No. 13-3215

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

IN RE: URETHANE ANTITRUST LITIGATION

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

BRIEF FOR THE AMERICAN INDEPENDENT BUSINESS ALLIANCE AS AMICUS CURIAE IN SUPPORT OF APPELLEES

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In re TFT-LCD (Flat Panel) Antitrust Litigation,
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In re Urethane Antitrust Litig.,
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In re Visa Check/Mastermoney Antitrust Litig.,
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OTHER AUTHORITIES

7AA Wright, Miller & Kane, *Federal Practice and Procedure: Civil Procedure*,
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Allan Kanner & Tibor Nagy, *Exploding the Blackmail Myth: A New Perspective on Class Action Settlements*,
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Amgen Inc. v. Connecticut Ret. Plans & Trust Funds,
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Antitrust Modernization Commission ("AMC") Report & Recommendations (2007) 9

Charles Silver, *"We're Scared to Death": Class Certification and Blackmail*,
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Dept. of Justice, Frequently Asked Questions Regarding the Antitrust Division's Leniency Program and Model Leniency Letters (Nov. 19, 2008) 8

Dept. of Justice, Model Annotated Corporate Plea Agreement (Dec. 20, 2013) 8

Fed. R. Civ. P. 23(f) advisory committee's note (1998) 19, 21

In re Parcel Tanker Antitrust Litig.,
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Robert H. Klonoff, *The Decline of Class Actions*,
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Robert H. Lande & Joshua P. Davis, *Benefits From Private Antitrust Enforcement: An Analysis of Forty Cases*,
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William F. Baxter, *Separation of Powers, Prosecutorial Discretion, and the "Common Law" Nature of Antitrust Law*,
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CORPORATE DISCLOSURE STATEMENT

The American Independent Business Alliance is a nonprofit corporation headquartered in Montana. It has no parent company and has issued no stock.

CERTIFICATE REGARDING PARTIES, RULINGS, AND RELATED CASES

Pursuant to this Circuit's Rule 28(a)(1), Amicus Curiae certifies:

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

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

(C) Related Cases. Amicus Curiae American Independent Business Alliance is not aware of any pending related cases. The class certification order in this case was previously before this Court on a petition from the Dow Chemical Company and its co-defendants under Federal Rule of Civil Procedure 23(f). The Court denied the petition. *In re Urethane Antitrust Litig.*, No. 08-602 (10th Cir. Sept. 2, 2008).

INTRODUCTION AND INTEREST OF AMICUS

The American Independent Business Alliance ("AMIBA" or "Amicus Curiae") is a national nonprofit organization that represents the interests of independent, locally-owned businesses and encourages entrepreneurship. AMIBA supports more than 80 affiliated community organizations across 38 states. Its affiliated organizations represent approximately 25,000 independent businesses covering nearly every sector of business.

AMIBA seeks to strengthen and enforce federal and state laws that prohibit restraints of trade and other unfair practices disadvantaging small and medium sized businesses. AMIBA believes the antitrust laws are essential to ensure that all businesses have the opportunity to compete and receive fair treatment under the law.

AMIBA's members and affiliates depend on competitive markets to create jobs and contribute to economic growth. But when, in highly concentrated markets, commodity suppliers such as the Dow Chemical Company ("Dow") conspire to fix prices at supracompetitive levels, AMIBA's business members are forced to pay overcharges.

This brief principally addresses the arguments made by Amicus Curiae Chamber of Commerce of the United States (the "Chamber").[1] The Chamber's brief misinterprets the law. And it advocates policies that, far from furthering the aims of free enterprise, would ultimately prove devastating to the economy: for free enterprise to flourish, private parties must be allowed to challenge anticompetitive behavior such as Dow's price fixing via class actions.

SUMMARY OF THE ARGUMENT

The decision to certify a class below—and the jury verdict that followed—serve to protect the right of all businesses to purchase goods and services at prices determined by the free market, a right the Supreme Court has deemed fundamental to our economic liberty. *Northern Pac. R. Co. v. United States*, 356 U.S. 1, 4 (1958). Consistent with the free market ethos underlying the antitrust laws, federal policy strongly favors private antitrust enforcement as a complement to government action. Further, for all but the very largest corporations,

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

private antitrust enforcement is possible only through the class action mechanism.

This case is a quintessential example of how the substantive antitrust laws are intended to function in concert with the rules of civil procedure. Thousands of businesses—the vast majority of which lacked the economic resources to pursue separate actions—combined their claims in a single, efficient proceeding to litigate common questions with common evidence in order to reach a common result. It is only for that reason that Dow has been held accountable for inflicting serious harm on the class and the economy as a whole.

Yet the Chamber and Dow argue that class actions, by their nature, unduly burden the economy and judiciary. If adopted, their views would alter the test for class certification from one *readily* met in many antitrust cases to one *rarely* met in any. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997) ("Predominance is a test readily met in certain cases alleging . . . violation of the antitrust laws.").

The Chamber and Dow are wrong, and a unanimous Supreme Court has so held. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343-45 & n.6 (1979) (holding that the antitrust laws were written to *encourage*

private antitrust enforcement, including through class litigation). The Chamber's argument about class certification is particularly misguided because it is ostensibly concerned about "hydraulic pressure" on defendants to settle "meritless" claims. The class certification order here did no such thing. Dow tried the case to a jury, and the jury found the class claims meritorious. The only "hydraulic pressure" on Dow flows directly from the nature and scope of its own misconduct found as a matter of fact by the jury—not from the district court's proper application of Rule 23. *See Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.,* 559 U.S. 393, 408 (2010) (Scalia, J., plurality opinion); *see also id.* at 435 n.18 (Stevens, J., concurring).

At bottom, Dow and the Chamber have taken a position that is wrong as a matter of law, anticompetitive, and antigrowth. They would preclude most businesses from enforcing the very laws enacted to encourage and protect competition in the free market. Amicus Curiae therefore respectfully asks this Court to reject those arguments and affirm the judgment below.

ARGUMENT

I. ANTITRUST LAWS ENFORCED BY PRIVATE PLAINTIFFS SAFEGUARD COMPETITION AND PROMOTE INNOVATION AND ECONOMIC GROWTH.

The Chamber claims, without factual support, that improperly certified class actions "impose a drag on the entire economy." (Ch. Br. at 6, 26.)[2] But Congress has determined (and experience has confirmed) that what *really* imposes a drag on the economy is price fixing; "the unrestrained interaction of competitive forces . . . yield[s] the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress . . . ." *Northern Pac. R. Co.*, 356 U.S. at 4.[3]

The Supreme Court has recognized repeatedly that vigorous enforcement of the antitrust laws is the foundation of this Nation's economic freedom and growth. *See, e.g.*, *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972) (referring to the antitrust laws as the "Magna Carta of free enterprise."); *Hawaii v. Standard Oil Co. of Cal.*,

[2] "Ch. Br." refers to the Chamber's amicus brief in this appeal.

[3] In any event, Appellees have shown that the class in this case was properly certified and that common issues of law and fact overwhelmingly predominated, as they typically do in price-fixing cases.

405 U.S. 251, 262 (1972) ("Every violation of the antitrust laws is a blow to the free-enterprise system envisaged by Congress."). Even Dow appears to understand this. When it filed its own price-fixing suit against shipping companies, it argued that "price fixing causes serious damage to the competitiveness of the market" and constitutes "economically deleterious anticompetitive behavior." *In re Parcel Tanker Antitrust Litig.*, No. 03-cv-01920, Dkt. No. 101 (D. Conn. Nov. 29, 2004); *see also In re Rail Freight Fuel Surcharge Antitrust Litig.*, No. 07-0489, 2013 WL 6153847, at *3 (D.D.C. Nov. 21, 2013) (referencing possible suit *by Dow* to remedy price fixing).

A. Private Actions Are Necessary to Ensure the Antitrust Laws Are Enforced.

The destructive economic effects of price fixing cannot be disputed, so the Chamber confines its attack on the rulings below to an attack on *private* enforcement of the antitrust laws, especially through class actions. Yet an attack on private enforcement is an attack on the federal antitrust regime itself. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 635 (1985) (finding that "[w]ithout doubt, the private cause of action plays a central role in enforcing this regime."); *see also In re High Fructose Corn Syrup*

Antitrust Litig., 295 F.3d 651, 664 (7th Cir. 2002) (Posner, J.) ("The Justice Department has limited resources; in the entire decade of the 1990s, it brought fewer than 200 civil antitrust cases, an average of fewer than 20 per year.").[4] It is well-established that "private antitrust litigation is one of the surest weapons for effective enforcement." *Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311, 318 (1965); *Hawaii*, 405 U.S. at 262.

This case illustrates the importance of private antitrust enforcement. Although the Department of Justice did not file charges, Appellees proved at trial that Dow entered into a long-running conspiracy with its direct competitors. *Cf. Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 151 (1987) (explaining that private antitrust enforcement remedies "a serious national problem for which public prosecutorial resources are deemed inadequate."). There

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[4] The Department of Justice relies on private treble damages suits to provide victims with restitution even where it has criminally prosecuted the violators. *See* Dept. of Justice, Model Annotated Corporate Plea Agreement, at 7 n.6, 9 n.12 (Dec. 20, 2013) ("In most criminal antitrust cases, restitution is not sought or ordered because civil causes of action will be filed to recover damages.") (available at http://goo.gl/BpuRdl); Dept. of Justice, Frequently Asked Questions Regarding the Antitrust Division's Leniency Program and Model Leniency Letters, at 18 (Nov. 19, 2008) ("Restitution is normally resolved through civil actions with private plaintiffs.") (available at http://goo.gl/rbdCS).

should be no doubt that the verdict below "vindicate[d] the important public interest in free competition." *Fortner Enters. v. United States Steel Corp.*, 394 U.S. 495, 502 (1969).

The Chamber's attack on private enforcement is thus contrary to the "long-standing policy of encouraging vigorous private enforcement of the antitrust laws." *In re Wyo. Tight Sands Antitrust Cases*, 866 F.2d 1286, 1291 (10th Cir. 1989); *see also* Antitrust Modernization Commission ("AMC") Report & Recommendations at 243-44 (2007), *available at* http://goo.gl/wfnZwq (same from bipartisan AMC).

B. Class Actions Are Essential to Ensuring Private Enforcement of the Antitrust Laws.

The Supreme Court "long ago" recognized the "importance that class actions play in the private enforcement of antitrust actions." *In re Lorazepam & Clorazepate Antitrust Litig.*, 202 F.R.D. 12, 21 (D.D.C. 2001); *see also In re Online DVD Rental Antitrust Litig.*, No. M 09-2029, 2010 WL 5396064, at *3 (N.D. Cal. Dec. 23, 2010) (same). Indeed, the government does not pursue certain cases precisely because private civil enforcement is available via a class action. *In re Packaged Ice Antitrust Litig.*, 723 F. Supp. 2d 987, 1011-12 (E.D. Mich. 2010); *cf. California v. American Stores Co.*, 495 U.S. 271, 284-87 (1990) (approving of "special

procedural advantages" given to "private litigants" such as the treble damages mandated by the Clayton Act, 15 U.S.C. § 15). Such cases are economically beneficial because they deter wrongdoing and compensate the victims of anticompetitive conduct. *See Mitsubishi Motors*, 473 U.S. at 635 ("The treble-damages provision wielded by the private litigant . . . pos[es] a crucial deterrent to potential violators.").

Empirical evidence, moreover, reveals that private enforcement and class actions are critical to antitrust enforcement. *See* Robert H. Lande & Joshua P. Davis, *Benefits From Private Antitrust Enforcement: An Analysis of Forty Cases*, 42 U.S.F. L. Rev. 879, 906 (2008) (discussing the importance of private enforcement); William F. Baxter, *Separation of Powers, Prosecutorial Discretion, and the "Common Law" Nature of Antitrust Law*, 60 Tex. L. Rev. 661, 690-91 (1982) (same from President Reagan's antitrust chief). For example, a study of 40 major private antitrust class actions revealed that private actions recover more than four times the amount recovered in government actions. *See* Lande & Davis, 42 U.S.F. L. Rev. at 895-97. Almost half of the money recovered in private suits did not follow government filings. *Id*. A 2013 follow-up study of 20 additional private suits supplies even more

"powerful empirical corroboration that private antitrust enforcement has provided valuable compensation and deterrence effects . . . ." Joshua P. Davis & Robert H. Lande, *Toward an Empirical and Theoretical Assessment of Private Antitrust Enforcement*, 36 Seattle Univ. L. R. 1269, 1295 (2013).

The Chamber's constricted interpretation of Rule 23, however, would foreclose private antitrust enforcement by all but the largest corporations.

C. A Unanimous Supreme Court Has Rejected the Chamber's Argument Against Antitrust Class Actions.

The Chamber's claim that antitrust class actions harm the economy is wrong, and a unanimous Supreme Court has so held. In *Reiter*, a class alleged that hearing aids were sold at inflated prices as a result of anticompetitive conduct, including price fixing. 442 U.S. at 335. The defendants argued, as do Dow and the Chamber here, that this type of class action would "have a potentially ruinous effect" on the American business community and would "add a significant burden to the already crowded dockets of the federal courts." *Id*. at 344. The Court rejected that argument and emphasized:

> Congress created the treble-damages remedy of § 4 precisely for the purpose of encouraging *private* challenges to antitrust violations. These private suits provide a significant supplement to the limited resources available to the Department of Justice for enforcing the antitrust laws and deterring violations.

Id. (emphasis in original); *see also In re High-Tech Employee Antitrust Litig.*, No. 11-cv-02509, ___ F. Supp. 2d ___, 2013 WL 5770992, at *8 (N.D. Cal. Oct. 24, 2013) (citing same).

The jury in this case found that Dow engaged in price fixing—collusion that represents "the supreme evil of antitrust." *Verizon Commc'ns, Inc. v. Trinko*, 540 U.S. 398, 408 (2004). The evidence disclosed a pattern of industry executives gathering in secret to fix prices, and Dow does not challenge the sufficiency of the evidence with regard to its collusion. The Chamber thus should not be heard to complain that the economy may bear some *indirect* costs from class litigation that provides redress to the victims of Dow's misconduct. (Ch. Br. at 6.) The many businesses that comprise the class bore massive *direct* costs when they paid more than $400 million in overcharges as a result of Dow's wrongful conduct. *See United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224 n.59 (1940) (holding that all price-fixing

agreements are banned because they pose a "threat to the central nervous system of the economy"); *see also King & King Enters. v. Champlin Petroleum Co.*, 657 F.2d 1147, 1151 (10th Cir. 1981) ("[T]here exists no justification for price fixing in a free economy." (collecting cases)).

D. Antitrust Actions Alleging Horizontal Price Fixing Are Well-Suited for Class Certification.

Horizontal price-fixing cases such as this one are well-suited for class treatment because the evidence centers on the defendants' conduct alleged to have driven up prices across an entire market, causing common harm—overcharges—to purchasers in that market. *See, e.g., 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."); *In re Scrap Metal Antitrust Litig.*, 527 F.3d 517, 535 (6th Cir. 2008) (same); 7AA Wright, Miller & Kane, *Federal Practice and Procedure: Civil Procedure*, § 1781 at 228 (3d ed. 2005) ("[W]hether a conspiracy exists is a common question that is thought to predominate over the other issues . . . .").

The Chamber (and Dow) respond that whatever the general rule, predominance cannot be established in any market where prices are

individually negotiated. (Ch. Br. at 7–14; Dow Br. at 27–28.)[5] This is a radical position. As the Chamber acknowledges elsewhere, there are few, if any, markets in which prices are not individually negotiated to some degree. (Ch. Br. at 10–11.) In other words, the Chamber asks this Court to find that horizontal price-fixing class actions essentially can *never* be certified. *Contra, e.g.*, *Amchem*, 521 U.S. at 625; *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 298-301 (3d Cir. 2011) (en banc).

Legions of courts have rejected similar arguments, even when cloaked in narrower terms. *See, e.g.*, *In re Static Random Access Memory (SRAM) Antitrust Litig.*, 264 F.R.D. 603, 614 (N.D. Cal. 2009) ("[C]ontentions of infinite diversity of . . . pricing have been made in numerous cases and rejected." (citations omitted)); *In re Ethylene Propylene Diene Monomer (EPDM) Antitrust Litig.*, 256 F.R.D. 82, 89 (D. Conn. 2009) ("Neither a variety of prices nor negotiated prices is an impediment to class certification if it appears that plaintiffs may be able to prove at trial that . . . the price range was affected generally." (citation omitted)). Neither *Wal-Mart* nor *Comcast* alters this analysis. *See, e.g.*, *In re Nexium Esomeprazole Antitrust Litig.*, No. 12-md-02409,

[5] "Dow Br." refers to Dow's opening brief in this appeal.

2013 WL 6486917, at *8-9 (D. Mass. Dec. 11, 2013); *In re Cathode Ray Tube Antitrust Litig.*, No. 3:07-cv-05944, 2013 WL 5391159, at *5 (N.D. Cal. Sept. 19, 2013); *see also Messner*, 669 F.3d at 815.[6]

II. THE CHAMBER'S ARGUMENTS ABOUT "SETTLEMENT PRESSURE" ARE MISPLACED, GROUNDLESS, AND PROVIDE NO BASIS FOR OVERTURNING THE VERDICT OR CLASS CERTIFICATION ORDERS.

The Chamber asks this Court to make it far more difficult to certify a class on the grounds that affirming class certification here would "exacerbate the problem of defendants being effectively forced to settle meritless claims." (Ch. Br. at 21–27.) The Chamber's assertion lacks support and is belied by the case at hand: Dow did not settle, and the jury found the claims meritorious.

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[6] To attempt to counter these many cases, the Chamber relies solely on a footnote from the Areeda & Hovenkamp treatise. (Ch. Br. at 10–11.) That footnote is taken out of context and cannot bear the weight the Chamber puts on it. *Cf. Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) (stating that one does not "hide elephants in mouse holes"). The footnote in question cites only *Robinson v. Texas Auto Dealers Association*, which held that the impact of listing a "vehicle inventory tax" as a separate line item on a customer's receipt—rather than charging exactly the same tax without itemization—could not be proven on a class-wide basis. 387 F.3d 416, 423 (5th Cir. 2004). Itemization in that case did not create an artificially inflated price or even affect the price at all: it simply provided information to the consumer. Such a claim is thus inherently individualized, while it is well-settled that the claims here are not. *See* Class Cert. Order 16 (discussing *Robinson*).

A. Dow Did Not Settle and The Jury Found That Dow Violated the Antitrust Laws.

The Chamber's policy arguments for imposing a more "rigorous" standard for class certification presuppose that the class claims are "meritless." (Ch. Br. at 7, 21, 26–27.) But the jury found that Dow participated in a multi-year conspiracy to fix prices in the urethane chemicals industry, harming the class of purchasers (including many small and medium sized businesses). And Dow does not challenge the sufficiency of the evidence supporting the jury's determination that Dow colluded to fix prices.

Accordingly, in stark contrast to the authorities cited by the Chamber, this case is by definition *meritorious*. At this post-judgment stage, the overriding concern is deference to the jury verdict, which itself weighs against the drastic and unprecedented remedy of post-trial decertification. *See Scrap Metal Antitrust*, 527 F.3d at 535-36 (rejecting post-trial challenge to class certification); *Samuel-Bassett v. Kia Motors Am., Inc.*, 34 A.3d 1, 32 (Pa. 2011) (same). Were the class to be decertified at this late stage, numerous class members would suffer extreme prejudice. Given the costs of pursuing separate individual antitrust suits, scores of small and medium sized businesses would be

forced to abandon their meritorious price-fixing claims against Dow. The Court should not countenance that result, particularly where Dow has not disputed that a class action, as opposed to individual actions, was a superior way to resolve this controversy.

B. Courts Should Not Deny Class Certification Out of Concern About "Settlement Pressure" on Defendants.

1. Neither Rule 23(a) Nor Rule 23(b) Permits Consideration of "Settlement Pressure."

The possibility of imposing "settlement pressure" should not drive decisions on whether to certify a class under Rule 23(a) and (b) any more than it should drive judicial decisions on motions to dismiss or for summary judgment. The Chamber's opposition to class actions simply cannot justify the creation of heightened, extra-textual legal standards for certification. *See Murray v. GMAC Mortg. Corp.*, 434 F.3d 948, 953-54 (7th Cir. 2006) (Easterbrook, J.) (reversing district court denial of class certification that was based in part on concern over the defendant's "potential liability in the billions of dollars," and stating "it is not appropriate to use procedural devices to undermine laws of which a judge disapproves.").

The fact that Rule 23 certification may result in a larger verdict does not undermine its proper application; otherwise, no class could

pass muster. Rule 23 does not "transform a $500 case into a $5,000,000 award"; it "transform[s] 10,000 $500 cases into one $5,000,000 case." *Shady Grove,* 559 U.S. at 435 n.18 (Stevens, J., concurring). As Justice Scalia explained, such an outcome "has no bearing . . . on [the parties'] legal rights," and a defendant's "aggregate liability . . . does not depend on whether the suit proceeds as a class action." *Id.* at 408 (Scalia, J., plurality opinion).

Contrary to the Chamber's arguments, "[m]ere pressure to settle is not a sufficient reason for a court to avoid certifying an otherwise meritorious class action suit."[7] *Klay v. Humana, Inc.*, 382 F.3d 1241, 1275 (11th Cir. 2004), *abrogated in part on other grounds by Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639 (2008). As then-Judge Sotomayor explained:

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[7] In a recent amicus brief in the Supreme Court, the Chamber reiterated its oft-stated position that settlement pressure from class certification warrants restricting Rule 23. *See* Brief of *Amici Curiae* Chamber of Commerce of the United States of America, *et al.* in *Amgen Inc. v. Connecticut Ret. Plans & Trust Funds*, No. 11-1095, 2011 U.S. Briefs 1085, at *26 (Aug. 13, 2012). The Supreme Court refused to adopt the Chamber's extreme position. *Amgen Inc. v. Connecticut Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1199-1202 (2013) ("We have no warrant to encumber securities-fraud litigation by adopting an atextual requirement of precertification proof of materiality that Congress . . . has not sanctioned.").

> The effect of certification on parties' leverage in settlement negotiations is a fact of life for class action litigants. While the sheer size of the class . . . may enhance this effect, this alone cannot defeat an otherwise proper certification.

In re Visa Check/Mastermoney Antitrust Litig., 280 F.3d 124, 145 (2d Cir. 2001), *overruled and superseded by statute on other grounds as stated in Brown v. Kelly*, 609 F.3d 467, 483 n.17 (2d Cir. 2010).

2. Settlement Pressure Is Addressed by Rule 23(f).

The Chamber's attempt to graft new requirements onto Rule 23 also overlooks that "settlement pressures have already been taken into account in the structure of Rule 23; such pressures were the main reason behind the enactment of Rule 23(f)." *Klay*, 382 F.3d at 1275; *see* Fed. R. Civ. P. 23(f) advisory committee's note (1998). Here, Dow availed itself of Rule 23(f). That Dow was unsuccessful does not somehow lessen the protections afforded defendants by Rule 23(f) in general. *Cf.* Robert H. Klonoff, *The Decline of Class Actions*, 90 Wash. Univ. L. Rev. 729, 741 (2013) (finding "Rule 23(f) has served primarily as a device to protect defendants.").[8]

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[8] Despite decades of effort, the Chamber has never been able to produce any empirical evidence that class certification pressures defendants into settling meritless claims. *See* Charles Silver, *"We're Scared to Death":*

[Footnote continued on next page]

It bears emphasis, moreover, that Dow went to trial and has represented that it will easily pay the judgment if it loses this appeal. (*See* R. 2887-1 at ¶ 3 (attesting that Dow has "more than $9 billion in aggregate of readily available liquidity to cover on short notice not only the judgment amount but much larger amounts as necessary.").) If anything, this action demonstrates that a defendant is *not* forced to settle after class certification: Defendants can and do take antitrust and other class actions to trial.[9] That Dow lost does not somehow put settlement pressure on other defendants which (unlike Dow) may not have violated the law.

Class Certification and Blackmail, 78 N.Y.U. L. Rev. 1357, 1359 (2003) (citing empirical research dispelling the notion that class certification coerces settlement of meritless claims); Davis & Lande, 36 Seattle U. L. Rev. at 1316 ("We know of no study providing evidence that any significant number of cases lacked merit and yet recovered substantial settlements."); Allan Kanner & Tibor Nagy, *Exploding the Blackmail Myth: A New Perspective on Class Action Settlements*, 57 Baylor L. Rev. 681, 698 (2005) ("In sum, the empirical evidence quite simply does not prove up the assertion that class certification applies hydraulic pressure on defendants to settle.").

[9] For example, in addition to the Urethanes trial, antitrust class action trials recently occurred in *In re Vitamin C Antitrust Litigation*, No. 06-md-01738 (E.D.N.Y), and *In re TFT-LCD (Flat Panel) Antitrust Litigation*, No. 07-md-1827 (N.D. Cal.).

3. Denying Class Certification Because It Could Pressure Defendants Wrongly Shifts Pressure to Plaintiffs.

While the Chamber argues that class certification orders may pressure defendants to settle, it neglects to mention the countervailing consideration: the denial of class certification effectively prevents the proposed class members from obtaining meaningful relief. *See, e.g.*, *Visa Check/MasterMoney*, 280 F.3d at 146 (affirming district court's class certification ruling where, without class certification, numerous "small merchants will lose any practical means of obtaining damages . . . ."). Indeed, "while affirming certification may induce some defendants to settle, overturning certification may create similar 'hydraulic' pressures on the plaintiffs, causing them to either settle or—more likely—abandon their claims altogether." *Klay*, 382 F.3d at 1275; *see* Fed. R. Civ. P. 23(f) advisory committee's note (1998) ("An order denying certification may confront the plaintiff with a situation in which the only sure path to appellate review is by proceeding to final judgment on the merits of an individual claim that, standing alone, is far smaller than the costs of litigation."). Which is precisely why it is vital that class certification decisions be made on the merits, not based

on how they might influence one side's view of settlement. The Chamber's arguments about settlement pressure in other cases provide no basis for overturning the jury verdict here and denying Plaintiffs and the class recovery of the more than $400 million in overcharges they paid.

CONCLUSION

The Chamber of Commerce's contention that improperly certified class actions impose a "drag" on the "entire economy" (Ch. Br. at 6, 26) is without empirical support or legal merit, and is wholly untethered to the facts and posture of this case. The class here was properly certified and will benefit the economy by compensating the victims of Dow's price fixing and deterring future antitrust violations. These strong policy considerations support affirmance. *See Klay*, 382 F.3d at 1274 ("It would be unjust to allow corporations to engage in rampant and systematic wrongdoing, and then allow them to avoid a class action….").
Accordingly, Amicus Curiae respectfully requests that the Court affirm the judgment below.

Dated: February 20, 2014

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. P. 29(d), because it contains 4,344 words, as determined by Microsoft Word 2010, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

I hereby certify that on February 20, 2014, I caused the foregoing to be filed with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by ECF, which will provide notice to all counsel of record in this matter.

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