No. 13-3215

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

IN RE URETHANE ANTITRUST LITIGATION

The Dow Chemical Company,
Appellant

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

APPELLANT'S REPLY BRIEF

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Oral Argument Requested

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GLOSSARY

AA	Appellant's appendix
AMIBA	American Independent Business Alliance
ASA	Appellant's supplemental appendix
Dow.Br.	Appellant's opening brief
MDI	Methylene diphenyl diisocyanate. It can be combined with a polyether polyol to produce flexible foam, such as mattresses and automobile seats.
TDI	Toluene diisocyanate. It can be combined with a polyether polyol to produce rigid insulation or structural foam, such as household and appliance insulation, adhesives, and sealants.
Pltfs.Br.	Class plaintiffs' response brief
Polyether Polyols	Chemicals that can be combined with TDI or MDI to make a polyurethane.
SA	Appellees' supplemental appendix
Systems	A set of chemicals, most commonly comprised of MDI with a polyether polyol and additives, needed to make a particular polyurethane product.

INTRODUCTION

As Dow demonstrated in its opening brief, class certification—and the $1.06 billion judgment—must be reversed because individualized evidence is needed to determine injury and damages. Plaintiffs respond that the existence of the conspiracy is a common question, and they emphasize evidence of communications between some executives about plans to announce price increases. Common issues do not predominate in antitrust actions, however, unless *both* conspiracy *and injury* can be resolved through common evidence. Here, plaintiffs alleged not an agreement as to actual prices, but an agreement to issue price-increase announcements. Those announcements did not raise actual prices, let alone cause injury, to all members of the class. It is undisputed that defendants often failed to make the increases "stick" with individual customers, many of whom are large multi-national companies.

To avoid individualized inquiries into how these announcements affected each customer's prices, plaintiffs hired Dr. McClave, a statistician who attempted to show that virtually all class members were injured and to quantify damages. Plaintiffs say that, with McClave's testimony and the "common" conspiracy evidence, the "trial was eminently manageable." Pltfs.Br.3. They urge deference to the verdict and claim decertification would be "unprecedented." *Id.* Plaintiffs ignore, however, both the text of Rule 23 and cases holding that a class may be

decertified prior to judgment even after a jury verdict. And the trial was manageable only because the court overrode Dow's right to contest injury on an individualized basis.

Moreover, McClave purported to prove classwide impact only by using extrapolation techniques that impermissibly *assumed* that 75% of the class was overcharged. This violated *Wal-Mart*'s prohibition on "Trial By Formula"—a prohibition not limited to class actions under Rule 23(b)(2), as plaintiffs claim. *See Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011). McClave's models also contained the same fatal defect condemned in *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013). To show otherwise, plaintiffs mischaracterize McClave's testimony, claiming he testified that the "*price-fixing conspiracy*" harmed nearly all class members. McClave said the size of the damages predicted *by his models* showed classwide injury, and those models indisputably assumed more than one antitrust violation—just as in *Comcast*.

In fact, McClave's models could not prove injury and damages at all. Plaintiffs simply repeat McClave's results-driven justification for his benchmark-shopping. As to his variable-shopping, they argue that one (and only one) of the demand variables he chose—TDI exports—is relevant to TDI prices. TDI *domestic* demand, however, was also relevant to TDI prices, and the omission of

this major variable rendered his models inadmissible. Nor can plaintiffs explain how McClave's models were reliable when they predicted damages during a period when the jury found none.

Tacitly conceding the deficiencies in McClave's models, plaintiffs claim other evidence supports the verdict. But plaintiffs' other expert, Dr. Solow, acknowledged the he relied on McClave in forming his conclusions about impact. And evidence of communication among senior executives about price-increase announcements cannot alter the undisputed economic evidence that prices were not parallel and many customers used their bargaining power to defeat price increases. Overall, prices stayed flat or fell despite rising demand and steady costs.

Because this undisputed economic evidence renders their allegations of an effective conspiracy untenable, plaintiffs claim prices would have fallen further due to "excess capacity." But at trial, McClave said excess capacity was not an important driver of price. Plaintiffs cannot simultaneously assert that defendants conspired to counteract downward price pressure from excess capacity, then "prove" the impact of that conspiracy based on models that deem excess capacity unimportant to price.

These and other flaws detailed below require reversal of the class certification rulings and entry of judgment for Dow.

ARGUMENT

I. THE DISTRICT COURT ERRED IN CERTIFYING THE CLASS.

A. *Wal-Mart* Precludes Class Certification.

1. Dow Was Entitled To Show, In Individualized Proceedings, That Particular Class Members Suffered No Injury Or Damages.

Plaintiffs argue that class certification is frequently granted in antitrust cases. Pltfs.Br.37-40. But "[e]very proposed class action must be decided on its own facts." *Wallace B. Roderick Revocable Living Trust v. XTO Energy, Inc.*, 725 F.3d 1213, 1220 (10th Cir. 2013) (quotations omitted). Individual issues predominate and a class cannot be certified in an antitrust case unless both the conspiracy *and injury* can be determined with common evidence. *See In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244, 252 (D.C. Cir. 2013); *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 311-12 (3d Cir. 2008); *Cordes & Co. Fin. Servs., Inc. v. A.G. Edwards & Sons, Inc.*, 502 F.3d 91, 105 (2d Cir. 2007); *Blades v. Monsanto Co.*, 400 F.3d 562, 566 (8th Cir. 2005); *Windham v. Am. Brands, Inc.*, 565 F.2d 59, 65-66 (4th Cir. 1977) (en banc).[1] *Wal-Mart* holds that, for *injury* to

[1] *In re Scrap Metal Antitrust Litigation*, 527 F.3d 517 (6th Cir. 2008), is not to the contrary. *See* Pltfs.Br.39, 42. There, the court upheld class certification where there was evidence that the conspiracy uniformly impacted all class members. 527 F.3d at 534. There is no discussion in the opinion that any class members were able to negotiate competitive prices.

be a common question, it must be "capable of classwide resolution" with common evidence, "in one stroke." 131 S. Ct. at 2551. Here, because prices were set through individual negotiations, whether all class members were injured cannot be resolved with common evidence "in one stroke."

Plaintiffs say "negotiations affect the *quantum* of damages, not the *fact* of injury." Pltfs.Br.40 (emphases in original). Not surprisingly, they cite no case for this illogical proposition. When a purchaser throws the price-increase announcement in the trash, buys from a supplier outside the alleged "cartel," or bargains to obtain a price at or below the price it had been paying regardless of the announcement, Dow.Br.6-9, 29-31, it is not injured.

Plaintiffs cite cases where district courts certified classes on the assumption that a conspiracy caused classwide injury by raising the baseline price from which negotiations began. Pltfs.Br.40. But plaintiffs cannot explain how a customer who negotiates away a baseline increase is "'injured in his business or property.'" *Windham*, 565 F.2d at 65-66 (quoting 15 U.S.C. §15). Nor do plaintiffs distinguish the appellate decisions holding that a class cannot be certified on the assumption that an increase in the baseline for negotiations caused all class members to pay supracompetive prices. Dow.Br.31-32 & n.5.

Plaintiffs are thus left arguing that McClave provided "compelling proof of damages" and classwide impact, and Dow had no right to individualized proceedings. Pltfs.Br.41-42. *Wal-Mart* forecloses both arguments.[2]

Wal-Mart's prohibition on "Trial by Formula" is not limited to class actions under Rule 23(b)(2). Plaintiffs note that, because individual proceedings were needed to adjudicate Wal-Mart's defenses to class members' backpay claims, damages were not "incidental" to equitable relief and thus could not be awarded in a Rule 23(b)(2) class action. Pls.Br.44-45. But individual proceedings were necessary because due process and the Rules Enabling Act protect a defendant's right to litigate defenses. *Wal-Mart*, 131 S. Ct. at 2561. That right cannot be defeated because plaintiffs offer a statistical model to show injury and damages for all class members; a defendant is entitled to rebut that showing with individualized proof. *Id.* That same reasoning applies here, as courts, both before and after *Wal-Mart*, have recognized. *See, e.g.*, *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 231-32 (2d Cir. 2008) (plaintiffs' plan to show injury with expert testimony about

[2] Plaintiffs contend that *Wal-Mart* (and *Comcast*) did not establish any "new" class certification law. Pltfs.Br.37. That assertion was rejected in *In re Rail Freight Fuel Surcharge Antitrust Litigation*, 725 F.3d at 255, and is contradicted by arguments plaintiffs' counsel is advancing elsewhere, *see* Br. of Applleants at 22, 28, *Sykes v. Mel S. Harris & Assocs.*, No. 13-2742(L) (2d Cir. Sept. 25, 2013) (arguing that *Wal-Mart* and *Comcast* ended lax approach to class certification taken by many courts).

"the average loss for each plaintiff" without allowing defendants "to challenge the allegations of individual plaintiffs" is "a due process violation" and "offends the Rules Enabling Act"); *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 333-34 (4th Cir. 1998) (reversing $390 million jury verdict where plaintiffs' expert based his damages calculations on "averages," and "classwide relief was awarded without ... any necessary connection to the merits of each individual claim") (quotations omitted); Dow.Br.35 (citing cases). The district court erred in not following that precedent and decertifying the class here.

2. The District Court Violated *Wal-Mart* By Allowing The Class To Proceed On The Basis Of Assumed, "Extrapolated" Impact And Damages.

Plaintiffs do not dispute that many customers rejected the price increases in the allegedly collusive announcements, Dow.Br.6-10, or that prices did not typically or uniformly increase after those announcements, Dow.Br.54-56. Quite the contrary, Solow testified that "collusion and competition are not an all-or-nothing thing," and admitted that defendants sometimes competed for class members' business. SA2723-24; *see also* SA2883-85. It is therefore undisputed that class members were not injured on every transaction.

Indeed, even McClave's gerrymandered models show periods when actual prices were at or below his predicted "but-for prices." AA1576-78. McClave's

models also show zero or "negative" overcharges for about 10% of all transactions he modeled.[3] Dow.Br.35-36. Yet in the extrapolations plaintiffs used to show injury and damages for 75% of the class, McClave assumed that the average overcharge observed in his models applied to *every* transaction. Dow.Br.34-40. Not only is this approach forbidden by *Wal-Mart* (*see supra* at 4-7), it also is not "sampling" in accordance with "'Statistics 101,'" as plaintiffs claim. Pltfs.Br.49 (quoting SA3535).

As Dow's expert Dr. Ugone explained, to be statistically valid, a sample must be "representative." AA1437-38. That is confirmed by the *Reference Guide on Statistics* cited in plaintiffs' brief (at 48), and McClave's own textbook. James McClave et al., *Statistics for Business and Economics* 15 (12th ed. 2014) ("to apply inferential statistics," one "must obtain a representative sample"). McClave's models, however, are *not* based on a "simple random sample." *See id.*;

[3] Additionally, at least 7% of class members whose damages were determined only by McClave's models had zero or negative damages. Dow.Br.35-36 & n.36. Plaintiffs claim the relevant number of class members with "zero overcharges" is 2%—a number they get by counting class members whose damages were calculated in part by extrapolation and in part by modeling as "modeled class members." Pltfs.Br.48-49 & n.8. That explanation proves Dow's point: because McClave's extrapolations assumed an overcharge on every transaction, they artificially inflated the percentage of "injured" class members. Had McClave not added the positive extrapolated damages to the zero or negative damages estimated by the models, the number of uninjured class members he identified would have been higher.

AA1433. He did not model "all products," "all producers," or "all customers large and small." Pltfs.Br. 49. Indeed, he did not model *any* Lyondell or systems transactions. Nor did he establish through any other form of analysis that his modeled transactions were representative of Lyondell or systems transactions. Dow.Br.37-40. It was therefore improper for McClave to apply the average overcharges from his models to every Lyondell and systems transaction. *See* Paul Johnson, *The Economics of Common Impact in Antitrust Class Certification*, 77 Antitrust L.J. 533, 548-49 n.43 (2011) (where data exist for only some defendants, the data "clearly are not a representative sample, and any conclusion based on such data may not extend to the population").

Plaintiffs attempt to excuse these violations of basic statistics by saying that Lyondell data "was missing" due to Lyondell's bankruptcy. Pltfs.Br.50. In fact, McClave had Lyondell data for transactions through 2006. He simply said he could not model it because "Lyondell was not available to respond to data questions." AA2173. But Lyondell agreed in its settlement to make "reasonable efforts" to help plaintiffs, including with respect to former employees plaintiffs might want to interview. AA0434-35. In any event, any "limitations" McClave perceived in the data do not result from wrongdoing by Lyondell, Dow or the other defendants, and cannot excuse the improper use of extrapolation.

Although Ugone "'understood'" McClave's reasoning for not modeling the Lyondell transactions, Plts.Br.50 (quoting SA5553-54), he did not endorse McClave's extrapolations. Rather, Ugone testified that McClave's extrapolations were unreliable because "you can't just take the [modeled] results and apply it to ... all of the systems where there was no modeling at all" or to Lyondell "where there was no testing at all." AA1437; *see also* AA1427. Plaintiffs are therefore wrong to say that McClave's extrapolations "rest[] upon a reliable foundation" and Dow did not marshal any "precedent" or "expert opinion to the contrary." Pltfs.Br.48 (internal quotation marks omitted).

Plaintiffs try to defend McClave's systems extrapolations by citing the district court's reference to unspecified "internal documents" that allegedly show that defendants viewed price increases for basic chemicals as "'helping them increase systems prices.'" Pltfs.Br.50 (quoting AA0412). Even if true, that would not support the conclusion that systems prices *always* were elevated by 74% of the average overcharge calculated by McClave's MDI model, as McClave simplistically assumed.

Plaintiffs ignore that Dow's systems prices were individually negotiated by sales representatives based on the system's value to the customer, so different systems containing the same MDI and polyols were sold at different prices.

AA1241-46; AA2020-21. Plaintiffs also ignore that systems tended to be "higher margin products" sold under "longer term contracts" so manufacturers "tended not to move the price up and down in the way [they] would with a commodity." SA5667. Consequently, there was "more stability in systems pricing," and a manufacturer "did not necessarily increase its systems prices even when it increased its MDI pricing." SA5667-68. Plaintiffs' own charts show that for a majority of the MDI and polyols price-increase announcements, at least one or two defendants did not announce a corresponding price increase for systems. Dow.Br.38.

In short, certification of a class based on McClave's extrapolations was improper.

B. *Comcast* Precludes Class Certification.

1. McClave Failed To Model Injury Resulting From The Only Violation On Which Dow's Liability Is Based.

McClave's models here have the same flaw that precluded class certification in *Comcast*. Dow.Br.41-44. Plaintiffs' attempts to distinguish *Comcast* are unavailing.

It is undisputed that (1) McClave's models assumed defendants engaged in a conspiracy to fix prices *and* to allocate customers and markets, and (2) plaintiffs did not prove the latter violation. Dow.Br.41-42. McClave thus did not model

injury and damages resulting from the only antitrust violation on which Dow's liability is based. Plaintiffs claim that McClave testified at trial that "Dow's *price-fixing conspiracy* 'impacted nearly every class member'" because prices exceeded those predicted by his models. Pltfs.Br.53 (quoting AA0530 (emphasis added)). But McClave testified only that, "given the persistence and size" of the damages "estimate[ed]" *by his models*, he concluded that "nearly all class members had been impacted or overcharged." AA0940. The "persistence and size" of damages estimated by models that assume *both* a price-fixing agreement *and* an allocation agreement do not estimate injury from a price-fixing agreement alone.

Alternatively, plaintiffs contend that *Comcast* is distinguishable because they "abandoned" their allocation theory before trial. Specifically, plaintiffs contend that McClave proffered a "but for" model that determined the difference between prices that would have existed in a "competitive" marketplace and observed prices. Pltfs.Br.54. Plaintiffs do not dispute that, if there had been an allocation conspiracy, it would have affected the "difference" McClave calculated. They say this is not a concern because no one contends there was an allocation conspiracy. Pltfs.Br.55-56.

But the *Comcast* defendants likewise did not agree that plaintiffs' additional theories were valid; they disputed plaintiffs' antitrust allegations. *See Behrend v.*

Comcast Corp., No. 2:03-cv-06604-JP (E.D. Pa.) (Dkt. Entry 138) (answer). Rather, what was dispositive in *Comcast* was that McClave *himself* developed models that "assumed the validity of all four theories of antitrust impact initially advanced by [plaintiffs]," but those models could not "attribute damages to any one particular theory of anticompetitive impact." 133 S. Ct. at 1434. The same is true here.

Plaintiffs are also wrong in suggesting that, because they eventually abandoned their allocation theory, McClave's damages calculations could only have measured the effect of the price-fixing conspiracy. Pltfs.Br.56 n.10. Under *Comcast*, the relevant issue is what the models were designed to measure. Plaintiffs' subsequent abandonment of their allocation conspiracy claims cannot alter that *McClave* assumed an allocation conspiracy and sought to measure its effects.

Moreover, plaintiffs' suggestion that they abandoned their allocation conspiracy because there was no evidence to support it, Pltfs.Br.56 n.10, is a convenient, *post hoc* assertion that contradicts positions they advanced below. Plaintiffs not only alleged an allocation conspiracy, *see* AA0368, AA0374, AA0378-80; they also served interrogatory responses before McClave filed his report claiming to have substantial supporting evidence, *see* ASA140, ASA148,

ASA158-59 (describing alleged meetings and discussions of "customer allocation agreement").

Having alleged the existence of an allocation conspiracy, claimed there was evidence to support that conspiracy, and submitted models premised on its existence, plaintiffs were obligated to proffer a revised "'damages case … consistent with [their] liability case.'" *Comcast*, 133 S. Ct. at 1433. Their failure to do so requires decertification of the class.

2. Class Certification Was Improper Because McClave's Regression Models Do Not Reliably Measure Impact And Damages Caused By The Alleged Conspiracy.

McClave's models do not reliably measure impact and damages because he engaged in variable-shopping: he chose variables not because they were likely, according to sound economic principles, to influence price in a competitive market, but because they appeared to correlate with actual prices in the period he was examining. Dow.Br.45-49. Plaintiffs do not claim otherwise. Instead, seeking to make a virtue of vice, plaintiffs tout that McClave picked variables to achieve a high R-squared. Pltfs.Br.57. But that is Dow's point. A high R-squared only means the statistician developed a "regression line" that is a reasonably good fit for the data being modeled. Robert Pindyck & Daniel Rubinfeld, *Econometric Models and Economic Forecasts* 73 (4th ed. 1998). It does not establish that the model

includes economically relevant variables or produces reliable predictions. *See* John Neter et al., *Applied Linear Regression Models* 82-83 (3d ed. 1996) (discussing "common misunderstanding" that high R-squared "indicates that useful predictions can be made"). To the contrary, adopting regression variables based on whether they correlate with prices (as McClave did) "runs the real danger of finding, through perseverance, an equation that fits the data well but is incorrect because it captures accidental features of the particular data set at hand (called 'capitalizing on chance') rather than the true underlying relationship." Peter Kennedy, *A Guide to Econometrics* 89 (6th ed. 2008). It is the kind of spurious approach that enabled statisticians to link S&P 500 returns to butter production and sheep population in Bangladesh in a model with a high R-squared. David Leinweber, *Stupid Data Miner Tricks: Overfitting the S&P 500* (1995). Such manipulated results are "utterly useless" for predicting "anything outside the fitted period." *Id.* at 5.

Plaintiffs offer an after-the-fact, economic justification for one (but only one) instance of McClave's variable shopping—namely, McClave's decision to use TDI exports as the only demand variable. Plaintiffs argue that TDI exports are "an important driver for TDI demand," because TDI exports "account[] for 40% of domestic production." Pltfs.Br.57. The problem, however, is not the *inclusion* of

TDI exports as a demand variable, but the economically irrational *exclusion* of domestic demand, which accounts for the remaining 60% of domestic TDI production. Indeed, McClave acknowledged that domestic demand was a critically important variable because he used only domestic demand variables in his models for MDI and polyols. AA1394-99, AA1597, AA2267. Plaintiffs provide no principled reason, much less any learned treatises, for believing that domestic TDI prices can be accurately predicted by models that exclude domestic demand.[4]

This is not a quibble that merely implicates the "'probativeness'" of the analysis. Pltfs.Br.57 (quoting *Bazemore v. Friday*, 478 U.S. 385, 400 (1986)). A regression analysis can be so "incomplete to be inadmissible as irrelevant," *Bazemore*, 478 U.S. at 400 n.10, and courts have excluded flawed regression analyses that omit a "major variable" relevant to the case, *see, e.g.*, *Bickerstaff v. Vassar Coll.*, 196 F.3d 435, 449 (2d Cir. 1999); *Coward v. ADT Sec. Sys.*, 140 F.3d 271, 274 (D.C. Cir. 1988); *see also Martinez v. Wyo. Dep't of Family Servs.*, 218 F.3d 1133, 1138-39 (10th Cir. 2000) ("[S]tatistical evidence … may be so flawed as to render it insufficient to raise a jury question."). Inclusion of all major

[4] Plaintiffs also concede that McClave used 12-month moving averages for input costs in the MDI model, but 6-month moving averages in the TDI and polyols models based solely on "fit." Pltfs.Br.57 n.11. They claim this was "sensible," but, like McClave, provide no economic justification for why the effect of cost on prices lingers for a year in one instance but for only 6 months in others.

variables is "particularly important in the context of antitrust litigation," where "'[d]amage estimates ... hinge on careful statistical analysis, reasonable assumptions, [and] reliable data,'" and errors in these areas can "'provide faulty conclusions as to the existence or the amount of damages.'" *In re Live Concert Antitrust Litig.*, 863 F. Supp. 2d 966, 973-74 (C.D. Cal. 2012) (quoting 2A Areeda & Hovenkamp, *Antitrust Law* ¶399c, at 447 (3d ed. 2006)).

Here, plaintiffs do not dispute the commonsense economic proposition that domestic demand is a major variable affecting domestic prices. *See* AA2323-24. And when domestic demand is included in McClave's TDI model, it predicts *negative* damages of more than $49 million. Dow.Br.48-49. This shows that his flawed method for selecting variables resulted in models that are "so incomplete as to be inadmissible as irrelevant." *Bazemore*, 478 U.S. at 400 n.10.

Nor have plaintiffs provided any justification for McClave's benchmark-shopping. Although plaintiffs contended that the conspiracy continued through 2004, McClave moved 2004 to the "competitive benchmark" period in his models. Dow.Br.49. Plaintiffs say this was appropriate because "McClave studied the data and found that 2004 prices were more consistent with competition than collusion." Pltfs.Br.58. But the *entirety* of McClave's "analysis" was that including 2004 in

the "competitive benchmark" generated favorable results.[5] Treating 2004 as a "conspiracy" year resulted in negative damages for MDI, polyols, and systems, and improbably high damages for TDI. Dow.Br.49. McClave's reasons for including 2004 in the benchmark period were thus circular and results-oriented. That the model can show plausible damages only if 2004 is moved to the benchmark period is not a justification for doing so.

3. The Jury Verdict Confirms McClave's Models Were Unreliable.

The jury verdict confirms that McClave's models do not reliably distinguish competitive prices from collusive prices. He testified that his models accounted for competitive factors, so "[s]omething other than competition" caused prices to be higher between 1999 and 2003 than the "but-for prices" his models predicted. AA1101. The jury, however, found no overcharges before November 24, 2000. Plaintiffs provide no reason for believing that McClave's models were reliable after that date when they were not but before that date.

[5] Contrary to their suggestions, Pltfs.Br.58, plaintiffs moved 2004 only *after* McClave determined he could not produce a model showing plausible damages with 2004 in the conspiracy period, *see* Dow.Br.49. McClave conceded he moved 2004 solely because of this "analysis" testing, AA0953-54, AA2215-16, AA2219, AA2231, not because he determined there was no evidence the conspiracy continued through 2004.

Plaintiffs note that the jury could have found the conspiracy was narrower or shorter than they claimed. Pltfs.Br.59. If so, that would prove Dow's point: If the conspiracy were narrower or shorter, McClave's models are unreliable because they showed damages over the broader or longer period. In any event, the models were *identical* in both periods, and there is no rational basis upon which the jury could reject them in one period but accept them in the other. Dow.Br.52. A jury may not "split-the-baby" without an evidentiary basis for doing so. *Id.* (citing cases).

Plaintiffs speculate that the models properly could have shown overcharges prior to November 24, 2000, because the "conspiracy was operational yet not proved." Pltfs.Br.61. But if the "conspiracy was operational" and inflated prices as McClave claimed, then the conspiracy would have been "proved." The jury, however, rejected the notion that there was an "operational" conspiracy; it found no overcharges prior to November 24, 2000. AA513-15. Thus, McClave's models "detect[] injury where none could exist" and cannot support class certification. *Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d at 252.

C. Dow's Challenges To Class Certification Were Preserved.

Plaintiffs ask this Court to ignore the defects in the class certification ruling on the grounds that Dow's challenges were waived or untimely. These arguments are groundless.

Defendants initially opposed class certification on the grounds that impact and damages are not common questions. ASA079-83, ASA086-109, ASA113-34. Dow raised the same objections in the motion to decertify the class, this time focusing on intervening Supreme Court precedent (*Wal-Mart*) and plaintiffs' new expert (McClave). Dow.Br.12.

That decertification motion, moreover, was not properly denied as untimely simply because it was filed "on the eve of trial." Pltfs.Br.27. Under Rule 23(c)(1)(C), an order granting class certification may be amended any time "before final judgment," so courts are "free to modify" the certification order in "light of subsequent developments in the litigation." *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 160 (1982); *see also, e.g.*, *DG ex rel. Stricklin v. Devaughn*, 594 F.3d 1188, 1201 (10th Cir. 2010) (if the court subsequently finds that the requirements of Rule 23 are not met, it should "amend its certification order to reflect its findings or decertify the class altogether prior to final judgment"). Indeed, the district court amended the class certification order post-trial to exclude from the

class those who purchased polyurethane products in 2004, a year plaintiffs initially alleged to be part of the conspiracy but then dropped after McClave moved it from the conspiracy period to the benchmark period in his models. Dow.Br.20.

Nor was Dow's decertification motion properly denied because its timing prejudiced plaintiffs. Whatever difficulties plaintiffs might have faced in "'assert[ing] individual claims at [that] time,'" Pltfs.Br.44 (quoting AA0523-24), were attributable to plaintiffs' litigation strategy. Plaintiffs successfully opposed defendants' motion for interlocutory review to resolve the propriety of class certification *before* the parties conducted merits discovery and prepared for trial. Dow.Br.11. Plaintiffs then discarded the expert they used to obtain class certification and retained McClave to attempt to show classwide injury and damages at trial. Moreover, the Supreme Court issued important decisions interpreting Rule 23 after McClave issued his report (*Wal-Mart*) and after trial but before entry of judgment (*Comcast*). This Court has recognized that *Wal-Mart* and *Comcast* must be considered and may require the reversal of a class certification order previously entered. *See XTO Energy*, 725 F.3d at 1221. Any suggestion that arguments based on those decisions were untimely is unfounded.

Plaintiffs claim that class decertification "on the posture here would be unprecedented," Pltfs.Br.3, 28, but this, too, is untrue, *see, e.g.*, *Broussard*, 155

F.3d at 334 (decertifying class after jury trial); *Forehand v. Fla. State Hosp. at Chattahoochee*, 89 F.3d 1562, 1566 (11th Cir. 1996) (same). A class should not be certified and a jury verdict cannot be affirmed where plaintiffs are permitted to portray the class as a "unified group that suffered a uniform, collective injury" based on the testimony of an expert who calculated damages using "averages" extrapolated from a "sample" of class members the defendant could not cross-examine. *Broussard*, 155 F.3d at 343, 345. *Wal-Mart* confirms that such a "Trial by Formula" violates the Rules Enabling Act by allowing the procedural device of a class action to "'abridge, enlarge or modify ... substantive right[s].'" 131 S. Ct. at 2561 (quoting 28 U.S.C. §2702(b)); *see also Broussard*, 155 F.3d at 345 (same). As Dow showed in its opening brief (at 27-53) and above, that is precisely what occurred here.[6]

II. PLAINTIFFS FAILED TO ESTABLISH ANTITRUST LIABILITY AS A MATTER OF LAW.

A. The Evidence Does Not Support A Finding That Defendants Implemented Any Conspiracy.

The evidence before the jury was insufficient to support a finding that any conspiracy was implemented and caused over $400 million in overcharges.

[6] Faithful application of *Wal-Mart* and *Comcast* will not preclude civil antitrust claims by private parties, as *amicus* AMIBA claims. The Clayton Act provides both for treble damages and attorneys' fees, 15 U.S.C. §15(a), and many plaintiffs opted out of the class to pursue individual claims.

Dow.Br.54-59. Demand was relatively constant and costs were rising. In these circumstances, a functioning conspiracy should have increased prices. Yet, actual prices held steady or declined, and prices of the various defendants moved in different directions and fluctuated month-to-month. Dow Br. 53-59.

Plaintiffs do not dispute this, and reviewing courts owe no deference to an economically incoherent jury finding of harm. Recognizing this, plaintiffs claim that "price stability" is "consistent with" an effective conspiracy because there was "excess capacity," which exerted "downward pressure on price, motivating formation of the cartel to arrest that decline." Pltfs.Br.36. But under plaintiffs' theory, only an *increase* in excess capacity during the class period could have caused prices to fall below where they were when the "cartel" allegedly began. Solow did not say excess capacity increased in the class period. He testified only that "there was excess capacity for these three products throughout much of this time period." AA0811; *see also* AA0809.

More fundamentally, Solow's assertion that excess capacity would have driven prices down is at odds with one of McClave's key modeling decisions. McClave did not include "capacity utilization" in his models (*i.e.*, how much capacity is being used and thus "how tight capacity is"), because he said it did "not … prove to be an important ... price driver." SA3685-86. Instead, McClave

considered only total capacity without regard to how much of that capacity was "excess." *See* SA3485-87. Plaintiffs cannot have it both ways. They cannot claim that defendants conspired to counteract downward price pressure from excess capacity, then "prove" the impact of that conspiracy based on McClave's models and methodology that rejected excess capacity as an important driver of price.

Plaintiffs' other efforts to divert attention from the undisputed and dispositive economic facts are equally unavailing. They claim that a jury could reasonably infer classwide injury from the "scope and nature of the conspiracy"; the "top-down" involvement of senior executives; the oligopolistic nature of the polyurethanes industry, which has high barriers to entry and "homogenous commodity products without close substitutes"; and a few documents and statements indicating that some believed price-increase announcements "worked" for some products or customers at some times. Pltfs.Br.32-34. Many of these claims are wrong; all of them are irrelevant.

In claiming that polyurethane products are "'homogenous commodity products without close substitutes,'" Pltfs.Br. (quoting SA9), plaintiffs cite the district court's summary judgment opinion that is irrelevant. *See Ortiz v. Jordan*, 131 S. Ct. 884, 889 (2011) (trial record "supersedes the record existing at the time

of the summary judgment motion."). Certainly, systems are not commodity products, but are custom-designed for a particular customer, Dow.Br.7—as the district court acknowledged in connection with class certification. *See* AA0411. And courts have rejected the notion that a market structure conducive to oligopolistic pricing is sufficient to permit an inference of anticompetitive pricing. *See, e.g.*, *Mitchael v. Intracorp, Inc.*, 179 F.3d 847, 859 (10th Cir. 1999).

More fundamentally, plaintiffs' purported inferences cannot obscure the economic incoherence of an alleged conspiracy in which prices held steady while demand was relatively constant and costs were rising in a market where price-increase announcements frequently did *not* lead to increases in actual prices. *See* Dow.Br. 8-9, 16-18, 29-31, 54-58. Plaintiffs say Dow's expert Professor Elzinga "conceded that actual price increases followed the conspiratorial announcements more than half the time." Pltfs.Br.34. But this one statement is cherry-picked. Elzinga admitted that prices sometimes increased in the month or two after an announced price increase was supposed to take effect, but he also noted that there was frequently no price increase or, if there was, prices dropped in the following months. *E.g.*, SA5258, SA5298-5300, SA5053-64. In the end, Elzinga concluded that "the actual prices paid in the marketplace did *not* follow the price-increase announcements in a lockstep pattern, to use Professor Solow's words, *nor in most*

cases did they stick, to use Professor Solow's terms." SA5075 (emphasis added). This shows that many class members were *not* injured by the announcements.

Finally, plaintiffs cite Solow's opinion that nearly all class members were injured. Pltfs.Br.34. Solow admitted, however, that there were significant instances of "cheating" and periods when the "cartel" broke down and defendants competed. SA2723-24; *cf.* SA5122-24 (Elzinga testifying that he found over 1000 internal documents from defendants discussing how "one of their competitors was poaching" and they risked losing business); AA1540-42 (competition for Foamex); AA1560 (competition for Firestone). Class members who were beneficiaries of periods of "hard fought competition," SA788, were not injured.

Moreover, Solow admitted that he relied on McClave's analysis in reaching his conclusion about impact. AA0825. He testified that his analysis would be "incomplete" if he "didn't have Dr. McClave's work." SA2791; *see also* AA0831-33. Solow's testimony thus provides no independent basis for concluding that any cartel impacted all class members.

Plaintiffs are therefore wrong to claim that, even without McClave's testimony, there is "[e]xtensive evidence support[ing] the finding that the cartel caused class-wide injury." Pltfs.Br.32. Without McClave's flawed models and extrapolations, nothing supports a finding that the alleged conspiracy was

implemented and thus injured all class members who would recover under the judgment.

B. Plaintiffs Failed As A Matter Of Law To Demonstrate That Lyondell Participated In The Alleged Conspiracy.

At a minimum, a new trial should be granted because there is no evidence that Lyondell participated in any conspiracy. Dow.Br.59-62. Plaintiffs say this argument was waived because Dow did not raise it until its post-trial reply brief. Pltfs.Br.30. Not so. In its post-trial motions, Dow argued that plaintiffs failed to prove a conspiracy as to *any* defendants—including Lyondell—and that Dow was therefore entitled to judgment as a matter of law. ASA046-50, ASA060-73. Dow specifically pointed to the evidence that Lyondell did not conspire to fix prices. ASA049-50, ASA062-63, ASA066.

Nor have plaintiffs identified evidence sufficient to support a finding that Lyondell agreed to coordinate price-increase announcements. The only relevant testimony is that of Lyondell's Dineen, who testified that he did not agree to anything at the Swan Restaurant, and that the meeting there played no role in Lyondell's price-increase announcements. AA0757-61, AA0771-72. Plaintiffs assert that the jury could discount Dineen's undisputed testimony, Pltfs.Br.31, but the jury necessarily rejected *plaintiffs'* view that the "lockstep" price-increase announcements after the Swan dinner caused any injury. The meeting occurred

during the pre-November 2000 period when the jury found no overcharges. AA0513-15; AA0767-70.

Plaintiffs also say that a conspiracy can be inferred because three, two-minute phone calls between Levi (Dow) and Portella (Lyondell) in 2002 and early 2003 preceded some price-increase announcements. Pltfs.Br.30. Massive antitrust liability cannot be imposed on the basis of such "evidence." The price-increase announcements cannot establish liability—such announcements were commonplace during periods where plaintiffs themselves acknowledge the marketplace was "competitive." AA0451; AA1375-78, AA1386-88; AA2143-45; *see also, e.g.*, *Am. Chiropractic Ass'n v. Trigon Healthcare*, 367 F.3d 212, 227 (4th Cir. 2004) ("mere contacts and communications … among antitrust defendants is insufficient evidence [of] an anticompetitive conspiracy") (quotations omitted). There is no evidence that the calls involved prices, SA489-97, SA3150-52, SA3232-34, SA3277-80, and undisputed evidence of legitimate reasons for the calls, AA0764, A0899-901 (supply agreement between Dow and Lyondell). Moreover, plaintiffs have no theory how these brief calls could have affected price-increase announcements Lyondell made *before* 2002.

Finally, the inference plaintiffs seek to draw presupposes that Lyondell "mirrored" the "parallel" prices of Dow and the other manufacturers, Pltfs.Br.30—

but the evidence demonstrates the opposite. *See In re Baby Food Antitrust Litig.*, 166 F.3d 112, 125 (3d Cir. 1999) ("[T]here must be evidence that the exchanges of information had an impact on pricing decisions."). The undisputed evidence is that: (1) Lyondell's prices did not follow Dow's prices, AA0520, AA1528, AA1533, AA1764, AA1766; (2) even after Lyondell announced a price increase, its prices frequently stayed flat or fell, AA1533, AA1766; (3) Lyondell generally remained the lowest-priced manufacturer, AA0520, AA1528-33, AA1762-66; and (4) rather than being parallel, prices of all of the defendants moved in different directions and fluctuated substantially from month-to-month, AA0520, AA1528-33, AA1762-66.[7]

Plaintiffs also say the verdict can stand even if the evidence is insufficient as to Lyondell. Pltfs.Br.31. But a finding that Lyondell was not in the conspiracy calls into question whether an operational conspiracy actually existed. In any

[7] Plaintiffs' cases are distinguishable. *See* Pls.Br.30. In *In re Publication Paper Antitrust Litigation*, 690 F.3d 51, 57-59, 64 (2d Cir. 2012), there was direct testimony that defendants had an express "agreement" to coordinate prices and coordinated pricing consistent with that agreement. In *In re Flat Glass Antitrust Litigation*, 385 F.3d 350, 363, 368-69 (3d Cir. 2004), there was "undoubted[] evidence" that numerous manufacturers had an express agreement to fix prices, that one conspirator had acknowledged an "across-the-board" agreement to fix prices, the defendant had been faxed non-public information about planned price increases by a member of the conspiracy, the defendant raised prices that were identical to the planned, non-public price increase, and the other manufacturers "followed with identical price increases."

event, even if it may be true in a criminal case where proof of injury is not required, *cf. United States v. Suntar Roofing, Inc.*, 897 F.2d 469, 476 (10th Cir. 1990), it is not true in a *civil* lawsuit by private plaintiffs seeking damages. If Lyondell did not conspire, Dow cannot be held jointly and severally liable for overcharges to Lyondell's customers—as the jury instructions provided. ASA027. Because the damages attributable only to Lyondell cannot be determined, Dow is at least entitled to a new trial. *See* Dow.Br.62.

III. DOW IS ENTITLED TO A NEW TRIAL BECAUSE THE DAMAGES AWARD IS BASED ON SPECULATION, AND THE RESULTING JUDGMENT VIOLATES THE SEVENTH AMENDMENT.

There was no evidentiary basis for the jury's damages award, which deviated from McClave's damages calculation by approximately 20%. Dow.Br.63-64. The verdict must be set aside, and further cannot be reduced to a judgment consistent with the Seventh Amendment, because there is no way of knowing which class members the jury thought were injured. *Id.* at 64-67. Plaintiffs fail to show otherwise.

1. Although the jury never received McClave's calculations or any breakdown of damages (except for the named plaintiffs), plaintiffs note that McClave testified that, if the jury accepted Ugone's criticisms of his variable selection, the overall, average overcharge would be reduced to approximately 10%

from the 13.4% McClave calculated—"that is, overall overcharges might be reduced approximately 25%." Pltfs.Br.62. McClave's testimony, however, relates only to the effect of changes in overcharges over the *entire* 1999-2003 class period, not to the post-November 2000 period in which the jury found liability. AA1586-87. McClave's damages estimates are not distributed equally over time. After November 24, 2000, the overcharge was only 9.8%—*lower* than McClave said would result if Ugone's criticisms were accepted for the *entire* class period. *See* AA1586-88; SA3556-71. McClave's statement thus did not provide a basis for re-calculating damages in the later period. And because McClave's models are non-linear, the jury had no rational way to reduce his damages estimate if it found the conspiracy was of a shorter duration, as the district court speculated. AA0537.[8]

Thus, the situation here is nothing like the cases relied upon by plaintiffs. *See* Pltfs.Br.62-63. Whatever latitude exists for a jury to split-the-baby, it may not do so where there is "no basis in the evidence" for the compromise. *Haslund v. Simon Prop. Grp., Inc.*, 378 F.3d 653, 658 (7th Cir. 2004). Here, the jury necessarily had to speculate to reduce McClave's damages.

[8] Likewise, there was no way for the jury to have adjusted McClave's damages if it found Lyondell did not participate in the conspiracy, *cf.* AA0537, because McClave never provided the damages attributable to Lyondell, AA1563-89.

2. Plaintiffs assert that there is no Seventh Amendment problem because aggregated damage calculations are common in class actions; Dow did not request a customer-by-customer allocation of damages; and Dow has no interest in the distribution of the award among the class members. Pltfs.Br.63-65.

Dow is not arguing, however, that the jury was required to award individualized damages for every class member. *Cf.* Pltfs.Br.64-65. Had the jury returned a verdict in the amount McClave requested, there would be no Seventh Amendment problem. The problem arises here because there is no way to tell whether the jury reduced the damages because it concluded that certain class members (*e.g.*, Lyondell customers) suffered no injury. Dow.Br.64-65. Plaintiffs cite no case rejecting a Seventh Amendment challenge to a judgment under these circumstances. Nor have they explained how the district court could mandate a *pro rata* reduction without substituting its judgment for the jury's.

Dow, moreover, does have an "interest" in the allocation of the damages award. While class members are ordinarily bound by a properly entertained class action, this protection does not apply against class members who "were not accorded due process of the law." *Pelt v. Utah*, 539 F.3d 1271, 1284 (10th Cir. 2008). As Dow showed, the courts have thus recognized a defendant may assert

arguments advancing the "rights" of class members to ensure the "'entire plaintiff class is bound.'" Dow.Br.66 (citing cases).[9]

CONCLUSION

The class should be decertified and judgment entered for Dow or in the alternative, the class should be decertified and Dow should be granted a new trial.

Respectfully submitted,

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[9] Plaintiffs' cases are irrelevant. *See* Pltfs.Br.64. None involved the Seventh Amendment, which affords "*both* parties" the right to have liability and damages determined by a jury. *E.g.*, *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935) (emphasis added). And none involved the situation where a class defendant seeks to "vindicate its own interests," *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 804-05 (1985), in ensuring that damages are properly allocated so that all class members are bound.

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