IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

IN RE URETHANE ANTITRUST LITIGATION	
THIS DOCUMENT RELATES TO: CLASS ACTION POLYETHER POLYOL CASES	Case No. 04-md-1616-JWL-JPO

THE DOW CHEMICAL COMPANY'S
RESPONSE TO CLASS PLAINTIFFS' MOTION TO AMEND THE JUDGMENT
AND MEMORANDUM IN SUPPORT OF DOW'S MOTION TO AMEND
THE MAY 15, 2013 JUDGMENT

On May 15, 2013, the Deputy Clerk of the Court electronically signed a document entitled "Judgment in a Civil Case," docketed as 2880 ("the Judgment"). Plaintiffs have since filed a Motion to Amend the Judgment (Dkt. 2885). As explained below, Dow objects to and seeks amendment of the Judgment,[1] and also opposes Plaintiffs' Motion, except as it relates to their request to reduce any damages awarded by $139,300,000. *See* Pl. Motion at ¶¶ 2, 7.

First, a judgment in this case must "conform to" the jury's clear rejection of all claims based on transactions prior to November 24, 2000, and Dow therefore is entitled to judgment in its favor for transactions prior to that date. The judgment also must conform to the fact that the jury provided no explanation for where it drew the lines—by time, product, or supplier—regarding transactions after that date.

Second, because only the jury could adjudicate causation and damages, Plaintiffs' efforts to supplant the jury's indeterminate verdict about transactions after November 23, 2000 with an "administrative" process would contravene well-established Seventh Amendment and Due Process principles. The impropriety of this approach is underscored by the fact that Plaintiffs' Plan is simply a repackaging of the same model rejected by the jury, and subject to the same defects identified by the Supreme Court in *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013).

Third, the same failure to have the jury decide claimant-specific damages means that no final judgment can be entered in this case. The only appropriate judgment must be partial—

[1] Because the verdict in this case was not a general verdict, any judgment would have to be entered pursuant to Rule 58(b)(2). It is unclear whether the Court approved the form of the judgment entered by the Clerk as required by the Rule, and the record does not reflect any such approval. Absent approval by the Court, the Judgment (Dkt. 2880) was not effective when docketed, and Dow reserves the right to argue that it had no legal effect. *See Am. Interinsurance Exch. v. Occidential Fire & Cas. Co. of N.C.*, 835 F.2d 157 (7th Cir. 1987) (dismissing appeal for lack of jurisdiction due to judge's failure to comply with Rule 58); *Camp v. Residential Elevators, Inc.*, No. 08-cv-73, 2009 WL 1598462, at *6 (N.D. Fla. June 4, 2009) (finding clerk's entry of judgment without effect due to failure to comply with Rule 58(b)).

dismissing claims against Dow based on transactions prior to November 24, 2000, and ordering a new trial for claims based on transactions thereafter. Dow does, however, believe that appellate review would be beneficial, and proposes use of 28 U.S.C. § 1292(b) as an appropriate vehicle.

I. The Judgment Must Conform To The Jury's Verdict, But Fails To Do So Here

"[I]f anything is settled in proceedings at law where a jury is impaneled to try the facts, it is, that . . . **the judgment of the court must conform to and follow the verdict**." *Bennett v. Butterworth*, 52 U.S. 669, 675 (1850) (emphasis added); *see also Wells Truckways, Ltd. v. Burch*, 247 F.2d 194, 198 (10th Cir. 1957) ("[W]here the intention of the jury is clear from the language of the verdict, **the court must make the judgment conform thereto**.") (emphasis added).

The Judgment in this case is defective because it fails to conform to the verdict in fundamental respects.

A. The Judgment Fails to Reflect The Jury's Finding That Dow Has No Liability for Transactions Predating November 24, 2000

The jury's answer to Question 3 on the Verdict Form clearly reflects its determination that no Class members were overcharged for any transaction predating November 24, 2000. Plaintiffs themselves concede the point, acknowledging "the jury determined that there were no overcharges prior to November 24, 2000." Pl. Motion at ¶ 14; *see also* May 15, 2013 Memorandum and Order at 1 ("jury found . . . overpayments did not include any overpayments prior to November 24, 2000); *id*. at 14 (noting "plaintiffs failed to sustain their burden of proof with respect to one period of time").

Contrary to the well-established requirement that a judgment "conform to and follow the verdict," the Judgment failed to reflect that Dow prevailed on the claims of all Class members who made purchases only before November 24, 2000, and failed to make clear that Dow faces no

liability for claims based on transactions predating November 24, 2000 (even for class members who had purchases both before and after November 24, 2000). These omissions from the Judgment are plain error, and should be rectified by the Court in an amended judgment. This amendment is also necessary so it is clear what claims and issues need to be re-tried in the even a new trial is ordered in this case.

B. The Verdict Does Not Support Entry of Judgment "Against" Dow and "In Favor" of the "plaintiff class" for Transactions After November 23, 2000

In contrast with the jury's clear finding for Dow with respect to transactions predating November 24, 2000, the critical elements of the jury's determination with respect to transactions after that date are unclear from the Verdict Form. Although the jury's answers to Questions 3 and 5, and its Note to the Court (Dkt. 2798), clearly evidence that the jurors rejected at least *some* of the claims presented by Plaintiffs at trial, no one can discern from the Verdict Form itself what the jury found about: (1) the duration and inception of the conspiracy that the jury determined existed; (2) which urethane suppliers other than Dow participated, and during what period(s) of time; or (3) what products were covered, and during what period(s) of time. For instance, "[t]he jury might have decided that the conspiracy did not exist for the entirety of the post-November 2000 period." *See* May 15, 2013 Memorandum and Order at 16. Or "[t]he jury might have [determined] that plaintiffs did not prove that Lyondell was a member of the conspiracy," or found no injury or damages with respect to purchases of Systems. *Id.*

The indeterminacy of the verdict is crucial: it goes to the most fundamental question of who prevailed on what claims and who lost—the essential question of ***entitlement*** to relief. But that indeterminacy is not reflected in the Judgment. In fact, the Judgment "in favor of the plaintiff class" appears to be in favor of all claims and all claimants—both before and after November 23, 2000.

Under these circumstances, with respect to transactions after November 23, 2000, no judgment can be entered for or against any party without violating the basic principle that "[a] verdict finding matters uncertainly and ambiguously is insufficient to support a judgment." *Hartnett v. Brown & Bigelow*, 394 F.2d 438, 441 n.2 (10th Cir. 1968); *see also Unit Drilling Co. v. Enron Oil & Gas Co.*, 108 F.3d 1186, 1193 (10th Cir. 1997) (finding district court abused its discretion by entering judgment based on an ambiguous verdict); *Fid. & Guar. Ins. Underwriters, Inc. v. Rodriguez*, 141 F. App'x 11, 13 (2d Cir. 2005) ("We are left to guess as to what the jury found, and what further findings may have been made as a matter of law by the court. We therefore cannot review the propriety of the judgment . . . and must vacate it.").

Nor can the indeterminacy of the verdict be ignored on the theory that the award of a lump sum obviates the need to actually determine ***which*** *plaintiffs won and which lost*. *See, e.g.*, *Windham v. Am. Brands, Inc.*, 565 F.2d 59, 72 (4th Cir. 1977) ("[T]he difficulties inherent in proving individual damages [cannot] be avoided by the use of a form of 'fluid recovery.'"); *Eisen v. Carlisle & Jacquelin*, 479 F.2d 1005, 1018 (2d Cir. 1973) (determining that the "fluid recovery" concept, insofar as it entailed the use of aggregated damages to circumvent Rule 23's requirements, was "illegal, inadmissible as a solution of the manageability problems of class actions and wholly improper"), *vacated on other grounds*, 417 U.S. 156 (1974). Indeed, to allow a jury to enter a verdict for an aggregate sum where the class injuries are not uniform would "significantly alter[] substantive rights under the antitrust statutes" in violation of the Rules Enabling Act. *In re Hotel Tel. Charges*, 500 F.2d 86, 90 (9th Cir. 1974); *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 231 (2d Cir. 2008), abrogation in part on other grounds recognized by *Koch v. Christie's Int'l PLC*, 699 F.3d 141, 148-49 (2d Cir. 2012) (holding class plaintiffs' proposal to calculate aggregate liability in a class-wide adjudication violated the Rules Enabling

Act because it "would inevitably alter defendants' substantive right to pay damages reflective of their actual liability"). The inadequacy of a judgment in this case that merely identifies a lump sum award for "the class" is grounded in Dow's constitutional right to have a jury resolve all aspects of each class member's entitlement to *any* award.

C. The Judgment Improperly Trebled the "Aggregate" Damages Figure Set Out in the Verdict Form

Relying on 15 U.S.C. § 15, the Judgment orders trebling of the aggregate damages figure set out in the Verdict Form (in response to Question 5). That statute provides: "any ***person*** who shall be injured in his business or property by reason of anything forbidden in the antitrust laws . . . shall recover threefold the damages by ***him*** sustained." While Dow does not dispute that a person or entity prevailing on a damages claim under the Sherman Act is entitled to have *its own* damages trebled, the statute does not authorize trebling of an "aggregate" dollar amount where there has been ***no determination*** of the damages owed to any class members. The right to trebling under the antitrust laws belongs to specific plaintiffs—not to a "class" as a whole. Unless and until damages are awarded to particular class members, the statute does not authorize trebling, and ordering the payment of treble damages for the "class" rather than for specific members of the class would violate the Rules Enabling Act's proscription against using procedural rules to alter or modify substantive law. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613 (1997) (Rule 23 "must be interpreted in keeping with . . . the Rules Enabling Act, which instructs that rules of procedure 'shall not abridge, enlarge or modify any substantive right,' 28 U.S.C. § 2072(b)."); *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2561 (2011).[2]

[2] In addition to the foregoing defects, the Judgment also fails to comply with Rule 23's requirement that it "include and specify or describe . . . whom the court finds to be class members." FRCP 23(c)(3)(B).

II. Plaintiffs' "Plan of Allocation" Seeks To Accomplish Ministerially What Can Only Be Decided By A Jury, But Was Not Decided Here

Plaintiffs seek to amend the Judgment "to approve" the "Plan of Allocation" (attached as Exhibit A to their Motion to Amend) that would "utilize the calculations already performed" by Dr. McClave. Pl. Motion at ¶ 13.[3] These "customer-specific" calculations purportedly were used by Dr. McClave in computing the aggregate alleged damages figures he presented to the jury, *Id*. at ¶¶ 13, 16, although they were not introduced at trial. Plaintiffs' request must be denied.

A. Dow Has a Clear Right to a Jury Trial on Causation and the Amount of Damages for Specific Class Members

First, Dow has a right to have a **jury** decide which plaintiffs are entitled to damages. No plaintiff is entitled to judgment against Dow absent a jury determination that the ***particular plaintiff*** proved ***each*** element of its claim against Dow. *See Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 353 (1998) ("It has long been recognized that 'by the law the jury are judges of the damages.'").

[3] The Court should reject Plaintiffs' Plan of Allocation as facially defective because it fails to disclose to the Court or to Dow the backup or output of the "calculations" that constitute the foundation of the Plan. *See, e.g., Cook v. Rockwell Int'l. Corp.*, 618 F.3d 1127, 1138 (10th Cir. 2010); *Strey v. Hunt Int'l Res. Corp.*, 696 F.2d 87, 88 (10th Cir. 1982).

B. By Plaintiffs' Own Choice, Plaintiff-Specific Damages Were Never Adjudicated

Dow's earlier post-trial motions carefully documented the *transaction and customer-specific nature of the marketplace*, as well as Dr. McClave's recognition of this fact in his data collection and model design, and in his calculation of damages for three specific class members.[4] The difference between such a market and those for securities or for other products involving "one price" markets is not subject to dispute.[5] Nor can it be disputed that any alleged damages were sustained on a transaction-by-transaction basis. In fact, the professed purpose (albeit not the actual implementation) of the model was to measure damages at the "transaction level." Trial Tr. at 2897:10-2898:4 (explaining how but-for prices were calculated for each "transaction or group of transactions"); *id*. at 2971:16-25 (model purportedly calculated damages based on "individual transactions").

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[4] *See* Memorandum in Support of The Dow Chemical Company's Motion for Judgment as a Matter of Law (Dkt. 2785-1) at 13-14; Memorandum in Support of The Dow Chemical Company's Motions for Judgment on the Verdict and as a Matter of Law or for a New Trial (Dkt. 2809) at 21-22; Corrected Reply Memorandum in Support of The Dow Chemical Company's Motions for Judgment on the Verdict and as a Matter of Law or for a New Trial (Dkt. 2826) at 16; Trial Tr. at 2897:10-2898:4 (McClave testimony explaining general damages calculation method), 2964:24-2966:4 (summarizing "average blended" overcharges), 2900:13-2901:2 (damages calculations only introduced for three named plaintiffs).

[5] Garden variety securities class actions, for example, often involve the market price of a security at a given point in time—a price that is the same for all members of the class. In the context and record of such a case, a verdict or judgment "for the class" may provide sufficient information to determine each class member who has successfully proven a claim and the amount of that individual class member's damages. By contrast, the transactions in this case are individually negotiated with the price for each of the three chemicals and each of the myriad systems fluctuating by transaction for any number of reasons. As a result, the verdict and evidentiary record in this case does not support judgment "for the class" or for any class member. This conclusion is separately confirmed by the jury's negative answer to Question 3, which precludes judgment for "the class" (or all class members) as it was originally defined or as that definition has been modified by the Court.

The record also is clear that Plaintiffs made the strategic decision **not** to put customer-specific damage assertions into evidence, except for the three class representatives. Their approach, rather, was to select out two basic periods of time and present aggregated damages, thereby foreclosing any determination of damages at a more granular level.

In the same vein, Plaintiffs resisted both jury instructions and a verdict form that would have enabled the jury to deliberate concerning, decide, and announce claims on any basis other than a lump sum award. *See, e.g.*, Class Plaintiffs' Brief in Support of their Proposed Verdict Form (Dkt. 2695) at 5; *see also* Class Plaintiffs' Brief in Support of their Jury Instructions (Dkt. 2689) at 12.

The result was a verdict in precisely the level of generality sought by Plaintiffs, save only that it was in favor of Dow for the period up to November 24, 2000, and it rejected some of their claims (which ones cannot be determined) during the period thereafter.

C. Accepting Plaintiffs' "Plan of Allocation" Would Violate Dow's Seventh Amendment and Due Process Rights

Plaintiffs' proposed "Plan of Allocation" reflects a very simple concept: to have an administrator accomplish what Plaintiffs decided not to present to the jury for its consideration and decision. The heart of the plan is for the administrator to apply the same McClave Model that was presented to the jury, disputed by Dow, and ultimately rejected by the jury in its verdict. The net result of adopting Plaintiffs' Plan would be to render claimant-specific awards that the jury never made, and could not have made on the record evidence presented at trial. Awarding damages to class members who have not demonstrated injury also would undermine a required, inherent check against Dow paying an inflated damages award. That risk is especially acute here because of the attribution by Dr. McClave's model of any "gaps" entirely to "overcharges"—a proposition which the jury rejected—and his use of extrapolated average

estimates for determining the awards to 75% of the class. Adopting such a plan would violate Dow's constitutional rights in at least three ways.

First, it would strip Dow of its jury trial rights under the Seventh Amendment. *See*., *e.g*., *Feltner*, 523 U.S. at 353-54 (finding Seventh Amendment right to jury trial violated when amount of damages decided by judge rather than jury).

Second, adopting Plaintiffs' Plan of Allocation would violate the Reexamination Clause of the Seventh Amendment. "The right to a jury trial in federal civil cases, conferred by the Seventh Amendment, is a right to have juriable issues determined by the first jury impaneled to hear them . . . and not reexamined by another finder of fact." *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1303 (7th Cir. 1995). In this case, the Court asked the jury to decide a question of aggregate damages.[6] Plaintiffs now ask the Court to revisit the issue of damages by acting as the fact-finder with respect to each class member's entitlement to damages. This is precisely the kind of "reexamination" of an issue prohibited by the Seventh Amendment. *Id*. (describing as "obvious" the Reexamination Clause problem when "juriable issues" are revisited by a judge); *see also Cimino v. Raymark Indus., Inc.*, 151 F.3d 297, 319-20 (5th Cir. 1998) (remanding for a new trial where the final trial phase failed to ascertain each plaintiff's individual damages and instead empowered the judge to set damages in violation of the defendant's "Seventh Amendment right to have the amount of the legally recoverable damages fixed and determined by a jury").[7]

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[6] *See* Verdict Form, Question 5 (Dkt. 2799); Jury Instructions 20 and 21 (Dkt. 2797).

[7] By adopting Dr. McClave's calculations the Court also would be reexamining the issue of "impact" in contravention of the Seventh Amendment because Dr. McClave concluded some class members were not impacted by the conspiracy, and suffered no damages. Trial Tr. at 2826:19-2827:7, 2832:16-21 (Plaintiffs asked Dr. McClave to analyze whether "all or nearly all" were impacted and Dr. McClave concluded only that "nearly all" class members were impacted);

Third, adopting Plaintiffs' Plan of Allocation also would violate Dow's Due Process rights. For example, Dr. McClave never produced class member-specific damages calculations to Dow except for the three named plaintiffs, depriving Dow of the opportunity to examine Dr. McClave under oath about those calculations (in front of the jury or otherwise). It would violate Dow's rights to adopt Dr. McClave's post-trial customer-specific assertions without giving Dow the right to investigate and contest their propriety. More fundamentally, however, it would violate Dow's Due Process rights to award damages to specific class members based on calculations generated using a model that the jury did not accept in at least two important respects having (1) disagreed with the model's finding of overcharges before November 24, 2000, and (2) declined to adopt the aggregate damages figure Dr. McClave propounded for the period after November 23, 2000.

Neither the Verdict nor the trial record support transforming Dr. McClave's contested and, indeed, rejected model into a definitive post-trial touchstone for proof of each class member's damages.

Nor can Plaintiffs justify their Plan of Allocation by characterizing it as merely "ministerial." *See Albright v. UNUM Life Ins. Co. of Am.*, 59 F.3d 1089, 1092-93 (10th Cir. 1995). Plaintiffs elected to avoid having the jury make class-member specific damages determinations. That choice has consequences, and there can be no doubt that resolution of each class member's entitlement to damages in post-trial proceedings would be contested,

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see also Memorandum in Support of the Dow Chemical Company's Motion to Decertify the Class (Dkt. 2707) at 21-22; The Dow Chemical Company's Supplemental Brief Supporting its Motion to Decertify the Class (Dkt. 2807) at 7. Allocation on this basis also would surface the incurable conflict of interest between these "Zero-Impact" class members and other class members. *See* Dkt. 2707 at 22; Dkt. 2807 at 6-7.

complicated, and require decisions about questions that were or should have been before the jury. *Strey v. Hunt Int'l Res. Corp.*, 696 F.2d 87, 88 (10th Cir. 1982).

D. Plaintiffs' "Plan of Allocation" Is Unsupported by the Verdict Because It Presumes Dow is Liable for All Transactions After November 23, 2000

Plaintiffs' Plan of Allocation would "be based on each Class Member's estimated overcharges for the period from November 24, 2000 through December 31, 2003, as determined by Dr. McClave" (Pl. Motion at ¶ 15), and therefore is unsupported by the Verdict. As explained in detail above, the Verdict is ambiguous about: (1) the duration and inception of the conspiracy that the jury determined existed; (2) which urethane suppliers other than Dow participated, and during what period(s) of time; or (3) what products were covered, and during what period(s) of time. Contrary to Plaintiffs' view, the jury made ***no*** finding that the conspiracy began on November 24, 2000. *See* May 15, 2013 Memorandum and Order at 16. "The jury might have decided that the conspiracy did not exist for the entirety of the post-November 2000 period." *Id*. Likewise, the jury made no finding that the conspiracy included either Systems or Lyondell sales post-November 23, 2000. *Id*. Yet, adoption of Plaintiffs' Plan would award damages for all such claims. Distributing damages to class members for claims on which they suffered no injury violates Dow's substantive right not to pay damages, except for claims on which the individual was "injured in his business or property." *See* 15 U.S.C. § 15.

E. Plaintiffs' Proposal For Allocation of Unclaimed Funds is Unauthorized by the Antitrust Laws and Would Violate Dow's Rights[8]

Under Plaintiffs' Proposed Plan "any funds allocable to Class members that remain unclaimed . . . shall be distributed to members of the Class . . . ." Pl. Motion, Exh. A at p. 3, Section D. Accepting Plaintiffs' suggestion would be unlawful.

First, under the antitrust laws, a plaintiff is entitled to only its own actual damages, subject to trebling.[9] Awarding a plaintiff damages in excess of its own compensatory damages is not authorized by the relevant statutes.

Second, awarding a plaintiff more than its actual compensatory damages (trebled) would violate the Rules Enabling Act. The fact that Plaintiffs' claims have been adjudicated in a class action (albeit improperly) cannot be used as a basis to award any plaintiff damages beyond those to which that plaintiff would be entitled in an individual lawsuit. No plaintiff has a right to the unclaimed funds to which any other plaintiff might be entitled.

Third, to award a plaintiff more than its actual damages (trebled) would constitute an unlawful taking under the Fifth Amendment, and also violate Dow's Due Process rights. *Cf. Philip Morris USA v. Williams*, 549 U.S. 346, 349 (2007) (holding damages award for harm to non-parties would amount to a "taking" without due process).

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[8] Dow maintains and does not waive its contention that the imposition of damages based on joint and several liability was improper and unconstitutional. *See* Dkt. 2809 at 63; *see also* The Dow Chemical Company's Responses to Class Plaintiffs' Jury Instructions and Dow's Proposed Jury Instructions, Dkt. 2689-4 at 84-85.

[9] *See* Jury Instructions (Dkt. 2797), Instruction 20 ("Antitrust damages are compensatory only. In other words, they are designed to compensate a plaintiff for the particular injuries ***it*** suffered as a result of the alleged violation of the law.") (emphasis added).

III. Any Damages Awarded In A Judgment Must Be Offset By The Settlements Obtained By Plaintiffs

For the reasons explained above, the Verdict does not support or permit the entry of judgment in favor of Plaintiffs. However, if and to the extent a judgment addresses the issue of any damages owed to Plaintiffs, Dow is entitled to an offset any damages by $139.3 million, as Plaintiffs themselves acknowledge. *See* Pl. Motion at ¶¶ 2, 7.

IV. Plaintiffs' Request For An Advisory Ruling On Their Entitlement To Fees And Costs Must Be Rejected

Dow opposes Plaintiffs' request that the Court "confirm Class Plaintiffs' right to an award of costs of suit, including a reasonable attorneys' fee." Pl. Motion at 1. The parties have agreed to defer briefing on any request for fees and/or costs (Dkt. 2886 at 4), and Plaintiffs' request for "confirmation" is both premature and inappropriate. *See Abbott Labs. v. Gardner*, 387 U.S. 136, 148-149 (1967) ("basic rationale" of ripeness doctrine is "avoidance of premature adjudication") (abrogated on other grounds, *Califano v. Sanders*, 430 U.S. 99, 105 (1977)). Any such "confirmation" by the Court would be tantamount to an improper advisory opinion. *See Columbian Fin. Corp. v. BancInsure, Inc.*, 650 F.3d 1372, 1376 (10th Cir. 2011) ("Article III has long been interpreted as forbidding federal courts from rendering advisory opinions.").

V. Because Final Judgment Cannot Be Entered, The Court Should Grant Certification Under 28 U.S.C. § 1292(b) Or Conduct A New Trial Addressing Transactions After November 23, 2000[10]

As explained above, Dow requests that the Judgment be amended to (1) conform to the jury's undisputed finding in its favor for the period up to November 24, 2000, and (2) remove the

[10] Dow maintains its view that it was entitled to judgment based on the verdict and as matter of law, and that that a new trial should be ordered as to the transactions after November 23, 2000 (Dkt. 2809, 2826, 2842), but given that this Court has denied those requests, the appropriate course of action absent reconsideration of those requests is certification of all issues for appellate review.

entry of judgment "against" Dow and "in favor of the plaintiff class." For the reasons set forth in Dow's post-trial briefs, the Court should then order a new a new trial to adjudicate the claims based on transactions after November 24, 2000.

But even if the Court declines to order a new trial, the amended judgment will not be final because the Court may not adopt Plaintiffs' Plan of Allocation without violating Dow's rights. Final judgment can be entered only when all of the work of adjudication is done. *Harbert v. Healthcare Servs. Grp.*, 391 F.3d 1140, 1144-46 (10th Cir. 2004) (order not final, despite judgment's inclusion of a "formula for the calculation of damages," where damages had not actually been calculated); *Strey*, 696 F.2d at 88 (judgment not final where aggregate damages determined without individual awards); *see also* Pl. Motion at ¶ 11 (recognizing allocation is necessary to render judgment final). Here, Plaintiffs' own Plan of Allocation powerfully demonstrates that more work remains to be done—before a jury.

Absent a new trial, it would be enormously beneficial to the resolution of this litigation to have the Court of Appeals resolve certain questions pursuant to 28 U.S.C. § 1292(b). In a separate filing Dow will request amendment of the orders it believes should be reviewed on appeal to state that each order "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." *See* 28 U.S.C. § 1292(b); *see also Yamaha Motor Corp., USA v. Calhoun*, 516 U.S. 199, 205 (1996) (the Court is not required to identify any particular controlling question in each order). In that filing, Dow will identify specific issues it believes should be addressed on appeal pursuant to Section 1292(b).

Respectfully submitted,

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Certificate of Service

On June 6, 2013, I caused a copy of this document to be filed with the Court through the ECF system, which provides electronic service of the filing to all counsel of record who have registered for ECF notification in this matter.

s/ Brian R. Markley
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