IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

IN RE: URETHANE ANTITRUST LITIGATION	**No. 04-MD-1616-JWL**
This Document Relates To: The Polyether Polyols Cases	

CLASS PLAINTIFFS' SUPPLEMENTAL BRIEF IN OPPOSITION TO THE DOW CHEMICAL COMPANY'S MOTION TO DECERTIFY THE CLASS

Dow does not cite even a single antitrust case in its supplemental brief. Given that the law is overwhelmingly against Dow, this should come as no surprise. Numerous courts, including this one, have long recognized that "the very nature of horizontal price-fixing claims are particularly well suited to class-wide treatment because of the predominance of common questions." *In re Urethane Antitrust Litig.*, 251 F.R.D. 629, 635 (D. Kan. 2008). *See also Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 625 (1997) ("Predominance is a test readily met in certain cases alleging ... violations of the antitrust laws"); 7AA Charles Alan Wright et al., Federal Practice & Procedure § 1781 (3d ed.) ("whether a conspiracy exists is a common question that is thought to predominate over the other issues in the case and has the effect of satisfying the first prerequisite in Rule 23(b)(3)").

Now, with the benefit of hindsight, the soundness of class certification is clear: the recently concluded trial on the merits—conducted fairly and efficiently—confirms the propriety, viability and superiority of class certification in this case.

I. Dow's Conspicuous Silence

Dow is completely silent on the important issues of (a) the untimeliness of its decertification motion, and (b) modification of the class definition (as opposed to decertification), both of which were discussed in Plaintiffs' initial brief in opposition to Dow's motion. *See* Plaintiffs' Memorandum of Law in Opposition to the Dow Chemical Company's Motion to Decertify the Class ("Plaintiffs' Opp.") (Dkt. No. 2752) at 3-6 & 18-20.

A. Timeliness

Dow could have moved to decertify the class on precisely the same (baseless) grounds at any point in time during at least the 21 months preceding the trial. But it chose not to. Indeed, Dow affirmatively disclaimed any intent to seek decertification as late as the pre-trial conference. Then, on the eve of trial, Dow abruptly reversed course. Dow did not, and still has not, offered any reason for its procrastination and it has not even tried to demonstrate that its untimeliness should be excused. As discussed at length in Plaintiffs' initial response to Dow's motion, other courts presented with similarly belated decertification motions have denied them as untimely.[1] This Court should do the same.

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[1] *See* Plaintiffs' Opp. at 3-6. *See also Gortat v. Capala Bros., Inc.*, No. 07-3629, 2012 WL 1116495, *4 (E.D.N.Y. Apr. 3, 2012) ("One additional factor weighs against decertification: the stage of the litigation. The information giving rise to defendants' motion—the opt-outs and signing of releases by class members—has been in defendants' possession for well over a year. It was nevertheless only until after the Court scheduled its final pre-trial conference and shortly before the Court set a trial date of May 7, 2012, that defendants on January 19, 2012 made their motion for class decertification."); *Easterling v. Connecticut Dept. of Correction*, 278 F.R.D. 41, 44 (D.Conn. 2011) (a court "should be wary of revoking a certification order completely at a late stage in the litigation process"); *In re Sulfuric Acid Antitrust Litig.*, 847 F. Supp. 2d 1079, 1083 (N.D.Ill. 2011) (refusing to consider decertification motion two months before trial); *In re Scrap Metal Antitrust Litig.*, No. 02 CV 0844, 2006 WL 2850453, *20 (N.D. Ohio Sept. 30, 2006) (denying as untimely decertification motion filed four days before trial).

B. Modification vs. Decertification

Dow frames its argument for decertification as though the Court had only two options: reaffirm the class definition as originally conceived back in 2008, or decertify the class. But this is a false dichotomy. As discussed in Plaintiffs' initial response to Dow's motion, should the Court have concerns about the class definition, the Federal Rules of Civil Procedure ("Rules") do not limit the Court to decertification but instead expressly contemplate and provide a mechanism for modifying it. *See* Plaintiffs' Opp. at 18-20. Indeed, modification is the norm, *see, e.g., Schorsch v. Hewlett-Packard Co.*, 417 F.3d 748, 750 (7th Cir. 2005) ("Litigants and judges regularly modify class definitions"), whereas decertification is extreme. *See, e.g., Gulino v. Bd. of Ed. of City School District of New York*, No. 96-CV-8414, 2012 WL 6043803 at *8 (S.D.N.Y. Dec. 5, 2012) (recognizing that decertification is an "'extreme step,' particularly at a late stage in the litigation." (quoting *Woe v. Cuomo*, 729 F.2d 96, 107 (2d Cir. 1984)).[2]

Decertification is particularly extreme and unnecessary here; it would nullify the jury's finding of widespread injury to the class by Dow's conduct, whereas a simple modification of the class definition would address most of Dow's criticisms while preserving the jury's verdict. Dow offers no justification—nor is there one—for electing to decertify the class when there is a less extreme, and more appropriate, remedy available.

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[2] The Rules recognize that during the course of litigation parties and courts may learn additional facts that lead them to want to modify their class definitions. Fed. R. Civ. P. 23(c)(1)(C) ("An order that grants or denies class certification may be altered or amended before final judgment."). *See also Carpenter v. Boeing Co.*, 456 F.3d 1183, 1187 (10th Cir. 2006) ("The district court can modify or amend its class-certification determination at any time before final judgment in response to changing circumstances in the case.") (citations omitted); *Davoll v. Webb*, 194 F.3d 1116, 1146 (10th Cir. 1999) (same); *Garcia v. Tyson Foods, Inc.*, No. 06–2198–JTM, 2012 WL 3594212, *20 (D. Kan. Aug. 21, 2012) (same). *See also* 32B Am. Jur. 2d Federal Courts § 1601 ("After certifying a class, the court retains broad power to modify the definition of the class if it believes that the class definition is inadequate. Thus, a court may modify the definition of a proposed class if such modification will remedy an inadequacy in the plaintiff's definition.").

When Plaintiffs initiated this litigation eight years ago, they reasonably believed that the conspiracy and its effects extended into 2004, and so pled. *See* Complaint (Dkt. No. 307) at ¶ 23. Over the course of discovery, however, it ultimately became apparent that the effects of the conspiracy had subsided by 2004. This new understanding was then reflected in amendments to Plaintiffs' discovery responses and in their expert reports. The Pretrial Order entered by the Court reflected this evolved understanding. The very first sentence under "Plaintiffs' Contentions" read: "Dow violated Section 1 of the Sherman Act, 15 U.S.C. § 1, and Section 4 of the Clayton Act, 15 U.S.C. § 15, from January 1, 1999 *through December 31, 2003*, by engaging in a conspiracy with its ostensible competitors …." Pretrial Order (Dkt. No. 2384), entered July 10, 2012, at 4 (emphasis added). Importantly, that same Pretrial Order amended all of the pleadings in the case "to conform to the contentions and allegations set forth in th[e] pretrial order." *Id.* at 21.

When the case was actually tried before a jury, Plaintiffs did not claim or present proof of any conspiracy or damages during 2004, *see* Dkt. No. 2797 (Jury Instr. 12), and the Court instructed the jury that the Class included those who had purchased Urethanes from January 1, 1999 *through December 31, 2003*. *See id.* (Jury Instr. 11). In effect, then, this case has been operating for some time as though the class period ended on December 31, 2003. Modifying the class definition to reflect this reality would bring the formal class definition in line with how the case was tried.[3] Should the Court, in its discretion, deem such a modification necessary, neither

[3] The *Garcia* case—discussed at length by Plaintiffs, Plaintiffs' Opp. at 18-20, and wholly ignored by Dow—presented nearly identical circumstances to those here. In *Garcia*, this Court modified the class definition after a jury trial to exclude class members for whom damages had not been asserted or proved. 2012 WL 3594212, *20-21.

Dow nor any member of the class would suffer any prejudice.[4]

Finally, as discussed below, such a modification would all but eliminate every one of Dow's arguments for decertification. Accordingly, Dow has not met its "heavy burden to show that there exist clearly changed circumstances that make continued class action treatment improper." *Chesher v. Neyer.*, No. 01-CIV-00566, 2005 WL 1683698, *9 (S.D. Ohio July, 19, 2005). *See also Hammer v. JP's Southwestern Foods, L.L.C.*, No. 08-0339-CV-W-FJG, 2011 WL 183972, at *2 (W.D. Mo. Jan. 19, 2011) ("to prevail on a decertification motion, defendant 'faces a heavy burden because doubts regarding the propriety of class certification should be weighed in favor of certification'") (citation omitted).

II. Dow's "Supplemental" Arguments Are Without Merit

Dow asserts that class certification is inappropriate because virtually all of the elements of Rule 23 (commonality, typicality, adequacy, predominance and superiority) are not satisfied. Almost all of these "supplemental" arguments (which merely rehash arguments made in Dow's initial brief) arise from the same so-called "facts": the alleged presence of "zero impact" and "2004-only" purchasers in the class. Dow has ignored the relevant law and grossly distorted the factual record.

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[4] Dow has known for nearly two years that Plaintiffs no longer claimed any effects of a conspiracy after December 31, 2003. The claims actually tried to the jury, the damages model put forth by Plaintiffs' expert, and the Court's instructions to the jury pertained only to the 1999-2003 timeframe. Any claim of prejudice by Dow would be "disingenuous," at best. *See Garcia*, 2012 WL 3594212, at *22 (rejecting claim of prejudice arising from modification of the class definition after trial where the defendant had been on notice of the change for approximately two years and where the facts presented to the jury conformed with the modified class definition). Neither would modification of the class prejudice the 115 class members who purchased only in 2004. Although these individuals would be excluded from the class by the modification, the statute of limitations on their claims has been tolled throughout the duration of this suit. *See Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 554 (1974); *see also In re Farmers Ins. Co., Inc., FCRA Litig.*, 738 F. Supp. 2d 1180, 1210, n.10 (W.D. Okla. 2010) (collecting cases, discussing state of 10th Circuit law, and holding that broad tolling principles apply).

First, Dow erroneously asserts that the testimony of Dr. McClave is the sum total of impact evidence offered by Plaintiffs. As explained in detail in Plaintiffs' JNOV Opp. at 15-22, Plaintiffs presented extensive non-econometric evidence of class-wide impact—in addition to the testimony of Dr. McClave—upon which the jury could have relied in concluding that all class members were impacted by Dow's collusive activity. Thus, Dow can only argue that there are "zero impact" class members by disregarding extensive record evidence.

Second, Dow's analysis is premised on an erroneous understanding of antitrust injury. Whether intentional or inadvertent, Dow's failure to cite even a single case that addresses antitrust injury has led it astray. Plaintiffs' theory of the case—and the theory presented to the jury—is straightforward. Plaintiffs alleged that Dow conspired with other manufacturers to inflate or stabilize the prices of certain urethane chemicals and that, as a result of this conspiracy, purchasers of those chemicals paid more than they would have paid in a competitive market. In other words, the injury alleged to have been suffered by substantially all purchasers was of the same type, known in the antitrust world as an "overcharge."[5] The cases recognizing the commonality and typicality of overcharge injuries in garden-variety price-fixing cases like this one are legion. *See* Plaintiffs' JNOV Opp. at 24 (collecting cases).[6, 7]

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[5] An injured class member is "one who takes at least one transaction at a supracompetitive price.... A customer may show a 'negative overcharge' in the aggregate but still have suffered at least one transaction at the elevated, supracompetitive price." *In re Chocolate Confectionary Antitrust Litig.*, No. 1:08-MDL-1935, 2012 WL 6652501, *18 (M.D. Pa. Dec. 7, 2012), *Rule 23(f) pet. denied* (3d Cir. Feb. 1, 2013) (internal citations, quotation marks and brackets omitted).

[6] In a related vein, Dow also argues—again, without citing any cases—that variable pricing, disparate amounts of damages, and the presence of some transactions that do not exhibit an overcharge somehow defeat commonality and predominance. This is wrong. All markets, including cartelized markets, include customers who are more or less price sensitive, and those with more or less purchasing power. *See In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 656-58 (7th Cir. 2002). As such, individual transaction prices often vary, even in markets where prices are fixed. *Id.* at 656 (explaining, in certified price fixing action, that an

Third, Dow exaggerates the presence of "zero impact" and "2004-only" class members. As detailed in the Declaration of James T. McClave ("McClave Decl."), attached to Plaintiffs' Opp. at Exh. A. and unchallenged by Dow, the 14 "zero impact" class members and the 115 "2004-only" class members account for a combined total of only 0.2% of all purchases during the class period. McClave Decl. ¶ 10 (Dkt. No. 2751-1). Dow does not cite any precedent—nor are Plaintiffs aware of any—that would support a decision to decertify a class where Plaintiffs have offered common proof that class members accounting for 99.8% of class purchases were impacted. Indeed, the law is overwhelmingly to the contrary. *See, e.g., DG ex rel. Stricklin v. Devaughn*, 594 F.3d 1188, 1201 (10th Cir. 2010) ("That a class possibly or even likely includes persons unharmed by a defendant's conduct should not preclude certification."); *Kohen v. Pac. Inv. Mgmt. Co. LLC*, 571 F.3d 672, 677 (7th Cir. 2009) ("[A] class will often include persons who have not been injured by the defendant's conduct;...Such a possibility or indeed inevitability does not preclude class certification."); Plaintiffs' Opp. at 9-12 (discussing cases).

Fourth, Dow purports to argue (again, without reference to any relevant case law) in defense of the Due Process rights of the class members accounting for 0.2% of class purchases, whose presence, according to Dow, has created a fundamental intra-class conflict. This is a

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agreement to fix base prices is *per se* unlawful "even if most or for that matter all transactions occur at lower prices"). While antitrust defendants can always cite individual transactions that, for one reason or another, deviated from the mean, such variations do not defeat class certification. *See also* 7AA Charles Alan Wright et al., Federal Practice and Procedure § 1781 (3d ed. 2005) (stating for antitrust class certification that "it uniformly has been held that differences among the members as to the amount of damages incurred does not mean that a class action would be inappropriate").

[7] Dow also argues that the jury's finding that there were no overcharges prior to November 24, 2000 defeats commonality. But this means only that there was a failure of proof with respect to claims prior to that date, not that the claims lacked commonality under 23(a)(2). *See, e.g., Messner v. Northshore University HealthSystem*, 669 F.3d 802, 823 (7th Cir. 2012) ("that some class members' claims will fail on the merits if and when damages are decided, [is] a fact generally irrelevant to the district court's decision on class certification").

spurious argument. In reality, of course, Dow's decertification motion is aimed at depriving the injured class members who made 99.8% of purchases from obtaining the compensation that has been awarded to them by the jury.[8]

Fifth, Dow's attacks on Dr. McClave are procedurally improper and substantively unfounded. Putting aside the fact that Dow waived these attacks by electing not to include them in its *Daubert* challenge to Dr. McClave, Dow's criticisms have no support in law, fact or science. Notably absent from Dow's supplemental memorandum (and from Dow's initial brief) is any reference or citation to a supporting case, treatise or expert; instead, Dow's *counsel* have ginned up their own criticisms. In any event, the relevant question in the context of class certification is not whether Dr. McClave is right, but whether his testimony constitutes common evidence upon which a reasonable juror could rely. Even Dow's own expert conceded that Dr. McClave's methodology is commonly accepted for estimates of classwide damages in price-fixing cases. *See, e.g.,* Trial Tr. (Dr. Ugone) at 4930-32 (acknowledging that multiple regression modeling is an accepted methodology for estimating damages in a price-fixing case); 4985 (acknowledging that extrapolation is an acceptable methodology).[9]

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[8] Modification of the class definition to end on Dec. 31, 2003 (as discussed above) would resolve any possible Due Process concerns with respect to the "2004-only" purchasers, as they would be free to bring their claims against Dow if they so choose.

[9] That Dow's lawyers or even its experts disagree with Dr. McClave on the merits is beside the point. *See, e.g., Amgen Inc. v. Connecticut Retirement Plans and Trust Funds*, 133 S.Ct. 1184, 1191 (2013) ("[T]he office of a Rule 23(b)(3) certification ruling is not to adjudicate the case; rather, it is to select the method best suited to adjudication of the controversy fairly and efficiently.") (internal quotation marks and brackets omitted); *In re EPDM Antitrust Litig.,* 256 F.R.D. 82, 100 (D. Conn. 2009) ("In essence, the defendants are asking the court to determine which multiple regression model is most accurate, which is ultimately a merits decision."). Here, the jury resolved enough of the factual disputes in favor of Plaintiffs to return a verdict against Dow. As discussed at length in Plaintiffs' JNOV Opposition, the jury was justified in doing so, including with respect to issues of impact and expert disputes. *See* Plaintiffs' JNOV Opp. at 15-48.

Finally, Dow's argument that class treatment does not afford a superior mode of resolving this dispute is belied by the recently concluded trial, which was conducted fairly, effectively and efficiently. The prospect of hundreds, and perhaps thousands, of individual trials—all of which would require similar presentations of evidence—would be much worse for the parties, the Court and society. Dow's transparent objective in making this argument—indeed, the entire premise of this motion— is to win procedurally what it could not win on the merits. In sum, this motion has nothing to do with the requirements of Rule 23, all of which are clearly satisfied here.

III. Conclusion

For the foregoing reasons, as well as those stated in Plaintiffs' initial opposition to Dow's motion, Plaintiffs respectfully request that the Court deny Dow's motion to decertify the class.

Dated: March 22, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that on this 22nd day of March, 2013, I caused the foregoing Class Plaintiffs' Supplemental Brief in Opposition to The Dow Chemical Company's Motion to Decertify the Class to be electronically filed with the clerk of the court by using the CM/ECF system which will send a notice of electronic filing to all counsel who have registered for receipt of documents filed in this matter.

/s/ *Gerard A. Dever*
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