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 SUPPLEMENTAL BRIEF SUPPORTING ITS MOTION TO DECERTIFY THE CLASS

Prior to trial, Dow filed a motion to decertify the class. Dkt. 2706. Since Dow filed its motion, the case has been tried and the trial record is now known. Dow submits this supplemental brief supporting its motion to decertify to address the trial record in light of the governing legal principles and the existing arguments in Dow's pending motion.

Legal Standards

As the Supreme Court has repeatedly observed, "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). "Even 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 In re Zurn Pex Plumbing Prods. Liab. Litig.*, 644 F.3d 604, 613 (8th Cir. 2011) ("As class certification decisions are generally made before the close of merits discovery, the court's analysis is necessarily prospective and subject to change . . . ."). Accordingly, decertification is appropriate at any time prior to final judgment. *See* Fed. R. Civ. P. 23(c)(1)(C); *DG ex rel. Stricklin v. Devaughn*, 594 F.3d 1188, 1201 (10th Cir. 2010) (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."); *Harlow v. Sprint Nextel Corp.*, 254 F.R.D. 418, 423 (D. Kan. 2008) (Lungstrum, J.) (granting certification while observing: "Should it become apparent later in the proceedings that common issues no longer predominate, the court can revise or decertify the class as appropriate.").

A plaintiff bears the burden of establishing the requirements of Rule 23. *See Devaughn*, 594 F.3d at 1194. That burden remains with the plaintiff even if the defendant is the movant, and even after certification is granted. *See, e.g., Spagnola v. Chubb Corp.*, 264 F.R.D. 76, 92 (S.D.N.Y. 2010) ("Even though the issue of class certification thus comes before the Court on Defendants' motion, the burden remains on Plaintiffs to prove that each of the required elements for class certification under Rule 23 has been satisfied."); *Bell v. Lockheed Martin Corp.*, No. No. 08-6292, 2011 WL 6256978, at *8 (D.N.J. Dec. 14, 2011) ("The burden of showing that class certification is appropriate always remains on the plaintiff."); *Ellis v. Elgin Riverboat Resort*, 217 F.R.D. 415, 419 (N.D. Ill. 2003) ("The party seeking class certification bears the burden of demonstrating that initial certification is appropriate . . . and likewise on a motion to decertify the class, bears the burden of producing a record demonstrating the continued propriety of maintaining the class action.").

Argument

By the time the parties were ready to try this case, it had become clear that much had changed since the Court granted class certification in 2008, and that proceeding as a class action was no longer appropriate.[1] The experience of the trial—and the verdict rendered by the jury—have confirmed this case could not be tried consistent with Rule 23, and without abrogating Dow's constitutional rights. Therefore, if judgment is not entered for Dow the Class should be decertified.

I. The Requirements of Rule 23(a) are not satisfied[2]

A. Commonality

When the Court granted class certification in 2008, it "readily found" the commonality requirement was satisfied in this case. Class Certification Order, 251 F.R.D. at 632. But since the Court granted class certification, the Supreme Court issued its decision in *Dukes*, 131 S. Ct. 2541. As the Tenth Circuit has observed, *Dukes* "substantially clarified the Rule 23(a)(2) commonality requirement." *Tabor v. Hilti, Inc.*, -- F.3d --, No. 11-5131, 2013 WL 150225, at *16 (10th Cir. Jan. 15, 2013). As *Dukes* explained: "What matters to class certification . . . is not the raising of common 'questions'—even in droves—but, rather the capacity of a classwide proceeding to generate common *answers* . . . ." 131 S. Ct. at 2552 (emphasis in original); *see*

[1] *See* Dkts 2706, 2707, 2709 (Dow's pending motion to decertify the Class and memorandum and exhibits in support). To avoid unnecessary duplication, Dow refers the Court to that filing, which is incorporated into this brief as if fully set forth herein.

[2] Dow does not dispute that the numerosity requirement is satisfied, although there does not seem to be agreement on the Plaintiffs' side about the number (and perhaps identity) of the Class members. *See, e.g.*, Trial Tr. at 168 (Plaintiffs' counsel: "about 2,400" class members); *id*. at 2275:17-18 (Solow: "There are over 2,700 members of the class"); *id*. at 2833:19-21 (McClave: "The number of class members is – is approximately 2,500, 2,600, in that – in that area"); *see also* Mailing Affidavit of Richard L. Sartory Re: Mailing of Notice of Pending Class Action, Dkt. 775-1 at ¶ 7 ("Duplicate names and addresses were removed which created a database of 11,545 unique potential class member names and addresses").

also Tabor, 2013 WL 150225, at *16. And, with clarification from *Dukes*, it is now well-established that "[w]ith respect to Rule 23(a)(2)'s commonality requirement, *a plaintiff must show that class members 'have suffered the same injury.'*" *Id*. (quoting *Falcon*, 457 U.S. at 157) (emphasis added).

As explained in Dow's post-trial motion[3] and in Dow's pending motion to decertify the Class, at trial the Class representatives could not show—and did not show—that all of the Class members "suffered the ***same*** injury." This is evident from the following facts:

- According to Dr. McClave's analysis, some Class members had only transactions with "positive" damages (*i.e.*, they paid more than Dr. McClave's but-for price), while other Class members had transactions with "negative" damages (*i.e.*, they paid ***less*** than Dr. McClave's but-for price);[4]
- According to McClave and his analysis, some Class members were ***not injured at all*** by the alleged conspiracy (which Dr. McClave assumed to have existed); and
- According to the jury's verdict, Class members with purchases prior to November 24, 2000 were not overcharged for those purchases (*i.e.*, not injured by the

[3] The Dow Chemical Company's Motion for Judgment as a Matter of Law or, In the Alternative, For a New Trial.

[4] The fundamental fact is that pricing conduct was highly variable in this industry. For example, as explained fully in Dow's post-trial brief at § II., the prices and non-price terms of each sale transaction often differed due to a host of highly individualized factors. The McClave Model does not account for all of these differences. Instead, they were ignored and assumed to be of no importance despite data showing that Class members at times paid less than the "but for" price computed by Dr. McClave. Dr. McClave's non-modeled damages figures depend heavily on averages rather than the actual data about the sales and circumstances. This resulted in an extrapolated and positive damages calculation that Class Plaintiffs relied on—even though that calculation had no nexus to the individual circumstances of each Class member. In short, the McClave Model assumes commonality, *i.e.* that Class members have all suffered the same injury. *Tabor*, 2013 WL 150225, at *16. The Model cannot prove its premise; it cannot establish commonality. Moreover, at trial, that predicate assumption was exposed as false.

purchases)—rendering those Class members differently situated from (at least some) Class members who made purchases only after November 24, 2000.[5]

B. Typicality

As the Court explained in its 2008 class certification order: "A prerequisite for certification is that the class representatives be a part of the class and possess the same interest and *suffer the same injury as class members*. Rule 23(a)(3) requires plaintiffs to demonstrate that the claims . . . of the class representatives are typical of the claims of the class members they seek to represent." Class Certification Order, 251 F.R.D. at 640 (emphasis added) (internal citation omitted).

At trial the Class representatives did not show—and could not show—that the claims of the Class representatives are "typical of the claims" of all other Class members. This is evident from the same facts demonstrating that the commonality requirement is not satisfied, as well as from the undisputed evidence presented at trial that the business relationships between the urethane supplier and their customers varied considerably, depending on many factors including customer size and contractual relationships.[6] This variation extended to variability in the leverage customers had to negotiate prices with the urethanes suppliers.

---

[5] As is discussed at greater length throughout Dow's post-trial motion, because the verdict does not provide enough information to determine which Class members who purchased after November 24, 2000 were injured (*i.e.*, it does not convey when the conspiracy was in effect, which companies other than Dow participated, and what products the conspiracy covered), some (but perhaps not all) of the Class members who made purchases only after November 24, 2000 were injured by the conspiracy the jury found to have existed.

[6] That such variation would exist should not be surprising since sales in the urethanes industry are dependent on numerous customer-specific factors, such as "individual negotiations, [and] variations in contractual relationships." *See* Class Certification Order, 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.").

C. Adequacy

In the July 2008 order granting class certification, the Court appropriately observed:

> Rule 23(a)(4) requires that the named plaintiffs must fairly and adequately protect the interests of class members. To satisfy this *prerequisite* to class certification, the plaintiffs must show that their *interests are aligned* with those of the persons they seek to represent and that they will vigorously prosecute the class through qualified counsel . . . .

Class Certification Order, 251 F.R.D. at 644 (emphasis added). As explained in more detail in Dow's previously filed motion to decertify, two fundamental conflicts of interests became plain as the case proceeded to trial. The first conflict was between (1) the 2004-Only Class Members and (2) other Class members. The second conflict was between (1) the Zero Impact Class Members and (2) all other Class members. The Class representatives and Class Plaintiffs' counsel proceeded to trial without attempting to remedy either of these conflicts—thereby subordinating the interests of certain Class members in the pursuit of benefits for others.

This violates the Due Process Clause, which "requires that the named plaintiff *at all times* adequately represent the interests of the absent class members." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985) (emphasis added). "Actual, not presumed, conformance with Rule 23(a) remains [] *indispensible*." *Falcon*, 457 U.S. at 160 (emphasis added); *see also Rex v. Owens ex rel. State of Okla.*, 585 F.2d 432, 435 (10th Cir. 1978) ("A party seeking class certification must demonstrate, under a strict burden of proof, that all of the requirements of 23(a) are clearly met."). "[T]he linchpin of the adequacy requirement is the alignment of interests and incentives between the representative plaintiffs and the rest of the class." *Dewey v. Volkswagen Aktiengesellschaft*, 681 F.3d 170, 183 (3d Cir. 2012). "A conflict concerning the allocation of remedies amongst class members with competing interests can be fundamental and can thus render a representative plaintiff inadequate." *Id.* at 184 (reversing class certification

order due to intra-class conflicts). Here, these two fundamental intra-class conflicts require decertification.

II. The Requirements of Rule 23(b) are not satisfied

A. Predominance

In addition to failing to satisfy Rule 23(a), the Class must be decertified because the predominance requirement of Rule 23(b) is not satisfied here. Plaintiffs' fundamental failure to establish that the predominance requirement was satisfied stems from failures of Dr. McClave's model.[7] Specifically:

- Presence of Zero-Damage Transactions: Dr. McClave's finding of Zero Impact Class Members (and thousands of zero-impact transactions that affected Zero Impact Class Members *as well as* other Class members) necessarily means that the "single overarching

[7] In addition to the failure of Dr. McClave's model as discussed in the text, individualized issues related to fraudulent concealment also abound. As Plaintiffs concede, the due diligence prong of an assertion of fraudulent concealment focuses on a ***plaintiff's*** *knowledge and/or conduct*. *See* Class Plaintiffs' Proposed Jury Instructions (Dkt. 2689-2) at 36 ("Fraudulent Concealment Elements": "To establish fraudulent concealment, Class Plaintiffs must prove . . . (3) that Class Plaintiffs did not know or by the exercise of due diligence could not have known that they might have a cause of action."). It is not possible to litigate fully the knowledge or conduct of Class members without their participating in the case. Yet this is precisely what Dow had to do. Although the jury did not reach the issue of fraudulent concealment because they found that no overcharges occurred prior to November 24, 2000, allowing the jury to adjudicate the fraudulent concealment claims of all Class members when Dow was deprived of the ability to defend itself regarding issues that are inherently individualized—as the Court has already recognized (*see* Class Certification Order, 251 F.R.D. at 640)—was inconsistent with Rule 23 and the Rules Enabling Act. *See Dukes*, 131 S. Ct. at 2561 ("Because the Rules Enabling Act forbids interpreting Rule 23 to 'abridge, enlarge or modify any substantive right' . . . a class cannot be certified on the premise that Wal-Mart will not be entitled to litigate its statutory *defenses to individual claims*.") (emphasis added); *see also id*. at 2560 ("Wal-Mart is entitled to individualized determinations of each employee's eligibility for backpay."); *see also Tabor*, 2013 WL 150225, at *18 (affirming denial of class certification based, in part, on failure to satisfy predominance requirement in light of individual issues presented by defenses). Dow was entitled to *defend* itself against each Class member's fraudulent concealment claim by testing and contesting ***each*** class member's assertion it "did not know" ***and*** "by the exercise of due diligence could not have known" it they might have had a cause of action.

conspiracy" he assumed existed did ***not*** have the same effect on all Class members. Instead, any impact varied depending on the identity of the customer (Class member) and the time period in question. ***This is not common proof of Class-wide impact***. Of course, *why* impact varied by Class member is a question Dr. McClave never addressed—and ***would call for the introduction and assessment of Class-member specific evidence (by both Plaintiffs and Dow) that cannot be presented in a mass trial***.

- Absence of Evidence of Causal Link Between Alleged Conduct and Actual Prices: Nothing in Dr. McClave's report quantified *any relationship between announced prices and actual prices*. Dr. Solow conceded this at trial. Trial Tr. at 2215:20-23.[8] And Dr. Solow did not himself perform any empirical or statistical analysis to ascertain any relationship between Dow's announced prices and the actual prices charged to customers.
- Extrapolation: For 75% of Class members Dr. McClave only "extrapolated" damages, and in so doing *assumed* rather than analyzed the issue of impact for those Class members. Thus, for three-quarters of the Class members, Class Plaintiffs were unable to make good on their representations to the Court during class certification briefing in 2007 and 2008 that they would be able to *prove* impact for all Class members with common evidence.
- The Verdict: The jury's verdict confirmed the inability of Dr. McClave's analysis to provide Class-wide evidence proving impact and damages. As addressed fully in Dow's

[8] The trial transcript of the testimony of witnesses who appeared by videotape in Plaintiffs' case contains omissions and some other errors. Dow has sent a proposed errata sheet to Plaintiffs in an effort to reach agreement on how to correct the trial transcript. If that effort is successful, it may result in modifications to the trial transcript while this motion is pending. To ensure that the process of correcting the trial transcript does not create confusion about what trial testimony Dow relies on in this brief, the cited pages from the current trial transcript are attached as Exhibit 1.

post-trial brief, the jury found no overcharges prior to November 24, 2000. The jury's finding renders Dr. McClave's model and conclusions obsolete since that model was predicated on the assumption that Dow and other urethane suppliers engaged in anticompetitive conduct during the period when the jury explicitly found there were no overcharges. Dr. McClave readily admitted on cross-examination that he did not know the effects on his model if the jury concluded there was not a conspiracy during 1999. Trial Tr. at 3123:16-3124:11. And he further admitted that his model only worked for the period 1999-2003 as a whole, and that he never estimated a model for individual years from 1993 to 2003. Trial Tr. at 3137:16-3138:1.

B. Superiority

It is also now clear that a class action is not superior to other methods for fairly and efficiently adjudicating the claims of Class members. To see why, one need look no further than the jury's verdict form. Although the jury clearly determined there were no overcharges prior to November 24, 2000—thereby rejecting the conspiracy presented to it—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 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. The Court, of course, could not possibly resolve the claims of *any* Class member with purchases after November 24, 2000 without this information—information which can no longer be obtained from the jury since it was dismissed notwithstanding Dow's request that the Court inquire further about the jury's determinations. Trial Tr. 5320:15-5321:11.

Although Dow tried to avoid the problem of indeterminacy in the verdict with its proposed verdict form (Dkt. 2696-1), it was predictable that a verdict not entirely in Dow's favor would be inconclusive with respect to the claims of many or all Class members. The claims of more than two thousand Class members, each with its own relationship with one or more of five different urethane supplier, covering four different sets of product groups, over a five-year period, are fundamentally unsuitable for class action treatment.

Conclusion

For the reasons stated in its post-trial brief, Dow asks the Court to enter judgment in favor of Dow as a matter of law. If the Court does not grant 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.

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

Certificate of Service

On March 4, 2013, a copy of the foregoing 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