discretion under Rule 23, and there is no basis for decertifying the class or upsetting the verdict. Dow's petition should be denied.

## ARGUMENT

### THE PANEL CORRECTLY FOUND THAT THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DETERMINING—AS BORNE OUT AT TRIAL—THAT COMMON ISSUES PREDOMINATED.

"Predominance is a test readily met in certain cases alleging … violations of the antitrust laws." *Amchem Prods. v. Windsor*, 521 U.S. 591, 625 (1997). Decades of authority have thus recognized price-fixing cartel claims, like those here, as paradigmatically suited to class treatment. AA0404-05 (collecting cases). Consistent with that long line of cases, the district court concluded that common issues predominated, and the Panel correctly deemed that fact-based conclusion to fall within the court's discretion.

In the typical pre-trial certification decision, courts are engaged in an inherently predictive exercise about what issues will predominate and "how the case will be tried," Fed. R. Civ. P. 23 advisory committee notes (2003). *Post*-trial, there is no need or room for guesswork. Here, "we know from the actual trial that individualized issues did not predominate" or render the trial unworkable. Op. 21. We know that the trial focused on evidence concerning the scope, nature, and market effect of the conspiracy, including evidence showing that senior Dow executives were central players in the scheme. *E.g.*, Op. 34-36; SA912-19, 1980-84 (executives fixed prices in calls from gas station phone booths and at private golf outings, meetings, and dinners). We know that plaintiffs presented ample common evidence of class-wide impact, and that even Dow's own witnesses offered common proof of impact. We know that the jury credited plaintiffs' common evidence over Dow's competing presentations, issuing a class-wide verdict that "Dow participated in a conspiracy to fix, raise, or stabilize prices" and that Dow's conspiracy "caused Class Plaintiffs to pay more for urethane chemicals than they would have paid absent a conspiracy." AA0513-15. And we know that the jury was never instructed to "infer" or "presume" anything, but rather based its verdict on the evidence.

### A. The Panel Did Not Presume Class-Wide Impact—It Relied on Substantial Common Evidence to Affirm the District Court.

**1.** Dow attempts to manufacture a circuit split by attributing an inference or presumption of class-wide impact to the Panel that it did not apply. Dow argues that

the Panel created a "rule" by which "classwide impact can[] be presumed from the existence of a price-fixing conspiracy," obviating any need for "plaintiffs to 'prove, through common evidence, that all class members were in fact injured.'" Pet. 4-5. The Panel adopted no such rule. Far from suggesting that class-wide impact shall be presumed in lieu of "evidence," the Panel relied expressly on common evidence of impact presented at trial in affirming the district court's predominance finding. The Panel acknowledged the "view" of some courts that price-fixing creates an inference of class-wide impact, but deemed that inference stronger "*where, as here, there is evidence*" of class-wide impact—and proceeded to catalog that evidence at some length, while emphasizing that the district court "had the benefit of the trial testimony." Op. 13-15, 38-39 (emphasis added).

The common evidence of class-wide impact introduced at trial was overwhelming.[1] Plaintiffs, for example, presented common proof of a systematic pattern of lockstep industry price increases imposed by the cartel: a series of price

[1] *See* AA0534 (Post-Trial Op.) ("[Plaintiffs] introduced evidence at trial that Dow participated in a conspiracy with other manufacturers to fix prices; that the conspiracy involved high-ranking executives at the companies who exercised control over pricing decisions across a variety of products; that the alleged conspirators engaged in lockstep pricing and price announcements; that such pricing decisions were effective; that the structure of the industry was conducive to a price-fixing conspiracy; and that the prices were supracompetitive during the conspiracy period. This evidence, which was not limited merely to experts' opinions, is sufficient to show injury to the class from the alleged conspiracy.").

increase announcements coordinated by top executives with nationwide pricing authority, issued by *all* cartel members and applicable to *all* customers in the same amounts on the same effective dates. Op. 14-15. Dow's witnesses further testified that the collusive price increases had a direct impact on *all* customer price negotiations. *E.g.,* SA4095-4103 (announcements were "where the negotiation starts with the customers"); AA1772-92; *see also In re Publ'n Paper Antitrust Litig*., 690 F.3d 51, 67-68 (2d Cir. 2012) (class-wide impact supported by coordinated lockstep price increases by executives with "final pricing authority").

Plaintiffs also proved at trial that the announced collusive price increases worked as intended, raising *actual* urethane transaction prices across the board. Op. 38-39 & n.22. Dozens of documents and admissions in the class certification and trial record, including testimony from Dow's own witnesses, showed that the increases stuck. *E.g.,* SA4156 (Dow director testifying that many increases were fully successful in raising prices throughout the market); SA482 (Dow documents stating that price increases were "**Working!!!!!!!**"); SA5258 (Dow's own expert conceding that many announcements resulted in actual price increases).

"The jury also heard from the plaintiffs' expert, Dr. John Solow"—unchallenged by Dow on appeal—who testified that structural features of the urethane industry, including a "'concentrated'" market with "high barriers to entry," commodity products, and "no close product substitutes," were conducive to

successful price-fixing having class-wide effects. Op. 36-37; *e.g.,* SA2640-55. Based on those industry features and the "collusive conduct he had observed" of the cartel, Op. 36, Solow testified that "nearly all of the members of the class were injured" by the conspiracy. SA2641; *see also In re High Fructose Corn Syrup Antitrust Litig*., 295 F.3d 651, 656-58 (7th Cir. 2002) (describing market structures where "secret price fixing might actually have an effect on price").

Finally, multiple-regression analysis of one million actual urethane transactions—that is, reflecting *post-negotiation* prices and thus controlling for any negotiations—showed systematic overcharges during the conspiracy period, across all urethane products, all geographic regions, and for large and small customers alike. The statistical evidence demonstrated that *98% of customers were overcharged*. AA2441, 2445 (McClave).

In combination, all of this common and mutually reinforcing proof of class-wide impact was properly credited by the jury on the merits, by the district court in its post-trial opinions, and by the Panel in its thorough opinion.

**2.** Dow next asserts that the Panel "certified [the class] on the illogical assumption that, where prices are negotiated, an increase in the base price harms *all* class members." Pet. 5. But once again Dow distorts the opinion and ignores the ample trial record. The Panel did not need to "assume" anything because plaintiffs did not rest after showing an inflated baseline for every negotiation. Rather,

plaintiffs introduced all the above evidence, *see supra*, that the conspiracy in fact had its intended illicit impact on actual transaction prices, not just baselines—*i.e.*, that the conspiracy was "working" and affected the prices paid by all or nearly all class members. In short, the Panel, like the district court, propounded no "theory of presumptive harm," Pet. 6, but rather made a factbound determination based on plaintiffs' evidentiary showing.

The cases that Dow cites as rejecting assumptions of impact are inapposite. Pet. 6. Both *In re New Motor Vehicles Canadian Exp. Antitrust Litigation*, 522 F.3d 6 (1st Cir. 2008), and *Robinson v. Texas Automobile Dealers Ass'n*, 387 F.3d 416 (5th Cir. 2004), arose in the more common pre-trial certification context where neither the trial nor appellate courts "had the benefit of the trial testimony" in evaluating predominance. Op. 15. And both cases denied class certification due to deficiencies in the proffered evidence. *See In re New Motor Vehicles*, 522 F.3d at 29-30 (argument for certification was solely based on "intuitive appeal" without "a more fully developed record"); *Robinson*, 387 F.3d at 424 (insufficient common evidence to establish predominance). Neither case involved the evidentiary showing of class-wide impact that readily distinguishes this case.

**3.** Finally, Dow alleges that the Panel found predominance based on common proof of conspiracy alone. Dow is wrong. The Panel found "*two common questions* that could yield common answers at trial: the existence of a conspiracy *and* the

existence of impact." Op. 16 (emphases added); *see also* Op. 13 (both "the existence of a conspiracy and impact … raised common questions"). Later, the Panel observed that "courts have regarded" conspiracy as "the overriding issue" in predominance analyses. Op. 15. But that unremarkable observation, *see* 7AA Wright & Miller, *Federal Practice & Procedure* § 1781 (3d ed. 2005) ("whether a conspiracy exists is a common question that is thought to predominate over the other issues"), did not remotely contradict the immediately prior finding that the evidence confirmed that impact was a common issue. Whether the common question of the conspiracy alone would satisfy predominance is of no moment where the Panel found both conspiracy *and* impact to be common issues.

### B. The Panel Correctly Rejected Dow's Strained Analogy to *Wal-Mart*.

**1.** Dow argues that the Panel erred in rejecting Dow's contention that class certification deprived it of the "right to litigate its 'defenses to individual claims.'" Pet. 9 (quoting *Wal-Mart*, 131 S. Ct. at 2561). But this belated claim of a *Wal-Mart* defect was not preserved. Dow raised *Wal-Mart* for the first time for a different proposition—one and a half years after *Wal-Mart* was decided—in its eve-of-trial motion for decertification, which the district court correctly deemed untimely and meritless. AA0523-24.

Equally important, Dow made a strategic decision not to seek separate, individualized damages proceedings in favor of presenting its "no impact"

arguments on a class-wide basis at trial. Op. 24 n.11. Dow opted with the Pretrial Order, jury instructions, and verdict form to pursue a preclusive class-wide defense verdict on all issues, including damages, instead of seeking to adjudicate damages (and the effect of negotiations on damages) class member by class member. *E.g.,* AA0467-68. At trial, Dow argued at length that the cartel failed because of industry economics and customer bargaining—and the jury considered and rejected those points on the merits. Dow had the opportunity to introduce evidence at trial that individual class members suffered no damages, but elected not to. Having aired—and lost—its "no impact" arguments on the merits, Dow cannot now, in the face of an adverse class-wide verdict, ignore its waiver of precisely the individualized determinations it now belatedly demands.

In all events, as the Panel detailed, this case bears little resemblance to *Wal-Mart*. *Wal-Mart* was a commonality decision involving a Rule 23(b)(2) class action of 1.5 million employees alleging that discretion exercised by local supervisors over pay and promotions showed a "pattern or practice" of sex discrimination under Title VII. Because there was no "company-wide policy of discrimination or 'a common mode of exercising discretion,'" Op. 12, there was "*nothing* to unite all of the plaintiffs' claims" and "'*no* common questions of law or fact'" capable of "'generat[ing] common *answers* apt to drive the resolution of the litigation.'" 131 S. Ct. at 2551, 2557 n.10 (emphases added). In short, "there was "no 'glue' holding

together the reasons for the alleged injury," and in the absence of any commonality, "individualized proceedings were necessary." Op. 12, 16.

This case is completely different. Commonality is conceded, and "common questions" as to both conspiracy and impact supplied the requisite "glue." Op. 16. Those common questions "drove the litigation and generated common answers that determined liability in a single 'stroke.'" Op. 17. The Panel was correct that the alleged conflict with *Wal-Mart* is illusory.[2]

**2.** Dow also contends that the Panel erred in rejecting its contention that McClave's use of the standard statistical technique of extrapolation to estimate damages for some customers created "just the kind of 'Trial by Formula' that *Wal-Mart* condemns." Pet. 9. As the Panel noted, this argument was untimely. Dow failed to raise this supposed methodological concern in its *Daubert* motion, and instead raised it "the day before trial … even though [Dow] had received Dr. McClave's report 21 months earlier." Op. 18. Having failed to object to extrapolation under *Daubert*, Dow has no cause to complain about its use at trial.

Dow alternatively argues that its argument must be considered because it is "based on plaintiffs' failure to meet their burden of proving classwide impact *at*

[2] Dow and its *amicus* get things backward in asserting that the Panel's ruling will harm businesses. It is their attempt to exonerate through decertification an established cartel member that a jury has found to have engaged in nationwide price-fixing of billions of dollars of commerce that would harm businesses and consumers.

*trial*." Pet. 12 (emphasis added). But this argument fares no better because, as the Panel correctly explained, this case involved nothing like the "Trial by Formula" condemned in *Wal-Mart.* This case did not involve the novel use of modeling as a substitute for a jury trial on liability, but rather a standard and widely accepted extrapolation methodology used for estimating damages in a wide array of civil cases, including antitrust cases. *E.g., Manpower, Inc. v. Ins. Co. of Pa.*, 732 F.3d 796, 806-08 (7th Cir. 2013).

Unlike in *Wal-Mart*, McClave did not extrapolate to "prove Dow's liability." Op. 18. As an initial matter, "Dow's liability as to each class member was proven through common evidence" that went well beyond McClave. Op. 18; *see also* AA0536 ("plaintiffs' evidence of injury to the class was not limited to Dr. McClave's testimony"). McClave's opinions on class-wide impact, moreover, were based on his multiple regression analysis of one million actual urethane transactions—a large and reliable dataset, as McClave explained—which showed systematic overcharges across all products and sizes of customers. Those persistent and pervasive overcharges, together with the exceptional statistical strength of the regression models, supported McClave's opinion and testimony that transaction prices were impacted across the board, injuring all or nearly all customers. McClave's impact opinions thus rest squarely on the modeled data, not extrapolations. He used extrapolations—a standard and uncontroversial statistical

tool in price-fixing cases—solely to estimate damages, in testimony that was just part of the overwhelmingly common evidence introduced at trial.[3] And Dow cross-examined McClave on these issues and presented competing expert opinions on extrapolation at trial, yet the jury's verdict credited McClave's damages estimates. *E.g.*, *King & King Enters. v. Champlin Petroleum Co.*, 657 F.2d 1147, 1158-59 (10th Cir. 1981) (jury's damages award warrants wide deference).

At bottom, McClave's use of extrapolations in estimating damages for some customers has nothing to do with *Wal-Mart*, and *Wal-Mart*—a commonality decision in a Rule 23(b)(2) action—has little to do with the Rule 23(b)(3) predominance finding at which Dow takes aim.

### C. The Panel Correctly Rejected Dow's Strained Analogy to *Comcast*.

Dow argues that McClave's model suffers from the "same flaw" that precluded certification in *Comcast*, contending that it measures "damages that are not the result of the wrong" on which Dow's liability is based. 133 S. Ct. at 1434. Dow alleges that McClave identified overcharges *before* November 2000, but that the jury held Dow liable from November 2000 (but not before) to December 2003. But there is a world of difference between the problem in *Comcast* and the common

[3] Contrary to Dow's assertion, Pet. 11, the district court did not suggest that McClave used extrapolations to form both his opinion on damages and his opinion on impact. *See* AA0526 ("Dr. McClave's model provided for the *extrapolation of damages* for some class members") (emphasis added).

and entirely unobjectionable practice of a jury finding liability and awarding damages for a shorter period than the plaintiffs alleged. *E.g.*, Op. 44 (collecting cases affirming awards of less-than-full damages sought).

As the Panel correctly held, *Comcast* is readily distinguishable. *Comcast* involved a pre-trial certification in which the lower court had "refus[ed]" to undertake a "rigorous analysis" of Rule 23 predominance. 133 S. Ct. at 1432-33. Here, not only did the district court conduct the requisite analysis, but "we know from the actual trial that individualized issues did not predominate." Op. 21. In *Comcast*, the district court had only a preliminary expert report to satisfy a conceded prerequisite for certification. Here, there was extensive evidence of class-wide impact and damages beyond McClave's testimony. In *Comcast*, plaintiffs had introduced no method for proving class-wide damages on a common basis at the certification stage. Here, plaintiffs proved class-wide damages on a common basis.

In all events, Dow's efforts to manufacture a "*Comcast* problem" out of the jury's finding that plaintiffs carried their burden of proof for part (but not all) of the alleged conspiracy period is wholly unavailing. The jury's verdict hardly amounted to a "reject[ion]" of the existence of pre-November 2000 overcharges, as Dow suggests. Pet. 14. The jury may have "fully credited Dr. McClave's models, but found the evidence [*e.g.*, evidence of conspiracy or the non-economic evidence of impact] insufficient to find an injury before November 24, 2000." Op. 41. And "the

plaintiffs' failure to prove a conspiracy for part of the alleged conspiracy period does not invalidate the finding of liability for [another] part of th[e] period." Op 41. Nothing about that reasonable weighing of the evidence—quintessentially the role of the jury—undermines McClave's model *in toto*.[4]

Finally, the Panel persuasively distinguished *In re Rail Freight Fuel Surcharge Antitrust Litigation*, 725 F.3d 244 (D.C. Cir. 2013). *Rail Freight* remanded for reconsideration where pre-trial certification rested solely on a model, which (as was apparent *ex ante*) detected injury for a category of plaintiffs "where none could exist." *Id*. at 248, 252. Here, conversely, "Dow has not identified *a single class member for whom injury was impossible*." Op. 42 (emphasis added). And this Court has the benefit of knowing that "[c]ommon issues predominated" in fact at trial. *Id*.

In the end, there is nothing remarkable, let alone reversible, about Dr. McClave's testimony—one piece of the extensive and damning body of evidence that plaintiffs presented, and that the jury credited, at trial.

## CONCLUSION

Dow's petition for rehearing or rehearing *en banc* should be denied.

[4] Dow erroneously claims that McClave "conceded" that "his models do not have any statistical probity in estimating overcharges during a shorter liability period." Pet. 15. McClave said the opposite, testifying that his models calculated reliable damages for the shorter period as well. SA3506-07.

Respectfully submitted,

s/PAUL D. CLEMENT

PAUL D. CLEMENT
*Counsel of Record*
CANDICE C. WONG
WILLIAM R. LEVI
BANCROFT PLLC
1919 M Street NW
Suite 470
Washington, DC 20036
(202) 234-0090
pclement@bancroftpllc.com

ROBERTA D. LIEBENBERG
DONALD L. PERELMAN
GERARD A. DEVER
MATTHEW DUNCAN
FINE, KAPLAN
AND BLACK, RPC
One South Broad Street
23rd Floor
Philadelphia, PA 19107

RICHARD A. KOFFMAN
KIT A. PIERSON
CHRISTOPHER J. CORMIER
SHARON K. ROBERTSON
LAURA A. ALEXANDER
COHEN MILSTEIN SELLERS
& TOLL, PLLC
1100 New York Avenue NW
Suite 500, West Tower
Washington, DC 20005

MICHAEL J. GUZMAN
REBECCA A. BEYNON
MICHAEL N. NEMELKA
KELLOGG, HUBER, HANSEN,
TODD, EVANS & FIGEL, PLLC
1615 M Street NW
Suite 400
Sumner Square
Washington, DC 20036

JOSEPH GOLDBERG
FREEDMAN BOYD HOLLANDER
GOLDBERG URIAS & WARD, P.A.
20 First Plaza
Suite 700
Albuquerque, NM 87102

ROBERT W. COYKENDALL
ROGER N.WALTER
MORRIS, LAING, EVANS, BROCK
& KENNEDY, CHARTERED
300 North Mead
Suite 200
Wichita, KS 67202

*Counsel for Class Plaintiffs*

October 24, 2014

## CERTIFICATE OF COMPLIANCE

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DATED: October 24, 2014

s/William R. Levi
William R. Levi

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I hereby certify that on October 24, 2014, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the CM/ECF system, which provides electronic service of the filing to all counsel of record who have registered for ECF notification in this matter.

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