IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

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

THE DOW CHEMICAL COMPANY'S REPLY BRIEF
SUPPORTING ITS MOTION TO DECERTIFY THE CLASS

Prior to trial, Dow filed a motion to decertify the class. Dkt. 2706. With the Court's permission (Dkt. 2822), Dow submits this reply brief supporting its motion to decertify. This brief responds to arguments raised in Plaintiffs' supplemental opposition brief ("Supp. Decert. Opp.") (Dkt. 2817). This brief also addresses last week's important decision by the Supreme Court in *Comcast Corp. v. Behrend*, -- S.Ct. --, No. 11-864, 2013 WL 1222646 (Mar. 27, 2013), in which the Supreme Court found a model proffered by Dr. McClave was insufficient to meet the requirements of Rule 23(b)(3). As explained in detail below, *Comcast* offers powerful confirmation that the Class in this case should be decertified. And like *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011)—another significant class certification decision issued since this Court granted class certification in 2008—*Comcast* will provide much needed guidance to lower courts, to ensure that certification is granted only when consistent with Rule 23, the Rules Enabling Act, and the guarantees of the Due Process Clause and Seventh Amendment. Indeed, *Comcast*'s impact is already being felt, with the Supreme Court this week overturning two other class certification rulings (one of which is relied on by Plaintiffs), and remanding those cases for proceedings consistent with *Comcast*.

I. Plaintiffs Do Not Dispute the Relevant Legal Standards

Plaintiffs do not dispute any of the relevant legal standards, established by case law and by Rule 23 itself:

- A class may be decertified at any time prior to final judgment[1];
- A plaintiff bears the burden of establishing the requirements of Rule 23; and
- The burden of establishing the requirements of Rule 23 remains with the plaintiff even if the defendant is the movant, and even after certification is granted.

II. Decertification of the Class is Required by Rule 23, the Rules Enabling Act, Due Process and the Seventh Amendment

A. *Comcast* confirms that the Class in this case should be decertified

Like here, in *Comcast* the plaintiffs attempted to prove impact and damages for the class through a regression model developed by Dr. McClave. Although the plaintiffs had originally advanced four theories of antitrust impact, the trial court accepted only one of the four—the "overbuilder theory"—as capable of being proved with classwide evidence, and certified a Rule 23(b)(3) class, having accepted that Dr. McClave's model could be used to prove impact and damages. After the Third Circuit affirmed, the Supreme Court granted review and reversed,

[1] If the requirements of Rules 23 are not met, decertification must be granted, even after a jury has rendered a verdict. *See, e.g., Wang v. Chinese Daily News, Inc.*, 709 F.3d 829 (9th Cir. 2013); *Broussard v. Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 337 (4th Cir. 1998). Despite Plaintiffs' implication that price-fixing cases are invariably fit for class certification (Class Plaintiffs' Opposition to Dow's Post-Trial Motion (Dkt. 2816) at 24 & n.9), a review of cases from only the past few years reveals otherwise. *See, e.g., Comcast*, 2013 WL 1222646; *In re Florida Cement and Concrete Antitrust Litig.*, 278 F.R.D. 674, 686-87 (S.D. Fla. 2012) (denying class certification); *In re Plastics Additives*, No. 03–CV–2038, 2010 WL 3431837, at *16 (E.D. Pa. Aug. 31, 2010) (denying class certification where plaintiffs failed to show actual injury because their expert "admitted that his regressions d[id] not show that each and every class member paid a higher price than they would have paid absent a conspiracy"); *In re Flash Memory Antitrust Litig.*, No. C 07–0086, 2010 WL 2332081, at *8 (N.D. Cal. June 9, 2010) (denying class certification); *Valuepest.com of Charlotte, Inc. v. Bayer Corp.*, 561 F.3d 282 (4th Cir. 2009) (affirming district court's refusal to certify); *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 326 (3d Cir. 2008) (reversing the district court's order certifying).

finding that class certification had been "improper." Specifically, the Court found Dr. McClave's model fell "far short of establishing that damages are capable of measurement on a classwide basis." *Comcast*, 2013 WL 1222646 at *5. In reaching that conclusion the Court set out several important observations about the use of models to support plaintiffs' case in a class action:

(1) "[A]t the class certification stage (as at trial), any model supporting a 'plaintiff's damages case *must be consistent with its liability case, particularly with respect to the alleged anticompetitive effect of the violation*";

(2) The model must "measure damages *resulting from the particular antitrust injury* on which petitioners' liability . . . is premised"; and

(3) The model must "bridge the differences between supra-competitive prices in general and supra-competitive prices attributable to" the specific theory of liability advanced (*i.e.*, overbuilding), and "must measure only those damages attributable to that theory."

Id. at *5-7 (emphasis added). Because Dr. McClave's model failed to "translat[e] the *legal theory of the harmful event* into an analysis of the economic impact *of that event*," the Court found class certification should not have been granted. *Id.* at *7 (emphasis in original).

1. *Comcast* confirms Dow did not waive any arguments in support of decertification

Plaintiffs contend that Dow "waived" its right to explain why problems with Dr. McClave's analysis warrant decertification, purportedly by not addressing those specific problems in its *Daubert* motion. Supp. Decert. Opp. at 8; Memorandum of Law in Opposition to Dow's Motion to Decertify the Class ("Decert. Opp.") (Dkt. 2752) at 21. The Supreme Court, however, dispensed with that argument when it reversed the grant of class certification in *Comcast*. *See Comcast* at n.4 (the failure to "make an objection to the admission of Dr. McClave's testimony under the Federal Rules of Evidence . . . does not make it impossible for

[defendants] to argue that the evidence failed 'to show that the case is susceptible to awarding damages on a class-wide basis.'").

2. *Comcast* highlights the significance of Dr. McClave's inability to establish causal links between the conduct challenged at trial and injury/damages to Class members

Before *Comcast* was decided Dow sought decertification because (among other reasons) Dr. McClave's model was incapable of establishing a ***causal*** *link* between "a competition-reducing aspect of the defendant's behavior," *In re Urethane Antitrust Litig.*, 251 F.R.D. 629, 634 (D. Kan. 2008), and the prices paid by Class members—particularly when applied to specific transactions and specific class members. *See* Dow's Memorandum of Law in Support of Motion to Decertify Class (Dkt. 2707) at 15. *Comcast* reinforces the significance of this defect in Dr. McClave's analysis, and further demonstrates why the Class must be decertified.

As in *Comcast*, in this case it is abundantly clear that Dr. McClave's model failed to "translat[e] the *legal theory of the harmful event* into an analysis of the economic impact *of that event*," and that certification is therefore improper. *Comcast*, 2013 WL 1222646 at *7. For example:

- **Dr. McClave's failure to distinguish the effects of the *specific* anticompetitive conduct challenged at trial from the effects of other allegedly anticompetitive conduct <u>not</u> challenged at trial** – As the Court will recall, for purposes of his modeling and analysis Dr. McClave *assumed* the truth of Plaintiffs' allegations of conspiracy, as set forth in the First Amended Complaint.[2] Specifically, Dr. McClave assumed the existence of "a collusive agreement 'to fix, raise, stabilize or maintain [prices] . . . ***<u>and</u> to allocate customers and markets*** for the Polyether Polyol Products in the United States.'"[3] Dr. McClave conducted his analysis

[2] *See* Expert Report of Dr. James T. McClave (Apr. 15, 2011) at 3 ("I have assumed for purposes of my calculations that the plaintiffs' allegations regarding the defendants' conspiracy are accurate"); McClave Dep. (June 8, 2011) at 85:23-86:9.

[3] McClave Report at 3 (emphasis added); *see also* First Amended Consolidated Complaint at ¶ 44, Dkt. 206-2.

while Plaintiffs maintained their allegation of customer and market allocation; it was more than a year after Dr. McClave completed his work that Plaintiffs elected not to pursue their allegation of customer and market allocation. *See* Pretrial Order (Dkt. 2374) at 4-5 (July 10, 2012). As Dow previously explained (Dkt. Dkt. 2785-1 at 17), this is significant because Dr. McClave's model failed to *distinguish* between (1) "overcharges" attributable to "price fixing" (*i.e.*, the "agreement" to "coordinate near identical price announcements and . . . work[] together to try to stick to those announced prices") and (2) "overcharges" attributable to the market and customer allocation he assumed occurred during his work. This is precisely the kind of defect which the Supreme Court found precluded class certification under Rule 23(b)(3). *Comcast*, 2013 WL 1222646 at *6-7. Dr. McClave unquestionably constructed and applied his model assuming a ***broader*** set of anticompetitive conduct by Dow and others than was alleged at trial and, like in *Comcast*, it "would be 'obvious[ly] and exceptional[ly] erroneous" to pretend Dr. McClave's model established impact and damages limited to the ***precise*** conduct challenged at trial. *See Id.* at 6 n.5.

- **Dr. McClave's failure to examine the relationship between the *specific* anticompetitive conduct challenged at trial and the impact of that conduct** – In order to prove impact at trial Plaintiffs were required to show a ***causal*** relationship between the "lockstep" price increase announcements they contend were the subject of the alleged agreement and the *actual* prices paid by customers. *In re Urethane*, 251 F.R.D. at 634 ("[T]he antitrust injury requirement allows a plaintiff to recover *only if* the plaintiff has suffered a loss that *stems from* a competition-reducing aspect of the defendant's behavior.") (emphasis added). But at trial, Dr. McClave repeatedly acknowledged that his models did not establish causal links between any alleged misconduct and the price "variances" he identified. *See, e.g.*, Trial Tr. at 3004:20-3005:2, 3145:1-6, 3145:25-3146:9. This is fatal to Plaintiffs' efforts to maintain a certified Class. As the Supreme Court explained in *Comcast*, to support certification Dr. McClave's model needed to "measure damages *resulting from the particular antitrust injury* on which petitioners' liability . . . [was] premised." *Comcast*, 2013 WL 1222646 at *6 (emphasis added).

- **The jury's refusal to accept the foundation of Dr. McClave's analysis** – The inability of Dr. McClave's model to establish the required ***causal*** *link* between the precise conduct challenged at trial and the prices paid by Class members was confirmed by the jury's verdict. In finding no overcharges before November 24, 2000, the jury clearly rejected the foundation of Dr. McClave's analysis: his premise that all "variance" between actual prices and his proffered "but-for" prices was attributable to anticompetitive conduct. And in repudiating that

> premise, the jury confirmed that Dr. McClave's model could not "bridge the differences" between (alleged) supra-competitive prices in general and supra-competitive prices attributable to the specific conduct challenged at trial, as required by *Comcast*.

That Dr. McClave's model and analysis have fallen "far short" is unsurprising given its many defects, addressed at length in Dow's prior filings. It is also unsurprising given the undisputed fact, recognized by this Court, that sales in the urethanes industry are dependent on numerous customer-specific factors, such as "individual negotiations, [and] variations in contractual relationships."[4] *See In re Urethane Antitrust Litig.*, 251 F.R.D. at 637; *see id.* at 639 ("The court is not nearly as persuaded that the issue of damages is as amenable to class-wide proof . . . in light of the myriad of products, pricing structures, individualized negotiations, and contracts at issue.").

B. Plaintiffs disregard the importance of the Rules Enabling Act in assessing the propriety of class certification

The Rules Enabling Act, a foundational element of federal civil procedure, forbids courts from interpreting the Federal Rules of Civil Procedure in a way that would "abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b); *see Dukes*, 131 S. Ct. at 2561. Courts have therefore recognized that Rule 23 is only a procedural device, and may not be used or applied in a manner that alters any party's substantive rights. *See id.*; *see also Amchem Prods., Inc. v.*

[4] Dr. McClave's own finding of Zero Impact Class Members (and thousands of zero-impact transactions that affected Zero Impact Class Members *as well as* other class members) also evidences his model failed to demonstrate that the anticompetitive conduct he assumed existed had "***classwide***" effects. Therefore, like in *Comcast*, his model cannot serve as common evidence used to show "the existence of individual injury resulting from the alleged antitrust violation." *Comcast*, 2013 WL 1222646 at *3.

Windsor, 521 U.S. 591, 613 (1997) ("Rule 23's requirements must be interpreted in keeping with Article III constraints, and with the Rules Enabling Act . . . .").[5]

In antitrust cases, the issue of liability "includes not only the question of violation, *but also the question of fact of injury, or impact*." *Alabama v. Blue Bird Body Co., Inc*., 573 F.2d 309, 320 (5th Cir. 1978) (emphasis added); *see id*. at 318 (liability under Section 4 of the Clayton Act "necessarily includes proof of injury to business and property"). "[P]roof of injury to business or property *of each class member* is critical for the determination of defendants' *liability* to any individual." *Shumate & Co. v. Nat'l Ass'n of Sec. Dealers, Inc.*, 509 F.2d 147, 155 (5th Cir. 1975) (emphasis added). The proof requirements are not obviated or lessened when the action is brought on behalf of a proposed class. Therefore, as the Third Circuit has explained: "importantly, individual injury (also known as antitrust impact) is an element of the cause of action; to prevail on the merits, ***every*** *class member* must prove at least some antitrust impact resulting from the alleged violation." *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 311 (3d Cir. 2008) (emphasis added).

Understandably, Plaintiffs prefer that the Court ignore the Rules Enabling Act. Only by doing so could Plaintiffs even pretend that the trial resolved any claims against Dow.

1. The inclusion of non-injured customers in the Class evidences that class members' individual claims could *not* be proved with common evidence

Much of Plaintiffs' effort to forestall decertification hinges on their notion that a class should be certified under Rule 23(b)(3) even when it includes uninjured class members. *See*

[5] Earlier this week, the Supreme Court vacated a class certification decision by the Seventh Circuit after the petitioner contended that the court had approved certification in contravention of the Rules Enabling Act. *See* Brief of Petitioner-Appellant at 11, *RBS Citizens, N.A. v. Ross,* No. 12-165. After vacating the decision below, the Supreme Court remanded the case for proceedings consistent with the *Comcast* decision. 2013 WL 1285303 (U.S. Apr. 1, 2013).

Decert. Opp. at 9-12; Supp. Decert. Opp. at 7. But Plaintiffs' contention—which disregards the Rules Enabling Act—is wrong, and the trial in this case provides a lesson in why it is wrong.

As an initial matter, Plaintiffs mistakenly rely on *DG ex rel. Stricklin v. Devaughn*, 594 F.3d 1188, 1201 (10th Cir. 2010), which they characterize as upholding certification of a class "that includ[ed] class members for whom injury might not be capable of proof." Decert. Opp. at 10; *see also* Supp. Decert. Opp. at 7. *Devaughn* addressed certification only for injunctive relief under Rule 23(b)(2)—not certification for damages under Rule 23(b)(3). *Devaughn*, 594 F.3d at 1199-1201. Thus, the Tenth Circuit's observation about the theoretical possibility that the *Devaughn* class might include "unharmed" persons lends no support to Plaintiffs' characterization of the law governing cases under Rule 23(b)(3). *See Dukes*, 131 S. Ct. at 2558-59 (describing Rule 23(b)(3) classes as "unlike" classes under Rule 23(b)(1) and (2) due to the need to show "individualized" damages); *Comcast*, 2013 WL 1222646 at *4 (contrasting cases under Rule 23(b)(1) and (2) from cases under Rule 23(b)(3)).

Unable to cite any apposite authority from the Supreme Court or the Tenth Circuit in support of the idea that certification of a class with uninjured class members under Rule 23(b)(3) is proper, Plaintiffs cite case law from outside the Tenth Circuit. For instance, Plaintiffs rely on *In re Whirlpool Corp. Front-Loading Washer Prods. Liability Litig.*, 678 F.3d 409 (6th Cir. 2012), for the proposition that "[e]ven if some class members have not been injured by the challenged practice, a class may nevertheless be appropriate." Decert. Opp. at 11 n.9. But the Supreme Court vacated that Sixth Circuit decision earlier this week, and remanded the case for further proceedings consistent with *Comcast*. *Whirlpool Corp. v. Glazer*, No. 12-322, 2013 WL 1285305 (U.S. Apr. 1, 2013).

Plaintiffs also rely on two Seventh Circuit cases: *Kohen v. Pacific Investment Management Company LLC*, 571 F.3d 672 (7th Cir. 2009), and *Messner v. Northshore Univ. Healthsystem*, 669 F.3d 802 (7th Cir. 2012). But *Kohen* concerned a question about standing in a class action, and the court's general observation about class composition—not limited to Rule 23(b)(3) cases—is quintessential dicta and irrelevant to the questions confronting this Court. And *Messner* too is factually inapposite.[6] There, the court found a defendant's untested assertion at the class certification stage that some class members suffered no injury did not preclude certification. *Messner*, 669 F.3d at 823-24. That ruling is unremarkable—and has no bearing on this case, where Dow's opposition to certification based on the presence of uninjured class members arose only after the completion of discovery (and after the fact was *conceded* by Dr. McClave).[7]

Plaintiffs' novel reading of Rule 23 is also inconsistent with *Comcast*, where the Court noted that "to meet the predominance requirement [plaintiffs] had to show [] that the existence of ***individual*** injury resulting from the alleged antitrust violation . . . was 'capable of proof at trial

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[6] Plaintiffs also cite *Mims v. Stewart Title Guarantee Co.*, 590 F.3d 298 (5th Cir. 2009). *See* Decert. Opp. at 11 n.9. *Mims*, however, addressed a challenge to the scope of a class definition crafted by the trial court on the grounds that it was overbroad. In affirming the trial court's definition, the Fifth Circuit cited *Kohen* for the proposition that "[c]lass certification is not precluded simply because a class may include persons who have not been injured by the defendant's conduct." *Id*. at 308. Plaintiffs' over-reading of *Mims* ignores that the Fifth Circuit has "repeatedly held that where fact of damage [*i.e.*, impact] cannot be established for *every* class member through proof common to the class, the need to establish antitrust liability for individual class members defeats Rule 23(b)(3) predominance." *Bell Atl. Corp. v. AT & T Corp.*, 339 F.3d 294, 302 (5th Cir. 2003) (emphasis added). Moreover, like *Kohen* and *Messner*, *Mims* bears no factual resemblance to this case, where the presence of uninjured class members is an undisputed fact, and where their presence is the result of an absence of typicality and commonality among class members, not an artifact of an imprecise class definition.

[7] Plaintiffs' reliance on *In re K-Dur Antitrust Litig.*, 686 F.3d 197 (3d Cir. 2012), is misplaced for the same reason. *See* Decert. Opp. at 10 n.7. Moreover, a petition for *certiorari* to review *K-Dur* is still pending with the Supreme Court, and that decision may ultimately be vacated before the end of the Court's term.

through evidence that [was] common to the class . . . .'" *Comcast*, 2013 WL 1222646 at *3 (emphasis added). That requirement would make no sense if Plaintiffs were correct that it is proper to certify a class with uninjured class members.

Although Plaintiffs lack controlling authority to substantiate their view of the law, this case does not require the Court to decide whether it ***ever*** would be appropriate to certify a Rule 23(b)(3) class notwithstanding that some class members were not injured. In *this case* it is undisputed that (1) some Class members were not overcharged in any transactions; (2) other Class members, while "overcharged" for at least one transaction, overall paid the same or less than Dr. McClave claims they should have; and (3) the jury conclusively found there were no overcharges before November 24, 2000. From these facts it is abundantly clear that class members' individual claims could ***not*** be proved with common evidence. Decertification is therefore required.

2. Plaintiffs fail to establish that Dr. McClave's "extrapolation" constituted proof of impact or damages

It is undisputed that for approximately 75% of the class members, Dr. McClave did not model any of their observations used to calculate damages; their damages calculations are based *entirely* on extrapolation. Trial Tr. at 2927:3-2928:13, 2929:5-10. It is also undisputed that instead of using statistics to test whether there was impact (inferred, Plaintiffs contend, from the presence or absence of positive "unexplained variance"), for the extrapolated observations Dr. McClave *assumed* impact, and then engaged in a straightforward mathematical calculation *which could only generate a positive damages number*.

Tellingly, in their two briefs opposing decertification Plaintiffs offer no meaningful defense of Dr. McClave's extrapolation approach. *See* Decert. Opp. at 21; Supp. Decert. Opp. at 8. Instead, they disingenuously attempt to portray Dow's expert, Dr. Ugone, as having endorsed

Dr. McClave's extrapolation approach. *See* Supp. Decert. Opp. at 8 (citing Trial Tr. 4985). In reality, Dr. Ugone criticized Dr. McClave's extrapolation approach in this case. *See* Ugone Report (Dkt. 2428-11) at 120-28; Trial Tr. 4869:10-17, 4924:18-4925:7. Moreover, the notion that Dr. Ugone's general statement about extrapolation could immunize Dr. McClave's approach in this case from criticism makes no more sense than saying that the general utility of regression analysis precluded the Supreme Court from finding improper in *Comcast* the trial court's certification based on Dr. McClave's regression model in that case. The "extrapolation" issue before this Court is *the specific approach by Dr. McClave in this case*—not whether some form of extrapolation can ever be used to support class certification. And here, Dr. McClave's extrapolation method is clearly inadequate to establish impact and damages for the vast majority of the class, and therefore (as in *Comcast*), Dr. McClave's particular use of an otherwise well-recognized methodology fails to meet the requirements of Rule 23.

The unreasonableness of Dr. McClave's presumption of impact for his extrapolated observations is evidenced by his own models, which themselves found that not all class members were impacted by the alleged conspiracy. Dr. McClave's extrapolation methodology also fails to provide a reasonable estimate of damages actually sustained by those class members for whom he has calculated extrapolated damages. Applying an average overcharge based on observations from all customers (with modeled damages) across a five-year period cannot yield a reasonable estimate of a given class member's actual damages. Once again, Dr. McClave's own findings of negative damage transactions among his modeled damages calculations demonstrate the unreliability of his extrapolation methodology, which assumes all non-modeled transactions *must* have been subject to an overcharge (*i.e.*, positive damages).

3. Entry of judgment for "the Class" would be inconsistent with the Rules Enabling Act and violate Dow's constitutional rights

Both the Rules Enabling Act and due process ensure that no Class member may have its claim against Dow sustained without a clear finding by the jury that the particular class member proved all of the elements of its cause of action. Here, although the jury clearly determined there were no overcharges prior to November 24, 2000, it is otherwise impossible to tell precisely what the jury concluded. For instance, no one can discern from the verdict form itself what the jury found about: (1) the inception and duration 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. It therefore would be an egregious misuse of Rule 23 to enter judgment for the "Class."[8]

4. The jury's "aggregate" damages award is inconsistent with the Rules Enabling Act and entering judgment in that amount would violate Dow's constitutional rights

It would also be improper to enter judgment against Dow in the amount set out in the verdict form in response to Question 5. While damages calculations in an antitrust case "need not be exact," *Comcast*, 2013 WL 1222646 at *5, the Rules Enabling Act makes clear that Plaintiffs nevertheless must prove damages—an element of the offense—for each class member. Not only did Plaintiffs fail to present evidence at trial for any Class member (other than Seegott) establishing (1) the identity of the Class member, (2) the products purchased by the Class member, and (3) the identity of the sellers of those products to the Class member, but they also elected not to present any evidence concerning damages for any individual class members other than the three class representatives. Here, the trial record simply did not establish which Class

[8] It is noteworthy that the jury did **not** return a verdict for "the Class." In fact, nowhere on the verdict form did the jury "find" for or against any of the parties. Instead, the jury answered specific questions posed by the Court.

members suffered damages, and in what amount.[9] The jury's aggregate damages award did not constitute or reflect proof of damages for any given Class member.[10]

And an aggregate damages award is particularly problematic here given the nature of the industry: business relationships between the urethane supplier and their customers varied considerably, depending on many factors including customer size and contractual relationships. *See In re Urethane*, 251 F.R.D. at 637. In fact, the Court previously observed in 2008 that it was not necessarily "persuaded that the issue of damages is as amenable to class-wide proof . . . in light of the myriad of products, pricing structures, individualized negotiations, and contracts at issue." *Id*. at 639. These industry characteristics—undisputed at trial—make an aggregate damages award improper, and further demonstrate why the Class should be decertified. *See Blades v. Monsanto*, 400 F.3d 562 (8th Cir. 2005) (affirming denial of class certification based on variability in market).[11]

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[9] Therefore, the aggregate award could not be allocated to Class members without violating the Rules Enabling Act as well as Dow's due process and Seventh Amendment rights, since Dow unquestionably would be entitled to make each class member prove its damages at trial in a non-class case.

[10] It would be improper to use Dr. McClave's models to allocate the jury's aggregate damages award for numerous reasons, including (1) the jury did not accept Dr. McClave's model or claimed damages figure, and (2) Dr. McClave's model was designed to work for the entire five-year "damages period," not for a shorter period to which it would be applied. It also would be improper to allocate the aggregate award among all class members (or all class members who purchased after November 24, 2000), since even Dr. McClave agreed that not all class members were overcharged. That would be akin to an impermissible "fluid recovery." *See, e.g.*, *McLaughlin v. American Tobacco Co*., 522 F.3d 215, 232 (2d Cir. 2008) ("When fluid recovery is used to permit the mass aggregation of claims, the right of defendants to challenge the allegations of individual plaintiffs is lost, resulting in a due process violation."); *In re Scrap Metal Antitrust Litig*., 527 F.3d 517, 534 (6th Cir. 2008) (noting that aggregate damages are not improper fluid recovery only where "the [evidence] . . . provides a means to distribute damages to injured class members in the amount of their respective damages.").

[11] Plaintiffs ignore the fact that aggregated damages are permissible only in limited circumstances—for instance, when there is a uniform injury for every class member that can be measured in exactly the same way. *Cf. In re Scrap Metal Antitrust Litigation*, 527 F.3d 517, 536 (6th Cir. 2008) (permitting aggregated damages because every class member suffered identical

C. Plaintiffs did not introduce either economic or non-econometric evidence of "classwide" impact

Plaintiffs claim they "presented extensive non-econometric evidence of class-wide impact . . . upon which the jury could have relied in concluding that *all* class members were impacted . . . ." Supp. Decert. Opp. 6 (emphasis added). This is untrue.

As a threshold matter, the record is clear that there was ***no*** evidence of ***class-wide*** impact—econometric or non-econometric. Even Dr. McClave did not opine that ***all*** class members were impacted by the challenged conduct. He did not do so for the simple reason that his analysis expressly found some class members were not impacted. Therefore, at trial, Dr. McClave was careful not to assert that every class member had been injured or suffered damages. Trial Tr. at 2832:16-21. Similarly, Dr. Solow never testified that all class members were impacted—nor could he have given the limitations of his own analysis. Trial Tr. at 2036:7-23.

As for the idea that Plaintiffs established class-wide impact with non-econometric evidence (*i.e.*, other than through Dr. McClave), as the Court readily recognized at various points during the litigation: "Plaintiffs rely on Dr. McClave's analysis to show that prices during the damages period were . . . above those levels that could be expected if based purely on competition (impact) . . ." *See* Dec. 21, 2012 Memorandum and Order (Dkt. 2649) at 9; *see also* Class Plaintiffs' Opposition to Dow's Motion to Exclude (Dkt. 2485) at 1 ("To address causation and damages, Plaintiffs retained Dr. James T. McClave"). Plaintiffs' post-trial suggestion that Dr. McClave was superfluous cannot be taken seriously.

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harm); *In re NASDAQ Market-Makers Antitrust Litig.*, 169 F.R.D. 493, 525-26 (S.D.N.Y. 1996) (allowing aggregated damages for a class that suffered a uniform harm and for which copious records documented the precise loss of each class member).

Nor should the Court take seriously the idea that "non-econometric" evidence presented at trial established "class-wide" impact. Class-wide means *all* class members. There was not a shred of non-econometric evidence at trial that proved impact for each and every class member.[12]

D. Plaintiffs' inaccurately claim that Zero-Impact Class Members were "injured"

Unable to dispute the fact that dozens of class members paid no more than Dr. McClave concluded they should have, Plaintiffs instead press the idea that a class member which paid ***less*** than it should have in a competitive market nevertheless was "injured" so long as it had at least one transaction where it "overpaid." *See* Supp. Decert. Opp. at 6 & n.5.

As an initial matter, Plaintiffs' argument contradicts the position of their own expert, who specifically testified that class members who overall were not overcharged were not "impacted" by the alleged conduct. *See* McClave Dep. (June 8, 2011) at 179:22-180:17; McClave Dep. (June 9, 2011) at 508:16-20.

In addition to contradicting Dr. McClave, Plaintiffs' argument suffers from a lack of legal support. Plaintiffs are unable to cite any controlling case law to substantiate their idea, or even an appellate decision from another jurisdiction. Instead, Plaintiffs rely on two district court cases which, when examined closely, undercut rather than support them.

In both of their opposition briefs, Plaintiffs rely on *In re Chocolate Confectionary Antitrust Litig.*, No. 1:08-MDL-1935, 2012 WL 6652501 (M.D. Pa. Dec. 7, 2012). *See* Decert. Opp. at 13; Supp. Decert. Opp. at 6 n.5. But Plaintiffs' quotation from the decision is actually a passage in which the court sets out Dr. McClave's definition of an "impacted customer" in that

[12] In fact, Plaintiff themselves do not even take that position, instead repeatedly telling the Court that the jury found "widespread" injury to the class. Supp. Decert. Opp. at 3. This choice of language is telling because it evidences that even Plaintiffs recognize they cannot accurately claim the jury found "class-wide" injury.

case. *Id*. at *18. Of course, Dr. McClave has taken a different position about impact here. But, in any event, the *Chocolate* court's apparent willingness to accept Dr. McClave's definition did not convert his definition there into a rule of law. Thus, it is unsurprising that the court felt no need to cite a single case in support of Dr. McClave's definition of an impacted customer in the *Chocolate* case.

Plaintiffs also rely on *In re Ethylene Propylene Diene Monomer (EPDM) Antitrust Litig*., 256 F.R.D. 82 (D. Conn. 2009), claiming it supports the proposition: "it is possible to suffer antitrust injury-in-fact and yet have no damages." Decert. Opp. at 14. But the full quotation from the case reveals a much more specific, limited statement:

> [I]t is possible for a plaintiff to suffer antitrust injury-in-fact and yet have no damages because it has taken steps to mitigate the actual price paid through rebates, discounts, and other non-price factors such as lowered shipping costs, technical services, or any other type of purchase incentive. **By <u>expending resources</u> to negotiate down from the supracompetive prices established by the cartel, plaintiffs who have suffered no damages may still have suffered an injury-in-fact from the antitrust conspiracy**. The fact that a plaintiff may have successfully employed bargaining power to fend off the *effect* of the conspiratorial practices does not mean that it has not been put in a worse position but-for the conspiracy.

EPDM, 256 F.R.D. at 88-89 (bold and underlining added). Thus, rather than support Plaintiffs' theory that a single overcharge transaction paid by a class member with zero overall damages is sufficient to establish antitrust injury, the *EPDM* court was making an altogether different point—irrelevant to the facts of this case—that the expenditure of resources to *avoid* overpayment can itself constitute an injury.

Once Plaintiffs' misleading citations to *Chocolate* and *EPDM* are set aside, it is clear they have no legal authority to displace the common sense point—conceded by Dr. McClave—that class members who paid the same or less than Dr. McClave says they should have were not injured. And even Dr. McClave concedes there are such class members. Decl. of James T.

McClave, at 4 (Feb. 3, 2012) (Dkt. 2752-1). Of the customer names for which Dr. McClave calculated modeled damages but no extrapolated damages, approximately 12.5% had negative modeled damages. Gustafson Decl. ¶ 11.

III. The Court Should Not Modify the Class Definition In Lieu of Decertification

Plaintiffs assert that "a simple modification of the class definition would address most of Dow's criticisms while preserving the jury's verdict," and that modification is "more appropriate" than decertification. Supp. Decert. Opp. at 3; *see also id*. at 5 ("modification would all but eliminate every one of Dow's arguments for decertification."). These assertions are incorrect in several respects.[13]

First, modification of the class to exclude class members which purchased only during 2004[14] would address only one of two adequacy problems,[15] while leaving unresolved Plaintiffs' inability to satisfy the typicality and commonality requirements of Rule 23(a), or the predominance and superiority requirements of Rule 23(b). Plaintiffs misapprehend the bases for

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[13] Plaintiffs' effort to portray Dow's decertification arguments as focused on the presence of 2004-Only purchasers in the Class is belied by their initial brief opposing decertification in which they observed "Dow devotes a substantial portion of its [decertification] motion to a belated challenge to the cogency and reliability of Dr. McClave's models." Decert. Opp. at 21.

[14] Plaintiffs' Supplemental Opposition Brief does not expressly state how they propose to modify the Class, but their initial opposition to Dow's certification motion suggested modifying the class period to end on December 31, 2003. *See* Dkt. 2752 at 20; *see also* Supp. Decert. Opp. at 8 n.8 (addressing due process implications of modifying the class definition to end on December 31, 2003).

[15] Plaintiffs' Supplemental Opposition Brief addresses modification only as it relates to 2004. *See* Supp. Decert. Opp. at 3-5. In their initial opposition to Dow's certification motion Plaintiffs suggested the Court could also modify the class definition to exclude Zero-Impact class members. Although Plaintiffs neglect to explain how that could be done, any such modification would be akin to a "fail-safe" class, which courts routinely reject as improper. *See, e.g.*, *Messner*, 669 F.3d at 825 (noting that a "fail-safe" class, "one that is defined so that whether a person qualifies as a member depends on whether the person has a valid claim," is "improper"); *Randleman v. Fidelity Nat'l Title Ins. Co.*, 646 F.3d 347, 352 (6th Cir. 2011) (affirming district court decision to decertify class, noting that a fail-safe class is "improper" because it "shields the putative class members from receiving an adverse judgment.").

decertification if they really believe Dow's arguments were confined to the presence of 2004-Only class members in the Class.

Second, Plaintiffs are mistaken when they argue Dow would not be prejudiced by modification of the class definition at this juncture of the case. As Plaintiffs acknowledge, Class Counsel and the Class Representatives long ago decided to abandon the claims of 2004-Only class members. It was their choice not to seek modification of the class at that time,[16] when there would have been minimal prejudice to Dow. But modification of the class definition now would permit these abandoned class members to initiate their own lawsuits against Dow, restarting a process that was supposed to be subject to coordination through the MDL process, thereby confronting Dow with the worst of both worlds: having had to try the claims of a certified class, *and* a post-trial spinoff of a subset of class members free to pursue separate, new cases against Dow. This would turn the class action and MDL processes on their heads.[17]

Third, Plaintiffs assert that the statute of limitations for 2004-Only class members "has been tolled throughout the duration of this suit." Supp. Decert. Opp. at 5. Although Dow does

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[16] Plaintiffs have not explained or justified their failure to seek amendment of the class definition to cure the intra-class conflict created by the decision to abandon the claims of the 2004-Only Class members. *Cf. Pettway v. Am. Cast Iron Pipe Co.*, 576 F.2d 1157, 1176 (5th Cir. 1978) ("[W]hen a potential conflict arises between the named plaintiffs and the rest of the class . . . the attorney's duty to the class requires him to point out conflicts to the court so that the court may take appropriate steps to protect the interests of absentee class members.").

[17] Plaintiffs reliance on *Garcia v. Tyson Foods, Inc.*, No. 06-2198-JTM, 2012 WL 3594212 (D. Kan. Aug. 21, 2012) is misplaced. As Dow previously noted (Dkt. 2785-1 at 14 n.28), *Garcia* featured a post-trial dispute over which class members' claims were actually tried to the jury. *See* Garcia, 2012 WL 3594212, at *19-20. Aside from illustrating the necessity that plaintiffs present evidence identifying the class members whose claims are being adjudicated by the jury, which was not done here, it is hardly clear that *Garcia* provides a model for handling complex procedural issues related to the trial of class claims (or that the decision to modify the class definition was correct). Moreover, unlike here, in *Garcia* the court expressly found that the defendant would not be prejudiced by the post-trial removal of certain class members from the class whose claims went to trial. *Id.* at *21 ("Tyson cannot show prejudice as a result of narrowing the class definition.").

not concede that is accurate, if it were true then modification of the class definition to "carve out" the 2004-Only class members will also be prejudicial to Dow because the 2004-Only class members will have had their claims tolled for an extended period of time after their claims were abandoned by Class Counsel and the Class Representatives (two years ago, according to Plaintiffs)—a result not contemplated by case law governing the tolling of claims asserted in a class action. *See Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974); *Sawtell v. E.I. du Pont de Nemours & Co., Inc.*, 22 F.3d 248, 253 (10th Cir. 1994) (*American Pipe* tolling is designed to "enhance judicial economy").

Fourth, allowing a post-trial spinoff of a subset of class members free to pursue separate, new cases against Dow also would violate Dow's due process and Seventh Amendment rights. The claims of the Class, as defined by the Court's 2008 certification order, went to trial. Although Dow strongly believes it is entitled to judgment in its favor based on the verdict and based on Plaintiffs' failures of proof, it would be an independent violation of Dow's due process and Seventh Amendment rights to enter judgment against Dow based on the jury verdict *and also* modify the class definition to sever 2004-Only class members, allowing them to pursue their own lawsuits after their claims were already tried (and not proven) by Class Counsel and the Class Representatives.[18]

[18] These specific constitutional problems will not arise if the Court grants Dow's Rule 59 motion for a new trial.

IV. Dow's Certification Motion Was Timely and Should Be Decided on the Merits

It is blackletter law that "a district court's order denying or granting class status is inherently tentative," *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 n.11 (1978), and that "[e]ven after a certification order is entered, the judge remains free to modify it in light of subsequent developments in the litigation." *General Tel. Co. v. Falcon*, 457 U.S. 147, 160 (1982); *see also Devaughn*, 594 F.3d at 1201 (The district court "possesses the discretion . . . [to] decertify the class altogether prior to final judgment."); *In re Integra Realty Res., Inc.*, 354 F.3d 1246, 1261 (10th Cir. 2004) ("[A] trial court overseeing a class action retains the ability to monitor the appropriateness of class certification throughout the proceedings and to modify or decertify a class at any time before final judgment."). Indeed, Rule 23 itself makes clear that decertification is appropriate at any time prior to final judgment. *See* Fed. R. Civ. P. 23(c)(1)(C).

Ignoring the language of Rule 23, and controlling decisions from the Supreme Court and the Tenth Circuit, Plaintiffs contend that Dow's decertification motion is "untimely." Their claim is unfounded.[19]

Unable to identify a single appellate decision even suggesting Dow's decertification motion cannot be decided on its merits, Plaintiffs cite a handful of district court cases from other jurisdictions—none of which support their position that Dow's motion may not be considered on grounds of timing.

For instance, Plaintiffs cite four cases in support of their claim that "other courts presented with similarly belated certification motions have denied them as untimely." Supp. Decert. Opp. at 2 n.1. However, none of these cases actually fit Plaintiffs' description:

[19] Ironically, footnote 2 of Plaintiffs' own supplemental opposition brief makes the point that class certification orders are tentative and can be modified until final judgment.

- *Gortat v. Capella Brothers, Inc.*, 2012 WL 1116495 (E.D.N.Y. Apr. 3, 2012) – Contrary to Plaintiffs' suggestion, the district court *fully addressed the merits of defendants' decertification motion*, which was based solely on the argument that the number of class members had become so small that the numerosity requirement of Rule 23(a) was no longer satisfied.

- *Easterling v. Connecticut Department of Corrections*, 278 F.R.D. 41 (D. Conn. 2011) – Contrary to Plaintiffs' suggestion, the district court *fully addressed the merits of defendants' decertification motion*, which was based solely on an intervening change in the law.

- *In re Sulfuric Acid Antitrust Litigation*, 847 F. Supp.2d 1079 (N.D. Ill. 2011) – Contrary to Plaintiffs' suggestion, the district court did not deny the decertification motion as untimely. Instead, the motion was denied because "the issues of law and fact raised by defendants in their motion to decertify already existed at the time" of the original certification decision. *Id*. at 1082.

- *In re Scrap Metal Antitrust Litigation*, 2006 WL 2850453 (N.D. Ohio Sept. 30, 2006) – Contrary to Plaintiffs' suggestion that *Scrap Metal* concerned a "similarly belated decertification motion," in reality the district court in *Scrap Metal* was confronted with a decertification motion (1) based solely on an alleged defect in notice to the class, where the defendant (2) had *not opposed* class certification, and (3) had not objected to the notice when it was sent out considerably earlier. *Id*. at *20. In addition, Plaintiffs fail to point out that when reviewing the trial court's class certification decision in *Scrap Metal*, the court of appeals considered the substance of defendant's notice argument, despite that defendant raised the issue in the trial court for the first time "three days before the scheduled trial." *In re Scrap Metal Antitrust Litigation*, 527 F.3d 517, 536 (6th Cir. 2008).

As the Supreme Court reiterated last week, "[t]he class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.' To come within the exception, a party seeking to maintain a class action 'must affirmatively demonstrate his compliance' with Rule 23." *Comcast*, 2013 WL 1222646 at *4. Plaintiffs' insistence that this Court forego substantive consideration of the issues presented by Dow's decertification not only flies in the face of Rule 23 itself and well-settled case law, it also is fundamentally inconsistent with the Court's duty to ensure that the "exception to the usual rule"

is made only when permitted by the specific requirements of Rule 23, the Rules Enabling Act, and the Constitution's due process and Seventh Amendment provisions. The Court should reject Plaintiffs' unfounded "timeliness" arguments, and decide Dow's decertification motion on its merits.[20]

Conclusion

For the reasons stated in its post-trial briefs, Dow asks the Court to enter judgment in favor of Dow as a matter of law. If the Court does not grant that relief, Dow asks the Court to decertify the Class for the foregoing reasons as well as the reasons stated in Dow's prior briefing on its motion to decertify the class.

[20] Although it is irrelevant to the legal question of whether Dow's decertification motion was untimely, Plaintiffs falsely claim—without any substantiation—that "Dow affirmatively disclaimed any intent to seek decertification as late as the pre-trial conference." Supp. Decert. Opp. at 2. Dow never told the Court it would not file a motion to decertify the Class, which explains why Plaintiffs were unable to provide a citation to support their misstatement.

Respectfully submitted,

STINSON MORRISON HECKER LLP

By */s/Brian R. Markley*
Brian R. Markley, KS 17485
bmarkley@stinson.com
Sara E. Welch, KS 16350
swelch@stinson.com
1201 Walnut, Suite 2200
Kansas City, Missouri 64106
Telephone: (816) 842-8600
Facsimile: (888) 290-2657

BOIES, SCHILLER & FLEXNER LLP

David M. Bernick
575 Lexington Ave., 7th Floor
New York, NY 10022
Telephone: (212) 446-2356
Facsimile: (212) 446-2350

Scott E. Gant
5301 Wisconsin Ave., N.W.
Washington, DC 20015
Telephone: (202) 237-2727
Facsimile: (202) 237-6131

PAUL HASTINGS LLP

Hamilton Loeb
Jeremy P. Evans
875 15th Street, N.W.
Washington, DC 20005
Telephone: (202) 551-1700
Facsimile: (202) 551-1705

Donald Morrow
695 Town Center Drive
Seventeenth Floor
Costa Mesa, CA 92626
Telephone: (714) 668-6291
Facsimile: (714) 668-6391

COUNSEL FOR THE DOW CHEMICAL COMPANY

AND

CLEARY GOTTLIEB STEEN & HAMILTON LLP

George S. Cary
Michael Lazerwitz
Thomas Moloney
2000 Pennsylvania Avenue, NW
Washington, DC 20006
Telephone: (202) 974-1500
Facsimile: (202) 974-1999

OF COUNSEL FOR THE DOW CHEMICAL COMPANY

Certificate of Service

On April 5, 2013, a copy of The Dow Chemical Company's Reply Brief Supporting Its Motion to Decertify the Class was 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
Attorney for The Dow Chemical Company