IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

IN RE URETHANE ANTITRUST LITIGATION	MDL No. 1616
This document relates to: The Polyether Polyol Cases	Civil No. 2:04-md-01616-JWL

MEMORANDUM IN SUPPORT OF THE DOW CHEMICAL COMPANY'S MOTIONS FOR JUDGMENT ON THE VERDICT AND AS A MATTER OF LAW, OR FOR A NEW TRIAL

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PRELIMINARY STATEMENT

The Court has taken great pains to bring this case to trial in accordance with a rigorous pretrial process. In that process, the Class Plaintiffs were the masters of their conspiracy claim. And in ruling on Dow's various summary judgment, *Daubert*, and *in limine* motions, the Court permitted the conspiracy claim to go to the jury precisely as Class Plaintiffs had framed it and precisely as Class Plaintiffs' experts sought to present it. Class Plaintiffs can have no issue but that the case they presented to the jury was a case of their choosing alone.

Considering now what judgment should be entered post-trial, the Court should ask itself three questions, in Dow's view. First, did the jury find that the Class Plaintiffs had proven the five-year antitrust conspiracy and injury alleged in the Pretrial Order, which the Court incorporated into the Jury Instructions? Second, did Class Plaintiffs present evidence at trial from which a reasonable jury could find an agreement in restraint of trade and actual impact on and damages to individual class members? Third, did Plaintiffs present evidence at trial from which a reasonable jury could, without speculation, find impact and calculate the amount of damages from the *different* conspiracy that the jury ultimately found (*i.e.*, a conspiracy of shorter but unknown duration and content)?

The answer to all these questions is "no." First, the jury expressly rejected the five-year conspiracy alleged by the Plaintiffs. Plaintiffs advanced at trial a single conspiracy beginning "at least" as early as January 1999 and extending to December 31, 2003, involving five suppliers and affecting four separate urethane-related chemical products. But both the jury's note and its verdict show that it found no "overcharges" prior to November 24, 2000, thereby rejecting the conspiracy that Plaintiffs alleged. Thus, entry of judgment for Dow is required because the jury did not accept the only conspiracy that was framed in the Pretrial Order and advanced by

Plaintiffs at trial and that Dow should have had a fair opportunity to defend. Plaintiffs are not entitled to choose a new theory, different from the one set out in the Court's Pretrial Order, at the expense of Dow's right to have the jury decide the facts relevant to Plaintiffs' *actual* theory rather than some different, unstated and unknown, theory.

Second, based upon the evidence Plaintiffs presented and the jury's verdict, no reasonable jury could have found any impact and damages. To prove those critical elements, Plaintiffs relied exclusively on their damages expert's model (the "McClave Model"). That model purported to show gaps or "variance" between modeled ("but-for") and actual prices between January 1, 1999 and December 31, 2003. The model itself did not explain why those variances occurred, but McClave inferred that any and all such variance over the five years was caused solely by collusion. Plaintiffs relied on these price gaps as their exclusive evidence of classwide impact and the amount of damages.

But the jury determined that no conspiracy and no "overcharges" existed at least prior to November 24, 2000. Given the verdict, the McClave Model cannot provide a reasonable basis for the jury to find impact or damages because the model does not provide a way to distinguish between variances associated with what the jury found to be legal conduct (pre-November 24, 2000) and those associated with what it found to be illegal conduct (commencing at some unknown date after November 23, 2000). The same method (producing the same type of variance) was used for both periods. (See Demonstrative at pages 18-19 below). With no other basis for the jury to find impact or to assess damages without speculation, the Plaintiffs' conspiracy claim fails, and judgment should be entered for Dow.

Third, additional serious failures of proof require judgment for Dow. For 75% of class members, injury and damage were created arithmetically by extrapolation (and without any

sampling). For the systems customers, there was not even a model. Rather, the fact of injury was simply inferred from a single 2008 Bayer document that was not even put into evidence, and the quantum of damages flowed from Dr. McClave's judgment rather than any reliable method. For all but two of the remaining 25% of class members, some data was available on an individual customer basis, but these individualized data was not presented to the jury, which instead only heard about three average overcharge numbers—for MDI, TDI and polyols. Nor did the model purport to demonstrate any causal connection between illegal conduct and actual prices—illegal conduct was simply inferred for the conspiracy period, and McClave acknowledged that if the jury rejected this inference then his model had no use. In the end, excepting the three class representatives, the jury was provided with **no** actual overcharge numbers for **any** of the thousands of class members—there was simply no demonstration of actual injury or actual damages.

The failure of proof extended as well to the fundamental assertion that there was a price-fixing agreement. Dr. Solow alone put before the jury testimony stating Plaintiffs' theory of agreement. It was Dr. Elzinga's undisputed testimony that the conduct called for under the alleged agreement (*i.e.*, lockstep price increase announcements, "trying" to make price increases stick, and competition with price cutters) also was consistent with non-collusive, oligopolistic conduct. So, evidence of the alleged agreement itself was crucial. And there **was** direct evidence regarding agreement—evidence provided by witnesses whom Plaintiffs in their opening excluded from the group of alleged wrongdoers, and whose testimony Plaintiffs relied upon to prove their case. These witnesses testified that they or others working with them were **not** involved in any price-fixing agreement. The only one who had even heard of an "agreement" presented only vague, second-hand knowledge of it. More specifically to the point of Plaintiffs'

theory of the case—a five-year overall conspiracy—all of the direct evidence **undercut** Plaintiffs' theory.

For these and additional reasons set forth below, Dow supplements its motion for judgment in its favor, and also requests entry of that judgment based upon the jury's verdict and as a matter of law. Dow has separately supplemented its motion to decertify the class and requests, in the alternative, that decertification be granted. Finally, and again in the alternative, Dow moves for a new trial.

ARGUMENT

I. DOW IS ENTITLED TO JUDGMENT BASED ON THE JURY'S VERDICT

A. The sole claim tried was an alleged five-year conspiracy beginning at least as early as January 1, 1999

"Plaintiffs have alleged in this case from the beginning . . . a single, overarching conspiracy among Dow and the other four . . . urethane manufacturers to stabilize the prices of the basic urethane chemicals TDI, MDI, and polyols . . . from 1999 through 2003."[1] This statement by Class Plaintiffs' lead counsel specifies the **one** conspiracy asserted in this case, and the **only** conspiracy presented to the jury at trial.

Of particular consequence under the Federal Rules and the practices at this Court, this **specific** conspiracy allegation was incorporated into the Pretrial Order in these terms: "The conspiracy to fix prices of Polyether Polyol Products among Dow and its competitors existed at least as early as January 1999 . . . ." Pretrial Order (Dkt. 2374) at 5. The only conspiracy in this

[1] Transcript of 11/19/12 Oral Argument on Summary Judgment (Ex. 1) at 35. This statement reiterated the declarations accompanying Class Plaintiffs' summary judgment briefing: "**From its inception, this case has been about a single overarching conspiracy. That is what Plaintiffs have alleged and what they intend to prove at trial**." Class Plaintiffs' Opposition to The Dow Chemical Company's Motion for Summary Judgment with Respect to All Claims (Dkt. 2436) at 146 (emphasis added).

case was thus defined by a specific time period of conspiracy and statutory violation, specific products, and specific participants in the alleged conspiracy.

The Pretrial Order supersedes the pleadings and controls the later course of litigation. *Hullman v. Bd. of Trs. of Pratt Comm. Coll.*, 950 F.2d 665, 667 (10th Cir. 1991). Any "claims, issues, defenses, or theories of damages" not included in the Pretrial Order are waived. *Wilson v. Muckala*, 303 F.3d 1207, 1215 (10th Cir. 2002). Class Plaintiffs included no other conspiracy in the Pretrial Order, and never sought to amend that Order.

Nor, since entry of the Pretrial Order, have Class Plaintiffs ever pursued a conspiracy of different scope. Indeed, in executing each of the central tasks called out in the Pretrial Order, Class Plaintiffs were vigilant in adhering to the scope of their stated conspiracy theory. Accordingly, in the summary judgment motion practice, in motions in limine, in the finalization of deposition designations, and in the pre-admission of documents, the touchstone of relevance was the all-in conspiracy alleged to have begun at least as early as January 1, 1999, and to have run through the end of 2003. Expert reports in this case likewise were tailored to that same period.

Class Plaintiffs' conspiracy remained unaltered at trial. During opening statements, Class Plaintiffs said that they would prove a conspiracy to fix the prices of MDI, TDI, polyether polyols and systems that lasted for five years beginning at least as early as 1999 and continuing through 2003. *See* Trial Tr. at 157-59, 165, 169.[2] Class Plaintiffs pledged that their expert Dr.

[2] The trial transcript of the testimony of witnesses who appeared by videotape in Plaintiffs' case contains omissions and 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

McClave would explain "how the plaintiffs were overcharged and the amount of the overcharge" on those chemicals "for the five years in question." *Id.* at 206-07.

And Dr. McClave delivered. For his first opinion, Dr. McClave asserted that "prices [of MDI, TDI and polyether polyols] were elevated above competitive levels during the period from 1999 to 2003." Trial Tr. at 2831. Similar pronouncements appear in the remainder of Dr. McClave's testimony. *See id.* at 2835 ("A. … The period to the right [on the demonstrative chart] being the – what I tabulated and analyzed as the competitive time period, 2004 to 2008, and the period on the left being the conspiracy period from 1999 to 2003. Q: And by 'conspiracy period,' do you mean that you determined there was a conspiracy there? A. No, that's when it's alleged to have occurred."); *see also id.* at 2856-57, 2859, 2885. Dr. McClave based his testimony on a model he constructed to conform to the parameters of the specific claim asserted by Class Plaintiffs. Thus, Dr. McClave testified that his model demonstrated that there were general and systematic overcharges for each of the chemicals at issue "across the entire period of time 1999 to 2003." Trial Tr. at 2895-97.[3]

Tellingly, the cross examination of Dr. McClave prompted Class Plaintiffs to insist that the full extent of the conspiracy articulated in the Pretrial Order was available to them at trial in the event that Dow opened the door to pre-1999 collusive conduct. Trial Tr. at 3167:14-3169:10. The Court agreed (id. at 3169:12-3170:24), and all will recall the extensive efforts Dow undertook to assure that no door would be opened and that January 1, 1999 (and no earlier date),

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2. Dow is not attaching as exhibits to this brief the trial exhibits cited herein because the Court has them already and there are no similar concerns associated with the trial exhibits.

[3] Dr. Solow's opinions too purported to confirm a conspiracy of the same duration. *See* Trial Tr. at 2028:17-2029:3 (stating that he focused his analysis on the period 1999-2003 at the direction of counsel and because he "came to the independent conclusion that that was the time period during which the cartel was in operation"). *See also id.* at 2030:7-2031:17 (describing why he believes excluding 2004 from the conspiracy period was appropriate); *id*. at 2321:22-2322:5 (told by counsel to focus on period 1999-2003).

would remain the "at least as early as" beginning point of the alleged conspiracy. (Id. at 3784:24-3785:8 (removal of deposition designations potentially relating to pre-1999 period); 3786:22-3787:8 (same); 3791:14-22 (same); 3802:5-10 (same); 4398:19-4399:5 (same)).

Consistent with their trial position, Class Plaintiffs asked the Court to instruct the jury that "Plaintiffs and the other members of the Class claim that, as a result of the alleged conspiracy, they were overcharged for urethane chemicals between January 1, 1999 and December 31, 2003." Class Plaintiffs' Proposed Jury Instructions (Dkt. 2689-2) at 15. The Court's final instructions essentially granted this request and further incorporated language from the Pretrial Order:

> Class Plaintiffs allege that Dow violated Section 1 of the federal Sherman Antitrust Act by entering into a price-fixing antitrust conspiracy with other major urethane chemical manufacturers – BASF, Bayer, Huntsman and Lyondell – to fix, raise, or stabilize the prices for MDI, TDI, polyols, and systems sold in the United States. Class Plaintiffs allege that that conspiracy existed at least as early as January 1999 and existed through December 31, 2003. Class Plaintiffs further allege that, as a result of that conspiracy, they suffered injury in the form of damages, in that they paid more for urethane chemicals than they would have paid if there had been no conspiracy.

Jury Instructions (Dkt. 2797) at 13. Precisely in order to assure that the jury both appreciated the consequent importance of Plaintiffs' theory and reached a verdict based upon that theory, Dow proposed a more detailed verdict form, so that any decision by the jury rejecting the five-year conspiracy in favor of a different conspiracy would be transparent and susceptible to review for purposes of determining what judgment should be entered. *See* Dkt. 2696-1. In response, the Court stated "the jury cannot find that the plaintiffs have satisfied their burden of proof if they don't prove the conspiracy they allege. I think you can make that argument." Trial Tr. at 5168.

In closing argument, Plaintiffs' counsel sought to convince the jury that Class Plaintiffs had proven the conspiracy and statutory violation that they alleged. In particular, Class

Plaintiffs' counsel argued that Dr. McClave's model proved that class members had been systematically overcharged on each of the chemicals at issue from 1999 through 2003. Trial Tr. at 5230. Accordingly, Class Plaintiffs' counsel urged the jury to find, among other things, that all class members had been injured by overpayments prior to November 24, 2000. *Id.* at 5231.

Dow, of course, had no say in Class Plaintiffs' class formulation, or in their claim in the Pretrial Order, or in their contention at trial. But Dow relied heavily on the Pretrial Order and Class Plaintiffs' vigorous prosecution of their five-year conspiracy theory. Specifically, the centrality of the five-year all-in conspiracy theory to Dow's defense flowed from the simple fact that, as the sole theory that Plaintiffs sponsored, the five-year conspiracy provided the sole litmus test for the credibility of Plaintiffs' position. Any flaw in that theory cast doubt upon Plaintiffs' case. If a different, less ambitious, theory had been proposed, Dow would have focused on that theory. But that never occurred. Plaintiffs' articulation of their five-year conspiracy claim governed their prosecution of their case in all proceedings through trial and was unwavering.

And so Dow directed all of its evidence and all of its arguments to meet Class Plaintiffs' conspiracy theory. As a historical narrative, that theory had distinct beginning and ending dates. The beginning was "at least as early as January 1, 1999." Potentially earlier, but not later. The end was December 31, 2003. Because the alleged agreement also had to encompass all products and all of the major suppliers at once, numerous companies, individuals, and details all had to be agreed and coordinated for all five years. Given this theory, the focus of Dow's defense was unsurprising. Dow attacked the narrative at its beginning and ending points, precisely where the evidence should have shown the distinct events of formation and dissolution and where the impact of the agreement should be manifested as changes in behavior. 1999 and 2003 became key years. As to 1999, Dow focused on the undisputed testimony of Ed Dineen regarding the

dinner at the Swan restaurant, the absence of any price increase announcements involving MDI, the absence of evidence regarding telephone calls, the absence of key players such as Stern, Barbour, Fischer and Levi from the scene until 2000, and the substantial price variance that the McClave Model showed from the beginning of 1999.[4] As to 2003, Dow sought to demonstrate the implausibility of any collusion at Dow given Barbour's numerous complaints about Fischer that year, given the management restructuring then underway, and given the fact that MDI prices actually moved in line with McClave's predicted prices in 2003. Critically, Dow demonstrated that 2004 was no different than 2003 when it came to one of the key pieces of evidence underpinning plaintiffs' case: the so-called lockstep price increase announcements. For the years in between, Dow's approach was simply opportunistic, demonstrating as events came before the jury that they reflected competition, not collusion. As critical is what Dow's approach was not. Dow did not focus on any particular time period between the alleged beginning and end of the conspiracy—because no alternative beginning or end was placed at issue

The Plaintiffs' theory of the case had an equally profound impact on the expert evidence. All experts joined issue over the all-in conspiracy theory. Not a word was uttered by Drs. Solow and McClave about anything other than a conspiracy of that full scope. And what a difference it would have made to the cross-examination of both witnesses if a different conspiracy were at issue. As to the McClave Model, the Court will recall that the central challenges to the model targeted three basic assumptions that drove its design and application: (1) that the five benchmark years were the "same" as the five alleged conspiracy years; (2) that no year that was

[4] Dow gave up the opportunity to present significant evidence in order to pursue this approach in accordance with the Court's rulings on opening the door to pre-1999 evidence. As the Court will recall, extensive designations of testimony previously submitted and allowed by the Court were withdrawn, including for example, Stern's broad denial of price-fixing at Lyondell. (Stern Depo. Tr. 415:22 – 416:2) (Ex. 3).

alleged to be collusive could be used as a benchmark year due to concerns over taint; and (3) that the "variance" between actual and predicted prices over all of the conspiracy years could only be attributed to collusion and therefore represented overcharge. It is obvious that a different conspiracy theory with a different duration would have profoundly affected all three assumptions. If Plaintiffs had agreed, for example, that the period from January 1999 through November 2000 was competitive, this would have opened all three assumptions to further challenges—that (1) the model still showed variance even when there was no collusion, (2) that 1999 and 2000 were still different from the benchmark period, but the model could not detect the reason for that difference, and (3) that Plaintiffs agreed that those years were not tainted and so should be included in the benchmark period.

In sum, it is difficult to identify any area of Dow's evidence that would **not** have been affected if Plaintiffs' theory of conspiracy had been different.

B. Judgment should be entered in Dow's favor dismissing the case based upon the jury's verdict and related note

Given the explicit and unequivocal scope of the conspiracy charge put to the jury in this case, it remains only to (1) determine what the jury found and (2) enter judgment on the verdict under Rule 58(b)(2), if and to the extent that any judgment can be entered in accordance with applicable law. On this record, it is obvious what the jury found with respect to the conspiracy charged—they found that it had not been proven. And there is no legal or factual obstacle to entering final judgment in Dow's favor in this case.

The determination of what the jury found must be driven by the paramount goal of making common, lay sense out of it. *See Johnson v. Ablt Trucking Co., Inc.,* 412 F.3d 1138, 1143 (10th Cir. 2005) (a court "must reconcile the jury's findings, by exegesis if necessary, . . . before [they] are free to disregard the jury's special verdict and remand the case for a new trial.")

(quoting *Gallick v. Baltimore & Ohio R. Co.,* 372 U.S. 108, 119 (1963)). In doing so, the court must look to the entirety of the record, including not only the verdict form itself but also the pleadings, instructions, and other "surrounding circumstances." 9B Wright & Miller, *Federal Practice and Procedure: Civil* § 2510 (3d ed. 2012); *see also Harvey v. General Motors Corp.*, 873 F.2d 1343, 1347 (10th Cir. 1989) (citing Wright & Miller). This inquiry includes consideration of any jury notes, as well as the Court's response to such notes. *See Audiotext Communications Network, Inc. v. U.S. Telecom, Inc.*, No. 97-3050, 1998 WL 458530, at *8 (10th Cir., August 6, 1998) (relying on note from jury as evidence to interpret jury verdict); *U.S. v. Ailsworth*, 138 F.3d 843, 847 (10th Cir. 1998) (Jury verdict interpreted "in light of the jury questions to the court, the court's answers and instructions").

The jurors in this case were attentive and engaged, and they most certainly were educated on the facts. What they did with those facts in reaching a verdict on the alleged five-year all-in conspiracy is straightforward. It is set forth in simple words in their note to the Court and in the answers they provided on the verdict form. All of the answers and the note reflect one finding about a five-year conspiracy, causing actual injury to the class over that period: that it had not been proven. Instead, the jury found a different conspiracy of shorter (but unspecified) duration and/or content. Thus, the jury conveyed in plain English, after a day of deliberation and less than three hours before the verdict was reached (*see* Trial Tr. at 5313:12, 5319:10), they were on the verge of a verdict that rejected Class Plaintiffs' five-year conspiracy. Specifically, the jury asked whether Instruction 23 applied absent a finding of collusion "prior to November 24, 2000?" Dkt. 2798. The jury then expanded on this question by stating "i.e., if we found no conspiracy in 1999 but we found conspiracy and concealment after November 24, 2000." *Id*. The jury thus

explicitly asked the Court how it should proceed if it found no conspiracy at all for at least part of the alleged five-year period.

Shortly after the Court responded to the jury's note, the jury returned a verdict form that implemented the approach set forth in its note. Question 1 on the form asked whether the jury found that "Dow had participated in a conspiracy." Instruction 12, which was among the instructions referenced in Question 1, incorporated Class Plaintiffs' five-year claim. But it nowhere described how the jury should answer Question 1 if it found a conspiracy of a lesser duration or scope. It is completely unsurprising that, having decided that Dow had participated in *a* conspiracy (albeit one of a shorter duration than Class Plaintiffs had alleged), a lay jury would answer Question 1 in the affirmative. The same applies to Question 2, to which the jury also answered yes. That question referred to Instruction 19, which does not set out the duration of, or products and participants in, the conspiracy alleged by Class Plaintiffs. In such circumstances, the jury's responses to Questions 1 and 2 are consistent with its finding of a conspiracy and actual injury of less than five years.

The jury's answers to Questions 3 and 5 further demonstrate that the verdict can be construed only as finding a conspiracy and actual injury of less than five years. In contrast to the general nature of Questions 1 and 2, Question 3 asked the jury whether Class Plaintiffs had suffered any injury prior to November 24, 2000. The jury answered "no." Similarly, Question 5 asked the jury to state the amount of damages proven by Class Plaintiffs. The jury entered $400 million—a little more than one-third of the $1.125 billion Class Plaintiffs had alleged based on the full five-year damages period.

The **only** interpretation that harmonizes and explains the full record of the jury's deliberations and conclusions regarding the assertion of a five-year conspiracy and resulting

injury is the jury's rejection of the claim. While a more complex interpretation could hold that the jury did find a five-year conspiracy but did not find actual injury commensurate with that conspiracy, that construction would contradict the note. It would also lead to the same result, *i.e.*, judgment for Dow. Any other interpretation of the verdict would contradict both the note and the jury's answers to Questions 3 and 5.

Nor does the result change if the note were to be inappropriately ignored. Class Plaintiffs' case must *still* fail because the jury's answer to Question 3 clearly states that Class Plaintiffs did not suffer injury throughout the five-year period alleged. Here, in response to the specific Question 3, the jury unequivocally stated that it did **not** find any injury stemming from Class Plaintiffs' alleged conspiracy prior to November 24, 2000. This answer must control over any competing interpretation of the jury's responses to the *general* Questions 1 and 2. This conclusion is further reinforced by the fact that the jury's answer to the specific Question 5 was entirely consistent with its answer to Question 3. Based on the jury's specific answers to these questions, there can be no doubt but that Class Plaintiffs failed to establish injury over the five-year period alleged. The jury's answers to Questions 3 and 5 are therefore fatal to Class Plaintiffs' claims.

Any suggestion that Plaintiffs now can re-do history and conform their theory of the case to the jury's finding of a different conspiracy should be rejected out of hand. As a threshold matter, this notion would fail because no one actually knows what conspiracy the jury did find, only that they did not find the one incorporated into the Court's instructions and Pretrial Order. Neither the duration, content nor the parties the jury had in mind, much less agreed to, can be ascertained at all.

Allowing Class Plaintiffs "bait" both the Court and Dow with one conspiracy theory and then "switch" to another would boldly flout Dow's rights. Neither Rule 15 nor Due Process permit this result absent Dow's consent prior to or during the trial. (Trial Tr. 5166:22-5167:5). That consent assuredly was never given, either expressly or by implication. To the contrary, Dow was at all points careful to assure that Plaintiffs theory of conspiracy had **not** changed from that set out in the Pretrial Order.

And so were the Class Plaintiffs. Their use of the Pretrial Order to this end was forcefully illustrated in connection with the issue of pre-1999 evidence. Plaintiffs also enforced their choice to prosecute the all-or-nothing five-year conspiracy they pled when they failed to request or even to support jury instructions that would have allowed the Court to determine what other conspiracy the jury might or did find. This was not an oversight. It was a deliberate trial tactic that was mandated by Plaintiffs' approach to proving impact and damages solely on the basis of an econometric model that simply purported to observe pricing differences between the five-year period of the alleged conspiracy and a five-year control period, but which actually made no attempt to (1) link such differences to any allegedly improper conduct, (2) provide damages estimates on the basis of a conspiracy period less than the full five years, or (3) supply a damages calculation for any individual class members (other than the three named plaintiffs and even for them for only the full five years). These deliberate choices by Class Plaintiffs mandate, as a matter of fairness as well as Dow's rights under the Rules Enabling Act and Seventh Amendment of the Constitution (as addressed below), that no verdict can be entered here other than a verdict in Dow's favor.

II. JUDGMENT IN DOW'S FAVOR IS REQUIRED AS A MATTER OF LAW BY CLASS PLAINTIFFS' FAILURE TO PROVE CLASSWIDE "IMPACT" AND DAMAGES FROM THE ALLEGED VIOLATION

To establish an antitrust violation, a private plaintiff must, among other things, prove both impact and the amount of damages. *See, e.g., King & King Enterprises v. Champlin Petroleum Co.*, 657 F.2d 1147, 1151 (10th Cir. 1981) (a plaintiff must show "that there is a causal connection between the defendants actions violative of the Sherman Act and the actual injury to the plaintiffs' business" and "the amount of damages sustained by the plaintiffs."; *Pierce v. Ramsey Winch Co.*, 753 F.2d 416, 435 (5th Cir. 1985) (holding in an antitrust case that "rank speculation will not be tolerated" and that the evidence must "support a just and reasonable inference of damages"). In a class action, impact and damages must be proven for each class member. *See, e.g., In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 311 (3d Cir. 2008).

Here, Plaintiffs failed to provide evidence of actual impact and damages for each and every class member.[5] The Court must therefore enter judgment in Dow's favor as a matter of law. *See In re Chocolate Confectionary Antitrust Litig.*, No. 1:08-MDL-1935, 2012 WL 6652501, at *17 (M.D. Pa. Dec. 7, 2012) ("The element of 'individual injury,' also known as antitrust impact, requires each individual class member to show that they were adversely impacted by the price-fixing conspiracy."); *In re Blood Reagents Antitrust Litig.*, 283 F.R.D. 222, 235 (E.D. Pa. 2012) ("Plaintiffs' burden at the class certification stage is not to prove the element of antitrust impact, although in order to prevail on the merits each class member must do so.") (internal quotations omitted); *In re Aftermarket Auto. Lighting Prods. Antitrust Litig.*, 276

[5] As noted above, Plaintiffs neither sought nor obtained a specific verdict in favor of the three individual class representatives who brought this action. Accordingly, under the Pretrial Order, to obtain any judgment they had to prove on a classwide basis and for each member of the class that, by the preponderance of the evidence, "(1) plaintiffs were injured when they purchased Polyether Polyol Products at higher prices than they would have paid but for any conspiracy; and (2) the measure of plaintiff's injury." Pretrial Order at 15.

F.R.D. 364, 369 (C.D. Cal. 2011) (same); *In re Plastics Additives Antitrust Litig.*, No. 03-cv-2038, 2010 WL 3431837, at *4 (E.D. Pa. Aug. 31, 2010) (same); *Reed v. Advocate Health Corp.*, 268 F.R.D. 573, 581 (N.D. Ill. 2009); *Bayshore Ford Truck v. Ford Motor Co.*, No. 99-cv-741, 2010 WL 415329, at *11 (D.N.J. Jan. 29, 2010) ("The fact that a case is brought as a class action does not change these proof requirements . . . Actual individual injury must be proven, whether by a common or individual method.").[6]

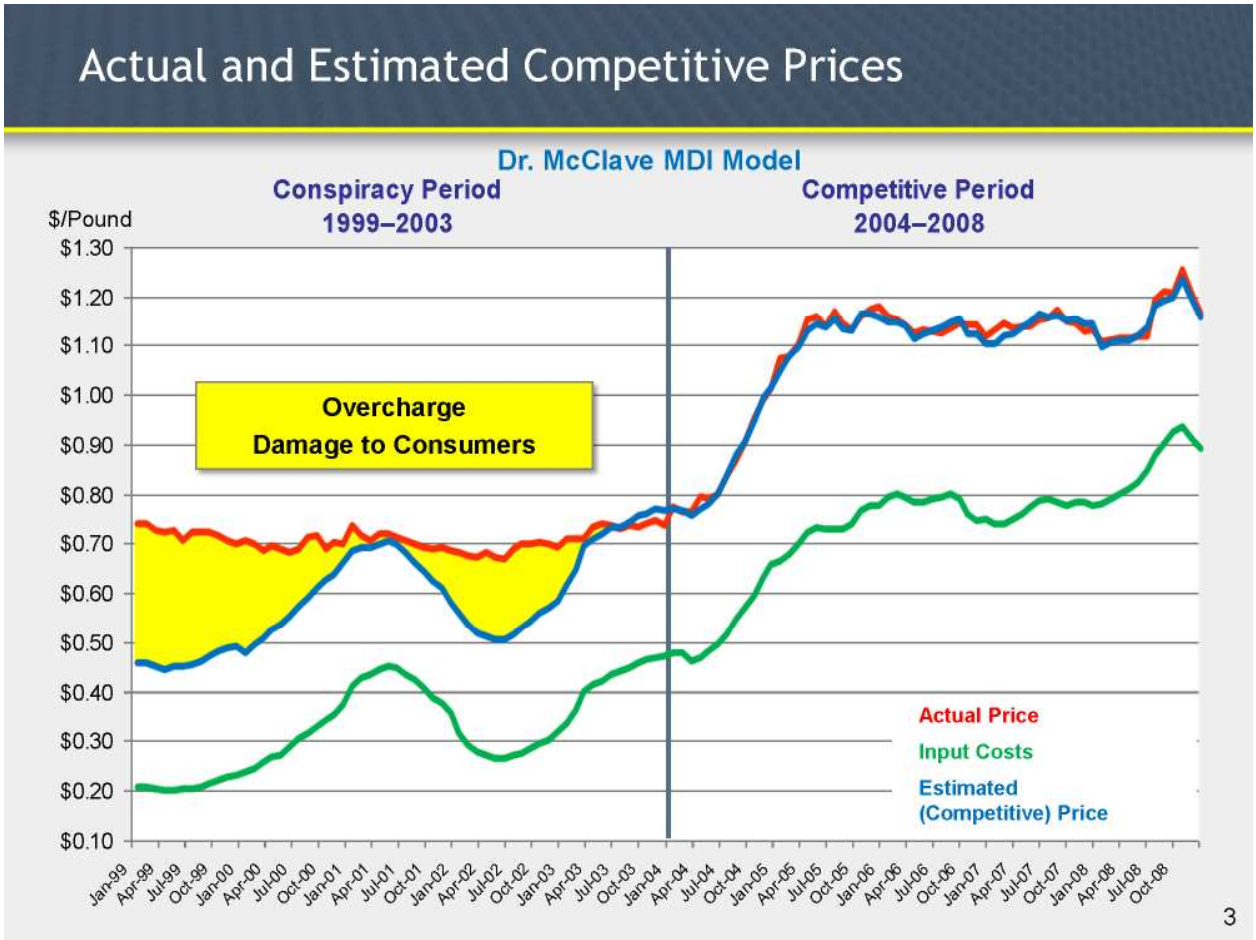
Similar requirements apply to proof of damages. These too must have a proven causal nexus to the unlawful conduct alleged. *In re Urethane*, 251 F.R.D. at 634. And, like injury in fact, damages must be proven for each class member. *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d at 311.

A. Given the jury's verdict, Class Plaintiffs' proofs of injury and damages are a nullity

As the Court is aware, Dr. McClave is "plaintiffs' expert on damages and causation," and "Plaintiffs rely on Dr. McClave to show . . . impact." Dec. 21, 2012 Order (Dkt. 2649) at 9 (emphasis added). The jury's clear and simple finding rejecting the claim of actual injury (asserted overcharges) for the period prior to November 24, 2000 is fatal to McClave's Model.

[6] There can be no serious dispute that if any member of the Class were pursuing its claim in an individual action rather than a mass trial, then that plaintiff would have to present at trial evidence of its purchases of the relevant products, including the identity of the company from which those products were purchased, and the amount purchased. After all, a plaintiff cannot prove impact or damages—essential elements of a Section 1 claim—if it fails to adduce proof that it actually purchased the products in question, and that it made those purchases from an entity that engaged in conduct violative of Section 1. *See, e.g.*, *Martino v. McDonald's Sys., Inc.*, 81 F.R.D. 81, 92 (N.D. Ill. 1979) ("*Once* a class member . . . has proved that he purchased from the defendants, who fixed supracompetitive prices, *then* the class member has suffered damage . . . .") (emphasis added). Despite the clear requirements for proving a Section 1 claim, and the well-established strictures of the Rules Enabling Act, Class Plaintiffs elected not to present for any Class member (other than Seegott) evidence establishing (1) the identity of the Class members, (2) the products purchased by each class member, and (3) the identity of the sellers of those products to each Class member. And the failure to adduce this evidence entitles Dow to judgment as a matter of law.

On cross examination, Dr. McClave acknowledged that he treated as "overcharges" every bit of the "variance" that he found when he applied his model to the five years of the alleged conspiracy period. Trial Tr. at 2998:6-9. The demonstrative Dr. McClave presented to the jury illustrated this. The yellow shaded area was the "variance" between the actual prices during the period at issue and the prices predicted by the model. Dr. McClave turned this "yellow" area into the fact of injury and the measure of damages classwide in this case by opining that variance equaled "overcharge." *Id*. at 2996:24-2997:21.

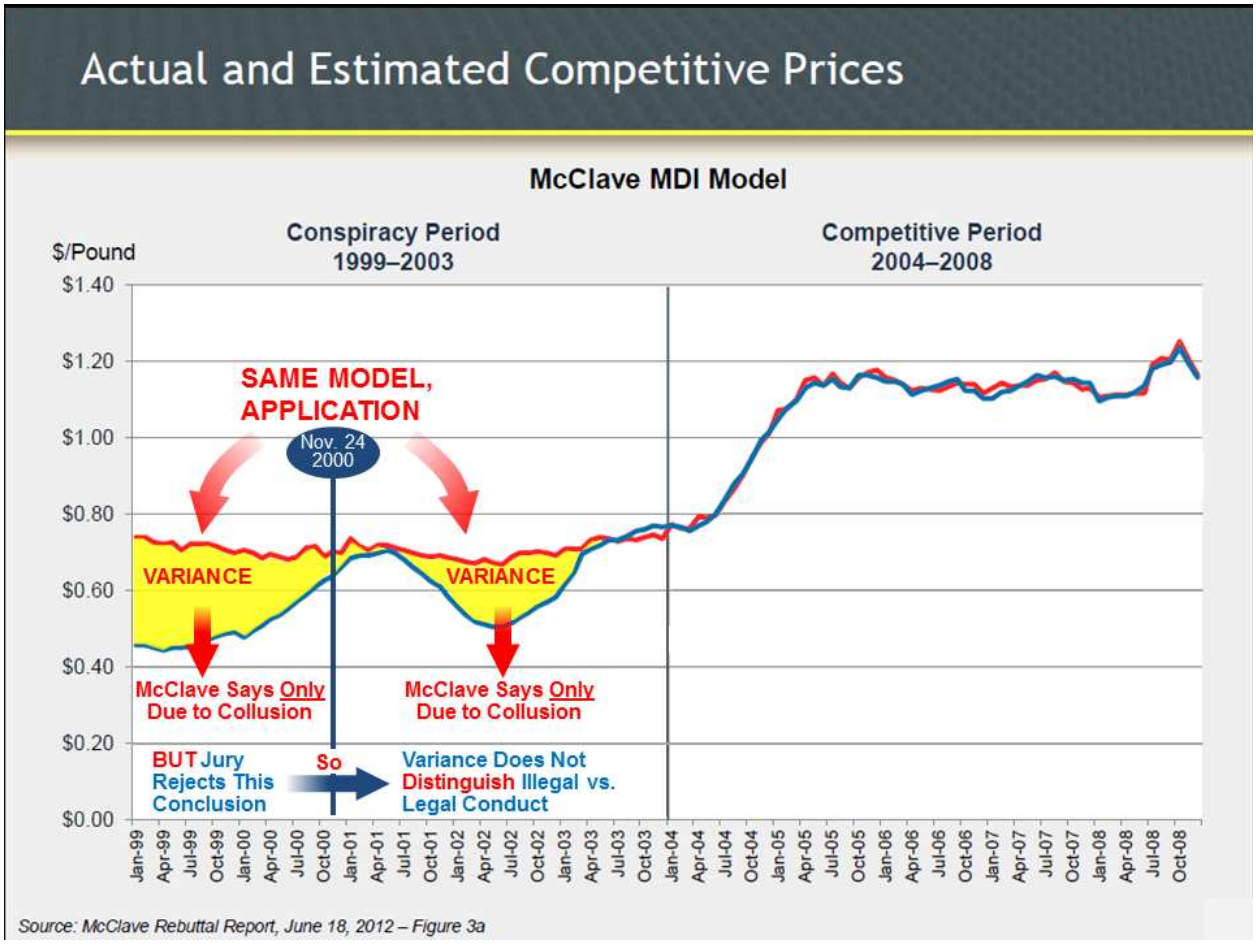


(McClave Demonstratives, at 3.)

But, and this is crucial, McClave's equating variance and overcharge was based upon the opinion that collusion was the sole cause of the variance—that nothing else caused the prices to

be different. Trial Tr. at 2990:4-2991:12, 2996:17-2997:21. He also assumed that all five conspiracy years were the "same" as the benchmark years in all material respects, save the alleged conspiracy. *Id.* at 2996:17-23. Thus, he admitted that if the jury found there was no conspiracy, the model was of no relevance. *Id*. at 3183:23-3184:18.

The jury's verdict has clearly and irreparably undercut Dr. McClave's central assumptions and ultimate opinion. In its answer to Question 3, the jury found there was no overcharge for at least 23 months of the conspiracy period. *See* Dkt. 2799 (Verdict Form). The jury thus divided the 1999-2003 period into two parts: (1) January 1, 1999 to November 23, 2000, where it found no conspiracy, and (2) November 24, 2000 to December 31, 2003, where it found some (unspecified) conspiracy. A demonstrative helps illustrate the impact of the verdict.



A vertical blue line has been added to illustrate the jury's verdict. Before the blue line is the pre-November 24, 2000, period during which the jury found no conspiracy. Their verdict means that something else caused the pronounced variance Dr. McClave found for the very period the jury said was not affected by collusion. Any "something else"—any other causal factor or "why"—is not accounted for in the McClave Model, Trial Tr. at 3015:22-3016:5, 3113:11-21, and this means that any modeled variance over any period and product cannot be equated (as Dr. McClave equated it) to collusion and overcharges.

Of course, a model that produces a positive result for a period that has now conclusively been established as a "no conspiracy" period is useless for assessing whether some other period was a "conspiracy" period or for assessing the amount of overcharges in such a conspiracy period. And the model's failure to differentiate between lawful and unlawful conduct is fatal to Plaintiffs' case. *See, e.g., Concord Boat Corp. v. Brunswick Corp.,* 207 F.3d 1039, 1055-57 (8th Cir. 2000) (holding that expert testimony should not be admitted when it fails to separate lawful from unlawful conduct); *U.S. Football League v. Natl. Football League*, 842 F.2d 1335, 1378-79 (2d Cir. 1988) ("Whatever latitude is afforded antitrust plaintiffs as to proof of damages, however, is limited by the requirement that the damages awarded must be traced to some degree to unlawful acts.... A plaintiff's proof of amount of damages thus must provide the jury with a reasonable basis upon which to estimate the amount of its losses caused by other factors, such as management problems, a general recession or lawful factors."); *Image Tech. Servs. v. Eastman Kodak Co.*, 125 F.3d 1195, 1224 (9th Cir. 1997) ("The [plaintiffs] must segregate damages attributable to lawful competition from damages attributable to [defendant's] monopolizing conduct"); *MCI Comm'cns Corp. v. AT&T*, 708 F.2d 1081, 1163 (7th Cir. 1982) ("[Plaintiffs'] lost profits study does not establish any variation in the outcome depending on which acts of

[defendant] were held to be legal and which illegal.... [T]he jury was left with no way to adjust the amount of damages to reflect lawful competition from [defendant]"); *Independent Services Org. Antitrust Litig.*, 114 F. Supp. 1070, 1090-91 (D. Kan. 2000) ("[Plaintiff's] burden includes the duty to disaggregate damages which are attributable to lawful conduct.... To meet its burden to disaggregate, plaintiff must provide the fact finder a reasonable basis upon which to estimate the amount of losses caused by lawful factors."); *Litton Sys., Inc. v. Honeywell, Inc.*, CV 90-4823 MRP(EX), 1996 WL 634213, at *2 (C.D. Cal. July 24, 1996) ("Except in circumstances where disaggregation is shown to be impossible or impractical, an antitrust plaintiff challenging a variety of conduct is required to segregate damages attributable to particular business practices or, at a minimum, to distinguish between losses attributable to lawful competition and those attributable to unlawful anticompetitive conduct."); *see also* IIA Areeda & Hovenkamp, ANTITRUST LAW ¶ 392b, g (3d ed. 2007) ("[An] antitrust damage calculation must isolate the effect of the antitrust violation. It should not include any other effects—good or bad—that influence the financial condition of the plaintiff.… The need to disaggregate obviously imposes a high standard of economic proof on the plaintiffs."); ABA, MODEL JURY INSTRUCTIONS IN CIVIL ANTITRUST CASES INSTRUCTION 4 (2005) ("If you find that there is no reasonable basis to apportion plaintiff's alleged injury between lawful and unlawful causes, or that apportionment can only be accomplished through speculation or guesswork, then you may not award any damages at all.").

While the jury's verdict means that the Court need look no further into the evidence, at trial Dow elicited clear and substantial reasons for variance unrelated to collusion. They included the statistical rigidity and over-tailoring of the McClave Model. Trial Tr. at 4874:6-23, 4877:14-4878:6, 4895:13-18, 4995:16-4996:7. Dow also produced the only historical evidence

in the case that tested Dr. McClave's assumption that the benchmark and conspiracy periods were so much the same that any difference between modeled and actual pricing could only be attributed to collusion. That evidence showed that the two periods were "fundamentally" different, as both Wood and Dawson testified and Dr. Ugone confirmed. *See* Trial Tr. at 3242:16-25, 3253:10-3254:15, 3280:13-3281:3; 4728:10-22, 4746:17-4748:14, 4751:3-4755:14, 4756:17-4757:24, 4762:24-4764:25, 4768:2-11, 4892:24-4894:2, 4910:21-4911:19.

The all-or-nothing McClave Model, although consistent with the all-or-nothing five-year case that the jury rejected, was not the only approach that Dr. McClave could have taken. For example, Dr. McClave could have:

- Actually analyzed the facts of the alleged conspiracy and deployed that analysis in his model;
- Analyzed the impact of price increase announcements on actual prices;
- Measured demand trends during the alleged conspiracy and looked for a relationship with pricing during the same period; and
- Looked at negotiations that actually occurred in the conspiracy period.

But Dr. McClave did none of these things. Accordingly, the jury's explicit rejection of the premise on which Class Plaintiffs rested their entire proof of impact and damages—that the gaps between modeled and actual observed prices throughout the 1999-2003 period can only be explained by wrongful "overcharges"—leaves Class Plaintiffs with no evidence on which the jury reasonably could have found for Class Plaintiffs on these two critical elements, and by itself compels a defense verdict in this case.

B. The failure to proffer evidence of actual injury and damages for the modeled class members

Plaintiffs made no attempt at trial to prove directly that the alleged conspiracy caused an antitrust injury to any class member. Plaintiffs provided no case studies showing that any class

members were actually harmed by the alleged conspiracy. Indeed, with the arguable exception of class representative Seegott, Plaintiffs did not even introduce the starting point for any such analysis, including (i) the identity of the class members, (ii) the product and timing of the purchase for each member, or (iii) the identity of the sellers of those products to each member. Moreover, in this industry in particular, the clear and undisputed fact is that there was not one market price for the urethane products at issue. Trial Tr. at 2212:8-15, 3286:6-11, 3491:24-3492:3. Instead, prices were quoted and negotiated customer by customer, *id*. at 2211:24-2212:1, 2520:6-10, 3490:20-3492:3, 3495:5-17, 3634:25-3635:6; different customers got different terms, and even the same customers got different terms at different times, *id*. at 2212:16-23, 2560:3-10, 2739:18-2742:3, 3549:5-14, 4202:19-25, 4440:12-4441:7; and price was not the only relevant term—the contracts include caps, contract durations, and various arrangements based upon volume and means of transportation, *id*. at 571:15-572:18, 2737:18-2738:13, 3490:20-3491:23, 3514:5-3515:8 (Trial Ex. 5099).

Failing to offer any direct evidence of actual impact on actual class members, much less damages, the sole "evidence" Plaintiffs provided at trial of impact and damages again was the model of Dr. McClave.

As the Court has heard on more than one occasion, the McClave Model covered only 25% of the customers. Trial Tr. at 2927:3-19. But even as to these customers, the model was used at trial to determine injury and damage for only two of them: Seegott and Industrial Polymers (all of class representative Quabaug's damages were extrapolated). *Id*. at 2900:13-2901:2. Rather than applying his model to more than two customers, Dr. McClave merely presented the jury with average overcharges by product category for the entire five-year period, based upon his application of the model. *Id*. at 2929:5-10. But even for modeled customers

those five-year averages do not reflect or prove the actual injury or damages to any particular Class member. There was no evidence of how many customers had such an overcharge.[7]

More specifically, the McClave Model captured data reflecting some of the variable circumstances listed above, but clearly not all of them. In the Model, transactions were grouped by months, customer, quantity, size of container, specific product within a product type (*e.g.*, particular brand name of MDI), and place of shipment. *See* Trial Tr. at 2914:24-2915:13. Other terms affecting price were not captured. Nor were variations in negotiating leverage over time even investigated. These limitations were dictated by the modeling, not by the facts.

But what is even more stunning is that the data that *was* gathered was *not* presented to the jury, nor was any means provided for the jury to make findings with respect to that data. The data for modeled customers showed variability around the mean or average. Trial Tr. at 4919:10-4920:1. For an individual customer, variation from the mean makes a difference. According to the model, some customers were overcharged by different amounts than others. *Id*. at 4924:18-4925:7. Some transactions actually show undercharges, again according to the model. *Id*. at 4923:5-13.

All of these variations make a difference in determining whether a particular customer was injured in a given transaction and the extent of that injury. The same applies with added force to the question of whether they sustained any net injury overall. Yet beyond the aggregated damage figures all that was presented to the jury were three average overcharge percentages (one for MDI, TDI, and polyols) shown by the model for approximately one million

[7] The jury rejected an essential premise on which this calculation is based: that there were overcharges for five years. Without that premise, the calculated average is wrong as a matter of mathematics.

transactions—three numbers fit all. And those numbers are positive for everyone, whether or not a given customer actually "overpaid."

C. The purported injury of 75% of Class members was created by extrapolation

The facts in the record are still more extreme for the remaining 75% of customers. No data was modeled for any of these class members. And no sample was taken to determine whether the modeled customers were representative of the non-modeled customers. Trial Tr. at 4987:13-21 (McClave did not test samples from half of modeled transactions, Lyondell, or systems transactions to see if there was a legitimate sample), *id.* at 4989:10-13 (McClave's extrapolation technique was not a sampling technique). Rather, for TDI, Polyol and MDI, the average overcharges calculated by the model were simply applied to the customers without analysis. Injury and damages were literally created with a click.

The determination of injury and damages for systems was no less fantastic. All systems customers were assumed to be injured—100% of them. No data said that this was so. McClave simply based the 100% assumption on a single after-the-fact 2008 document, which never even came into evidence. The amount of this assumed overcharge also was based upon nothing more than McClave's experienced hunch. No model, no statistics, no scientific investigation. Nothing.

Because Dr. McClave presumed rather than analyzed impact for his extrapolated observations, there was no evidence presented at trial with which the extrapolation-only class members proved they each suffered impact. As a result, Dow is entitled to judgment as a matter of law with respect to the claims of those class members. *See, e.g.*, *J.B.D.L. Corp. v. Wyeth-Ayerst Labs., Inc.,* 485 F.3d 880, 890-91 (6th Cir. 2007) (affirming summary judgment for defendant where expert could not establish causal link between alleged antitrust violation and

alleged injury); *El Aguila Food Prods., Inc. v. Gruma Corp.,* 131 Fed. App'x 450, 454-55 (5th Cir. 2005) (affirming judgment as a matter of law in defendant's favor where plaintiffs' expert failed to demonstrate that defendant's conduct was a material cause of its actual or threatened injury); *St. Louis Convention & Visitors Comm'n v. NFL,* 154 F.3d 851, 863 (8th Cir. 1998) (affirming grant of judgment as a matter of law where there was no evidence by which a jury could have drawn a logical inference on issue of causation).

D. The jury had no basis to award a damages figure unsupported by evidence

Independently, Dow is entitled to judgment as a matter of law because Dr. McClave presented the jury with only two damage figures—$1,125,608,094 for January 1, 1999 to December 31, 2003, and (in the alternative) $496,680,486 for November 24, 2000 to December 31, 2003—but the jury awarded neither of these figures. Instead, without any indication of when or how long or what parties or products were involved in a conspiracy, the jury awarded damages of $400,049,039.00.

Nothing in the record supports this award. The McClave Model is not linear, meaning it does not predict the same amount of damages for each particular day, month, or year within the damages period. Instead, the gap between the actual and the predicted prices varies over time, as the demonstratives above plainly show. To illustrate, the model finds damages of $496.7 million for a damages period starting on November 24, 2000 and ending on December 31, 2003, representing 44% of the total damages sought, even though this period makes up 62% of the alleged conspiracy period from January 1, 1999 to December 31, 2003, for which damages were sought. Thus, without actually running the model, the jury could not make a reasonable estimate of damages without speculation or guesswork. That is contrary to law. *See*, *e.g.*, *King & King Enterprises v. Champlin Petroleum Co.,* 657 F.2d 1147, 1157 (10th Cir. 1981) ("There must be

reasonable evidence from which a jury can rationally infer the amount of damages.") (citing *Bigelow v. RKO Radio Pictures, Inc*., 327 U.S. 251 (1946)).

E. The failure of the model to prove causation with respect to any injury or damages

"[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 . . . . This element can be 'likened to the *causation* element in a negligence cause of action.'" *See, e.g.*, *In re Urethane Antitrust Litig.*, 251 F.R.D. 629, 634 (D. Kan. 2008) (emphasis added) (quoting *State of Alabama v. Blue Bird Body Co.*, 573 F.2d 309, 317 (5th Cir. 1978).

By design, Dr. McClave's model was incapable of establishing any link between the alleged conspiratorial conduct and any injury or damages. The model was designed solely to use a set of defined variables to explain pricing. The alleged conspiratorial conduct was not among them. The resulting model was then applied to the conspiracy period and the variance between predicted and actual prices during that period was measured. With this use, the model had reached its limits. The model could not and did not find any statistical relationship for the variance (Trial Tr. at 2998:19-2999:2), nor any explanation of the variance (*id*. at 3181:7-15), nor any cause of the variance (*see, e.g.*, *id*. at 3004:20-3005:2, 3145:25-3146:9).

The ultimate proof that Dr. McClave's model did not establish a causal impact from alleged misconduct is his ready acknowledgement that if the jury failed to find the collusion he assumed, then his model just collapsed. Trial Tr. at 3183:23-3184:18. He had no fact or analysis that would remain true in the face of a litigation verdict rejecting the claim of collusion.

III. JUDGMENT IN DOW'S FAVOR ALSO IS REQUIRED AS A MATTER OF LAW BY CLASS PLAINTIFFS' FAILURE TO PROVE AGREEMENT

Class Plaintiffs also failed to prove the agreement that is both the "essence" of conspiracy as a matter of law, *see Champagne Metals v. Ken-Mac Metals, Inc.*, 458 F.3d 1073, 1082 (10th Cir. 2006) (citing *Summit Health, Ltd. v. Pinhas*, 500 U.S. 322, 330 (1991)), and, according to their expert Dr. Solow, the "first step" economically for any cartel. Trial Tr. at 2235:21-2236:5 (referencing *Cartels, Collusion and Horizontal Merger*, in HANDBOOK OF INDUSTRIAL ORGANIZATION (Richard Schmalensee et al. eds., Vol. 1, 1989).

A. "Agreement" is required for a "price-fixing" conspiracy

The essence of conspiracy is "a meeting of minds in an unlawful agreement." *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 771 (1984) (internal citations and quotation marks omitted); *see also Champagne Metals*, 458 F.3d at 1082; *Mitchael v. Intracorp, Inc.*, 179 F.3d 847, 856-57 (10th Cir. 1999). In the antitrust context, an "agreement" requires two or more parties to surrender their previously independent interests in the pursuit of a common benefit. *See Copperweld*, 467 U.S. at 769 ("In any conspiracy, two or more entities that previously pursued their own interests separately are combining to act as one for their common benefit."); *see also Monsanto Co. v Spray-Rite Service Corp.*, 465 U.S. 752, 768 (1984) (to form an agreement actionable under Section 1, the parties must arrive at "a conscious commitment to a common scheme designed to achieve an unlawful objective"); *In re Nat'l Ass'n of Music Merchants, Musical Instruments & Equip. Antitrust Litig.*, MDL 2121, 2012 WL 3637291, at *2 (S.D. Cal. Aug. 20, 2012) ("The touchstone of an agreement is a 'meeting of the minds,' creating a sense of mutual obligation among the alleged conspirators."). That agreement is not merely a decision by two people or firms to do the same thing for their own independent reasons, even if those reasons are the same. As the Supreme Court has explained, the "common reaction of firms

in a concentrated market that recognize their shared economic interests and their interdependence with respect to price and output decisions is not in itself unlawful." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 553-54 (2007) (internal quotation marks omitted). Class Plaintiffs' economist testified that this basic legal proposition is underpinned by economic necessity. As he acknowledged on cross examination, for a cartel to exist, there must be an "agreement," an "arrangement," a "deal." Dr. Solow opined, without dispute, that firms "make a choice to go along with the arrangement that the firms have." Trial Tr. at 2233:20-2234:4. *See also id.* at 2235:21-2236:5 (agreeing that the first step of a cartel is an agreement). Dow's expert, Dr. Kenneth Elzinga, also identified entry into an agreement as the differentiating factor between a collusive and non-collusive oligopoly. *See id.* at 4680:25-4681:4 ("Well, to my mind, what distinguishes the two categories of oligopoly is whether there's a deal or an agreement or an arrangement or whether the interaction between the sellers in the oligopoly is one of interdependence, strategic interdependence.").

A cartel agreement must have certain features, both as a matter of law and as a matter of economic fact. In a price fixing conspiracy, there must be an agreement to affect actual prices. *See United States v. Socony-Vacuum Oil Co.,* 310 U.S. 150, 222 (1940) ("[P]rices ***are fixed***…if the range within which ***purchases or sales will be made is agreed upon*****,*** if the prices paid are to be at a certain level or on ascending or descending scales, if they are to be uniform, or if by various formulae they are related to the market prices. They are fixed because they are agreed upon.") (emphasis added); *United States v. Standard Oil Co*., 316 F.2d 884, 890 (7th Cir. 1963) ("Unless the individuals involved understood from something that was said or done that they were, in fact, ***committed to raise prices***, there was no violation of the Sherman Act.") (emphasis added).

Dr. Solow agreed with this premise as well. He acknowledged the agreement must relate to actual (not announced) prices, otherwise it "wouldn't be much of a cartel." Trial Tr. at 2254:12-18; *see also id.* at 2239:2-11 (the agreement must be about what the intended impact is on price), 2240:13-17 ("I believe the intended impact was to maintain the price above a competitive level."), 2247:1-5 (Q: Do you think – is it your opinion that the cartel that you say existed with respect to Dow was a cartel where there was advanced agreement on particular price increases? A: Yes, I do.").

And, economically, there must also be agreement to a penalty for cheating. Dr. Solow emphasized the obvious fact (also underscored by Dr. Elzinga) that all firms have an incentive to raise prices in order to make more money. *Id*. at 2047:15-2048:7 (Solow), 4431:17-25 (Elzinga). As soon as prices rise, there also arises a commensurate incentive to cheat by cutting price and gaining volume. *Id*. at 2115:4-2116:10, 2237:14-21 (Solow), 4432:1-25, 4434:22-4435:1 (Elzinga). Thus, a cartel agreement requires a mechanism to deal with cheating (monitoring and penalizing). *Id.* at 2239:12-2240:2; s*ee also id.* at 2238:19-22. This is the give-up, the commitment that makes a cartel an economic reality.

Critically, these basic principles govern "agreement." While, as discussed below, evidence of agreement may "direct," "indirect, "formal," or "informal," that evidence must be assessed for its sufficiency to prove an "agreement" as defined by the law and, on the record in this case, that meets the economic requirements announced by Plaintiffs' own expert.

B. The "Agreement" Plaintiffs sponsored before the jury

The threshold question posed in this case is: What was the alleged collusive agreement? As the Court will remember, this was not revealed before trial. It was not until Dr. Solow was cross-examined that the alleged agreement was defined in testimony:

> It was to issue—it was to issue announcements of prices by an amount within some range and to try to match those price increases and then to stick to them as best they could to prevent the price from falling to the competitive level.

Id. at 2241:19-24; *see also id.* at 2255:5-11 (characterizing the alleged agreement as "an agreement to make the announcement—make the announced price increases and to try to make them stick as much as possible"), 2257:4-11 ("I think the agreement was that the firms coordinated their price increases—their announcements of price increases and then they took steps to try to make certain that those price increases stuck as much as possible in order to prevent the price from declining in the marketplace during a time when there was excess capacity and great downward pressure on prices."). As to the economic penalty, Dr. Solow offered only the assertion that the penalty was to "selectively compete" with those who cheated. *Id*. at 2265:24-2266:3, 2266:21-24. *See also id.* at 2268:3-23, 2270:24-2271:7.

On its face, this theory of agreement is a far cry from the restraint of trade targeted by the Sherman Act. In responding to the theory, Dr. Elzinga testified without contradiction that the conduct specifically called for by Dr. Solow's theory of agreement was, in fact, precisely what should have and did occur in the industry without collusion. Dr. Elzinga explained that the lockstep conduct encompassed by Dr. Solow's theory of agreement is entirely consistent with a noncollusive oligopoly, *i.e.,* with competition. For example, with respect to lockstep price increase announcements:

> Q. Tell us whether the fact that there are lockstep announcements, whether that means that there's a cartel?
>
> A. No. Lockstep announcements could also appear in a noncollusive oligopoly.

Trial Tr. at 4442:10-14. Similarly, efforts by the urethane suppliers to get the price increase announcement to "stick" and competition following a failure do so is just as indicative of a noncollusive oligopoly. *See id.* at 4684:5-22. As summarized by Dr. Elzinga:

> Q. So the pattern of lockstep announcements, companies then trying to make the customers accept it, failure, and then competition to pick up the business, is there any difference between that and noncollusive oligopolistic conduct?
>
> A. No. That would be consistent with noncollusive oligopoly conduct.

Id. at 4684:23-4685:5.

Plaintiffs never disputed Dr. Elzinga's testimony regarding these core elements of Dr. Solow's cartel theory.

The fact here that Class Plaintiffs' own theory of cartel merely re-labels noncollusive interdependent conduct as collusion (that the suppliers agreed to do what they would have done anyhow) means that evidence of conduct allegedly undertaken pursuant to such an agreement would be fully consistent with independent action because the alleged agreement is to do what the suppliers would have done anyhow in the absence of any agreement.

Under these facts, evidence of the conduct allegedly agreed to stands in equipoise under *Monsanto* and *Matsushita*, and Plaintiffs must prove conspiracy by a preponderance of other evidence that tends to exclude the possibility of independent conduct.

C. Plaintiffs failed to carry their burden of proving the alleged agreement

Plaintiffs must show proof of the alleged five-year agreement by direct or circumstantial evidence. *Champagne Metals,* 458 F.3d at 1082. Here, the direct evidence affirmatively rejects Plaintiffs' theory of conspiracy, and the circumstantial evidence does not support a different result.

1. The direct evidence refutes rather than proves the broad conspiracy alleged in this case

Viewed in light of the legal requirements of "agreement" and Dr. Solow's testimony on cartels, the record here shows that: (1) there is substantial direct evidence that is relevant to the five-year conspiracy alleged in this case, but that evidence contradicts such a conspiracy; (2) the

same is true of the agreement defined by Dr. Solow; and (3) there is no direct evidence of any agreement on pricing at all, save for a second-hand report of an alleged agreement between some TDI suppliers in 2003.

No witness provides any direct evidence to support any price fixing agreement spanning five years, all products and all suppliers. Indeed, sixteen of the seventeen who testified about the existence of an agreement at any time during the five-year conspiracy period testified that there was no such agreement. And all, without exception, denied that they were involved in any agreement. This included the three witnesses who Class Plaintiffs themselves proffered as credible witnesses—not among the alleged wrongdoers identified by Plaintiffs in their opening statement (Trial Tr. at 214:17-23)—to testify concerning conversations about pricing. Stephanie Barbour herself was clear that neither she nor her subordinates ever reached an agreement with competitors on pricing:

- Q. Did you ever agree with a competitor to sell products to customers at a specific price?
- A. Did I agree? No. (Trial Tr. at 802:20-23)

- Q. To your knowledge, were you or your subordinates ever involved in a price fix for MDI?
  A. Subordinates, no.

- Q: To your knowledge, were you or your subordinates ever involved in a price fix for polyols? A: No. (*Id.* at 803:17-24)

- Q. And in all those meetings that you had with your counterparts at BASF or Huntsman or Bayer, you, yourself, never discussed price increases with them for MDI, right?
  A. Correct.
  Q. And you testified yesterday, did you not, that in all the meetings you had with them, you never discussed price increases for rigid polyols, correct?
  A. Correct.
  Q. And in those meetings that you had with them, you told us that you never agreed with them on announcing price increases, right?
  A. Correct. (*Id.* at 843:24-844:15)

Larry Stern, the other primary witness on whom Class Plaintiffs relied, also denied ever entering into an agreement with David Fischer or having knowledge of any agreement with any competitor to fix the price of any of the four urethane products:

- Q. I want to ask you about agreements. During the time that you were at Bayer, did you ever agree with a competitor to fix prices for polyether polyols?
  A. No, sir.
  Q. Did you ever agree with a competitor to fix prices for MDI?
  A. No, sir.
  Q. Did you ever agree to fix prices with any competitor for systems?
  A. No, sir. (Dkt. 2789-1 at 215:17-216:15) [8]

- Q. All right. So, I want to formulate the same question. At any of these calls did you agree with Mr. Fischer to raise prices for any polyurethane product?
  A. No, sir. (*Id.* at 397:16-21)

Edward Dineen, formerly of Lyondell, who Class Plaintiffs relied upon to try to establish the existence of a conspiracy in 1999, firmly testified that there was no agreement to fix prices or coordinate price increase announcements, and no action to achieve such an effect:

- Q. The discussion you had with Mr. Dhanis and Mr. Wood at the February dinner, that discussion played no role whatsoever in any subsequent price increase announcement that Lyondell issued?
  A. No. (*Id.* at 1419:14-19)

- Q. And the record also shows that Dow, Bayer, Huntsman and BASF issued similar six-cent price increase announcements for polyols and TDI to be effective

[8] Larry Stern Trial Transcript, Dkt. 2789-1 (filed 2/15/2013). See also id. at 290:18-291:1 (at June 2000 Greenbrier, no agreement with Parker or Wood related to price levels); Tr. 449:6-10 (no agreement concerning July 1, 2000 increases); Tr. 619:8-13 (no agreement concerning March 1, 2002 polyols increase); Tr. 688:8-15 (no May 2002 agreement with Huntsman in Singapore); Tr. 688:17 – 689:5 (after July 1, 2002, Huntsman took actions undermining effectiveness of July 2002 MDI increase); Tr. 690:13-20 (Stern conversation with Hankins in Singapore did not change the intensity of MDI competition between Bayer and Huntsman); Tr. 959:17-23 (Stern testimony that Bernstein and Dhanis were either lying to him in Singapore, or he misgauged their resolve); Tr. 799:14-19 (no coffee shop agreement with Bernstein); Trial Tr. 5085:17-5086:1 (no agreement concerning July 1, 2002 MDI increase); id. at 5086:3-9 (Bayer, Huntsman, BASF and Dow continued to compete vigorously after July 1, 2002 MDI announcement); Trial Tr. 5068:5 – 5071:6 (2001 Bayer price declines for TDI, MDI and polyols driven by competitive pricing from BASF, Dow, Huntsman and Lyondell, who were pursing pricing strategies that were different from Bayer's).

on the same day, April 1, 1999. Are you aware of any agreement among Lyondell, Dow, Huntsman, Bayer and/or BASF to coordinate the price increase for polyols or TDI that was announced effective on April 1, 1999?
A. I am not. (*Id.* at 1419:21-1420:8)

- Q. Did you cause Lyondell to take any action regarding pricing of urethane products as a result of your dinner meeting with Mr. Dhanis and Mr. Wood on February 8, 1999?
A. I did not. (*Id.* at 1420:10-16)

The ancillary witnesses from Bayer to whom Plaintiffs referred at trial similarly denied participation in or knowledge of any price fixing agreement involving Bayer and Dow or any competitor. Michelle Blumberg testified:

- Q. During your time at Bayer, did you agree with any competitor on the amount or timing of any price increase?
A. No. (*Id.* at 543:25-544:4)

- Q. During your time Bayer, did you ever conspire with anyone from Dow to fix prices of urethane chemicals or allocate customers or markets for urethane chemicals?
A. No. (*Id.* at 545:1-6)

See also generally Trial Tr. at 542:24-545:6; 545:7-546:22 (no one at Bayer instructed Blumberg to agree or informed her of an agreement); 551:2-12 (Friedrich never directly indicated the existence of an agreement, nor did anyone else at Bayer); 564:13 – 565:5 (business conduct did not change after Friedrich's "don't worry about prices" comment in 2002); 567:24-570:4 (competition at Huber remained strong among suppliers after Friedrich comment).

Robert Kirk of Bayer likewise testified that none of Bayer's price increase announcements resulted from any agreement with competitors:

- Q. Okay. And for – for all of those increases in 2002, whether earlier or later, as you sit here today, do you have any reason to believe that any of those increases was the result of an agreement among competitors to set prices for urethanes

products?
A. No. (*Id.* at 3897:20-3898:6).[9]

Jerry Phelan of Bayer testified extensively that he did not enter into any agreement with his industry counterparts to fix or stabilize prices and was unaware of any such agreement. *Id.* at 654:13-660:18.

All this evidence came *directly* from the mouths of witnesses that Class Plaintiffs presented to the jury in their case-in-chief. But refutation of the existence of any agreement to coordinate price increase announcements (let alone an agreement to fix prices) also came through direct testimony from several former employees of Dow with no remaining affiliation to the company:

- Rick Beitel, a former employee of Dow, testified that there was no agreement or understanding with competitors on what to charge customers or any discussions with competitors of "mutual resolve to stick to price increase announcements". *Id.* at 3474:12 – 3475:19. Moreover, as the head of sales for polyurethanes between 1999-2003, he testified that it would not have been possible for there to have been some sort of price-fixing agreement for MDI, TDI, or polyols without him knowing about it. *Id.* at 3550:21-3551:2.

- David Fischer, the former Business Vice President of Dow's polyurethane business from 2000 to 2004, testified that he did not reach an agreement with anyone from Bayer about

[9] *See also* Trial Tr. at 1313:7-1314:11, 1315:2-9 (Stern never told Kirk that he had an agreement with competitors and never indicated that Stern knew competitors would follow price increase announcements), 1318:1-11, 1318:18-1319:22 (Fischer never asked Kirk or Bayer to agree to support a price increase and no one at Bayer agreed to raise prices (ever or in in response to comments by David Fischer of Dow)), 3876:7-15 (no one at Bayer involved in pricing – including Stern and other involved between 1999-2004 – ever told Kirk that price increase announcements were the result of an agreement with competitors), 3886:19-3887:4 (no one at Bayer ever told Kirk not to worry about aggressive competition because there was an agreement with competitors), 3896:23-3897:11 (no one at Bayer ever told Kirk not to worry about price increases because there was an agreement with competitors); *see also generally* Trial Tr. at 542:24-545:6; 545:7-546:22 (no one at Bayer instructed Blumberg to agree or informed her of an agreement); 551:2-12 (Friedrich never directly indicated the existence of an agreement, nor did anyone else at Bayer); 564:13 – 565:5 (business conduct did not change after Friedrich's "don't worry about prices" comment in 2002); 567:24-570:4 (competition at Huber remained strong among suppliers after Friedrich comment). *See also* Trial Tr. at 4205:22-4206:23 (Bayer U.S. employees told to "ignore" Friedrich's commands concerning Firestone).

the timing or amount of any price increase, or any agreement with Bayer related to Foamex or any customer. *Id.* at 1142:17-1143:3.

- Robert Wood, Fischer's immediate predecessor and subsequent boss, testified that if there was a deal between Dow and any competitor concerning the urethane chemicals, he would have known about it. *Id.* at 3350:14-3351:5.

Marco Levi also denied having any agreement regarding pricing of urethane products with anyone from BASF, *id.* at 4299:6-4300:2, or improper pricing discussions with his counterparts at Bayer, *id.* at 2487:12-2488:15.

On this undisputed record of "direct" evidence, no further analysis stands in the way of entering judgment for Dow on Plaintiffs' five-year conspiracy theory. A case in which the direct evidence on the conspiracy charged was divided might be more difficult. But here, no one says that there was a five-year conspiracy. All insist that they were not involved in any such conspiracy. Only one witness testified to any "agreement" and that allegation was confined to TDI, 2003, and to BASF, Dow, and Bayer.

The direct evidence is equally dispositive of Dr. Solow's theory of agreement. No one testified directly to the agreement articulated by Dr. Solow, much less for all years, all products and all suppliers.

Turning finally to Ms. Barbour's purportedly "direct" evidence of an agreement reported by Mr. Levi, that evidence is not, in fact, direct and cannot even stand up to the objective facts about pricing conduct in 2003. Ms. Barbour testified that, at a point in 2003 that she could not remember, Mr. Levi had told her "he had met with the competition, and that there was an agreement, that they were all in a bad situation financially, and that they were going to make sure these price increases stuck." Trial Tr. at 689:2–6, 18–22. Ms. Barbour clarified that Mr. Levi was referring to "Bayer and BASF" (*id.* at 689:25), and that she had been referring to TDI, a product for which Levi was responsible, when asking her question (*id.* at 688:24–689:1), but she

had not specified any particular geographic region (*id.* at 689:12–14). This second-hand report of conversations that Mr. Levi allegedly had with Bayer and BASF regarding TDI in 2003 are not direct evidence of a conspiracy involving Dow, because the alleged statement from Mr. Levi to Ms. Barbour does not report the *exact words* from the allegedly *illicit* conversation. *See Superior Offshore Int'l, Inc. v. Bristow Group, Inc.*, 490 F. App'x 492, 498 (3d Cir. 2012).

Even setting aside Mr. Levi's direct denial of Ms. Barbour's account (Trial Tr. at 2673:4-14, 4299:6-21), Mr. Beitel's direct denial of any cartel at any time, the myriad facts surrounding Ms. Barbour's deteriorating relationship with Mr. Fischer, her relationship with Dow, and her failure to tell anyone of her specific claims until she was deposed years later, specific facts about TDI pricing conduct following the Spring announced increase are clear, reliable and directly contrary to Ms. Barbour's testimony. Dow announced only one price increase for TDI in 2003, to be effective on April 1, 2003. *See* Trial Ex. 2112 at 18-21. In the months following that announcement:

- BASF's TDI pricing was mostly flat for the two months following the increase, spiked for a month, and then declined to pre-announcement levels after August 2003;[10]
- Huntsman's TDI pricing was flat for a month, spiked for the month of May, and then declined for the rest of 2003 and below pre-announcement levels by July 2003;[11] and
- Lyondell's TDI pricing dropped immediately after the April 2003 increase and was below pre-announcement levels for most of 2003.[12]
- Dow's TDI pricing increased by the full amount of the announcement in May, but had dropped to pre-announcement levels by June, then remained above pre-announcement level for most of the rest of the year before declining precipitously after October 2003.[13]

[10] Trial Ex. 5249.

[11] Trial Ex. 5252.

[12] Trial Ex. 5253.

[13] Trial Ex. 5251.

- Bayer's TDI pricing increased by around the amount of the announcement in April through June before dropping below pre-announcement levels for the remainder of the year.[14]

This pattern of divergent pricing outcomes is precisely the opposite of what a cartel should produce. Moreover, the record evidence shows competition in TDI throughout 2003, further undermining the notion of a conspiracy around the time of the April 2003 TDI price increase.[15]

2. Plaintiffs failed to carry their burden of proving agreement with circumstantial evidence

While the direct evidence is clear and dispositive, the circumstantial evidence does not change the result. "To survive . . . a directed verdict,"[16] a plaintiff still "must show that the inference of conspiracy is reasonable in light of the competing inferences of independent action or collusive action that could not have harmed [plaintiffs]." *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986). Evidence that is potentially consistent with lawful oligopolistic coordination must therefore be supported by other evidence that excludes the possibility of independent action. *See Gibson v. Greater Park City Co.*, 818 F.2d 722, 724-25 (10th Cir. 1987) (drawing distinction between circumstantial evidence that is unambiguously inconsistent with independent action and other circumstantial evidence); *Golden Bridge Tech., Inc. v. Motorola, Inc.*, 547 F.3d 266, 273 (5th Cir. 2008) ("It is not sufficient under

[14] Trial Ex. 5250.

[15] *See, e.g.*, Trial Ex. 5262 (showing changing market share (*i.e.*, competition) for all suppliers of TDI to Foamex throughout 2003); Trial Ex. 4211 (Dow July 2003 internal report) ("BASF has lost its mind" on flexibles pricing and has been the "primary driver" of price declines in 2003); Trial Ex. 443 (BASF May 2003 internal report) (Dow has conduct on price increases is "just the opposite" of announcements; Dow deteriorating TDI/polyols market); TT 3345:10-3350:6 (Wood testimony concerning TX 443 and 4211).

[16] In their submission on jury instructions, Plaintiffs suggested to the Court that the *Monsanto*/*Matsushita* requirement does not apply at trial. *See* Dkt. 2689 at 5-6. This is wrong. *Matsushita* applies to judgments as a matter of law by its own terms, "to survive . . . a directed verdict." *Matsushita*, 475 U.S. at 588.

Matsushita for [plaintiffs] to simply propose conceivable motives for conspiratorial conduct; [their] evidence must tend to show that the possibility of independent conduct is *excluded*") (emphasis in original).

Drawing these inferences in an industry that is prone to lawful oligopolistic coordination is particularly difficult, because the "plus factors" of motive to conspire and action against self-interest that courts often apply to determine whether there is evidence that excludes independent conduct become unreliable. *Superior Offshore*, 490 F. App'x 498 (3d Cir. 2012) ("The first two factors [motive to conspire and action against self-interest] are generally less important because they may indicate simply that the defendants operate in an oligopolistic market, that is, may simply restate the (legally insufficient) fact that market behavior is interdependent and characterized by conscious parallelism . . . . The third factor, on the other hand, encompasses 'non-economic evidence that there was an actual, manifest agreement not to compete . . . .") (internal citations and quotation marks omitted); *see also id.* at 499–500 ("Alternatively, given the concentration of the helicopter-services market at issue here, such price increases could have just as easily been the result of 'price leadership' as of price fixing. This obvious business reason for the defendants' actions casts serious doubt on whether wrongful concerted activity was the real cause of the price increases.") (internal citations omitted).

Indeed, even evidence that certain individuals may have spoken of an "agreement" with competitors is of dubious reliability in showing an *unlawful* collusive agreement, because "the mental process that characterizes much actual cartel bargaining closely resembles the process by which oligopolists come to settle on a particular supracompetitive price through recognized interdependence." *See* Areeda & Hovenkamp, ANTITRUST LAW ¶ 1432b3. As a result of this psychological process, individuals involved in interdependent oligopoly often think about— and

refer to—their interdependence with competitors as an "agreement" and think about "commitment," "cheating," and "punishment" in moralistic terms. *See* Louis Kaplow, *On the Meaning of Horizontal Agreements in Competition Law*, 99 Cal. L.R. 683 (2011).

Nor do communications among competitors necessarily shed light on the question of whether an agreement was reached during the communication, as Dr. Solow admitted. Trial Tr. at 2198:8-25 (telephone calls roughly coinciding with price increase announcements may relate to legitimate business communications and would expect there to be many telephone calls if there were many business relationships between the companies), *id*. at 2209:8-11 ("To be precise what I said is that simply from observing the lockstep price increase announcements I would not infer that there was a cartel, I would not come to the conclusion that there was a cartel.").

Indeed, courts have found communications among competitors exchanging price information to be insufficient for a reasonable jury to infer an unlawful agreement, absent evidence showing that the activity "had an impact on pricing decisions" for the particular products at issue. *Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan*, 203 F.3d 1028, 1034 (8th Cir. 2000) (citations omitted); *see Mitchael v. Intracorp, Inc.*, 179 F.3d 847, 859 (10th Cir. 1990); *In re Baby Food*, 166 F.3d 112, 125 (3d Cir. 1999); *Krehl v. Baskin-Robbins Ice Cream Co.*, 664 F.2d 1348, 1357 (9th Cir. 1982).

Beyond the lockstep announcements and "monitoring" (both of which Dr. Solow acknowledged could take place without collusion), the circumstantial evidence overwhelmingly featured in Class Plaintiffs' case was precisely the type of evidence that has been found to be insufficient to support an inference of collusion, *i.e*., communications among competitors about "pricing." And in this case, that evidence was either disputed where the parties to the communication both recalled what they discussed, or one party simply did not recall the

discussion, or there was no testimony about the discussion. Moreover, the sources of such testimony were solely Stern and Barbour. The testimony of those same witnesses confirmed the limited probative value of what they had to say about the communications. Stern in essence testified that he drew a line and reached no agreement. Barbour's testimony about pricing discussions was all second hand, and she denied having participated in any agreement herself.[17] His selections therefore do little to speak to the issue now before the Court, which turns upon the totality of what the jury heard.

Against such equivocal and conscribed evidence, there weighs in the balance extensive, objective evidence about what actually happened with pricing conduct. Both Dr. Solow and Dr. McClave disclaimed having analyzed the relationship between the price increase announcements which were the object of Class Plaintiffs' alleged agreement and the actual prices on which Class Plaintiffs must show an impact. Trial Tr. 2214:15–23 (Solow) (cannot draw a connection between announced prices and actual prices based on McClave's model), 3151:21–3153:21; *see Blomkest*, 203 F.3d at 1034; *see also Mitchael*, 179 F.3d at 858–59; *Krehl*, 664 F.2d at 1357.

In stark contrast, Dr. Elzinga confronted Dr. Solow's theorizing and looked to the facts that should show that such an agreement existed if it was anything more than theory. *See* Trial Tr. 4438:7-4439:6, 4444:4-4445:3. He looked at the price increase announcements and demonstrated that they had no consistent relationship with actual prices and certainly did not result in the pattern of increased actual prices that would reflect the existence of a cartel. *Id.* at 4446:19-4451:7 (explaining why Dr. Solow's theory is not reflected in Dow's actual pricing for MDI), 4451:8-4453:14 (explaining why Dr. Solow's theory is not reflected in Dow's actual

[17] While Dr. Solow also relied upon historical documents that he found supported "price over volume" strategy, he acknowledged on cross examination that all of the evidence he presented represented the Plaintiffs favorite evidence. Trial Tr. 2171:17-2172:25.

pricing for TDI), 4453:15-4455:2 (explaining why Dr. Solow's theory is not reflected in Dow's actual pricing for polyols), 4455:3-4457:23 and 4461:9-4462:10 (explaining why Dr. Solow's theory is not reflected in pattern of actual pricing for TDI by Bayer, BASF, Huntsman and Lyondell). *See also* Trial. Exs. 5247, 5249, 5250, 5251, 5252, 5253, 5256. As Dr. Elzinga explained, the pattern of actual prices "doesn't square with Professor Solow's theory or hypothesis about how the cartel worked." Trial Tr. 4462:14-17. *See also id.* at 4456:17-19 ("clearly something is going on here, something is driving prices besides the price increase announcements.").

As for the drivers of actual price, Dr. Elzinga focused on Class Plaintiffs' theory that the alleged conspiracy was designed to and did have the effect of maintaining prices at a level above what they otherwise would have been due to excess capacity. His evidence examined the determinants of price and found that the flat price trend from 1999 through 2003 was the product of flat demand and generally increasing costs. Trial Tr. at 4485:4-4503:14; Trial Exs. 5236-40 (slides 11-15 in transcript). The economic facts did not show that prices would have been lower were there not a cartel; rather, they showed cost pressure on the alleged conspirators to increase prices. For example, after 2002 the MDI margins are reduced because of the increased price of benzene, and this is inconsistent with the idea that there was a cartel (Trial Tr. at 4500:20-4503:4). Dr. Elzinga then focused his analysis on competition for customers and found it to be robust, completely contrary to Dr. Solow's testimony and cartel economics. *Id*. at 4503:15-4511:11, 4514:17-4517:25; Trial Exs. 5262-64 (slides 16-18 in transcript). While Class Plaintiffs sought to 'eyeball' the price increase charts differently, Dr. Elzinga was not even challenged on the conflict between his findings and Solow's theory: (1) there was no pattern of a relationship between the announcements and actual prices; (2) actual prices were determined by

demand and tracked flat demand rather than departing from falling demand; and (3) competition for customers was broad and vigorous, not muted and selective. Trial Tr. at 4512:12-4514:16.

As the law requires, when the Plaintiffs' circumstantial evidence of pricing communications and snippets of historical documents about pricing strategy are considered as part of the evidence as a whole, three basic conclusions are unavoidable. The first is that the direct evidence in this case is deep, credible and—with the doubtful exception of Ms. Barbour's testimony regarding TDI pricing in 2003—weighs entirely against any claim of collusion, and certainly against a five-year, all-in conspiracy. While Plaintiffs would like to brush away all such testimony as predictable denials, they simply cannot in this case because the testimony came from the very witnesses they presented to the jury as both free from wrongdoing and credible. Plaintiffs have never solved this fundamental problem with their case because the problem simply cannot be solved. The second conclusion is that the circumstantial evidence upon which Plaintiffs' case centrally depended is of precisely the type that has been found by courts to have limited value. Third, there really was no contest when it came to the economic facts of what the suppliers actually did with their prices. Whether this is characterized as direct evidence (because conduct is the ultimate test of whether there is collusion) or circumstantial evidence, it is highly reliable and objective.

And in this case, there was only one analysis of the relationship between announcements and actual prices, only one analysis of the Plaintiffs' theory that prices would have fallen in the alleged conspiracy period, and only one systematic analysis of whether there was competition for customers. All were done by Dr. Elzinga. Neither Dr. McClave nor Dr. Solow systematically analyzed the relationship between announcements and actual prices, nor did they support the assertion that prices should have fallen (Dr. McClave's model merely assumed that they should

have been lower from the very beginning of January 1999), nor did they have any method for examining what actually happened to competition for customers. At the end of the day, the case came down to the direct evidence of **no agreement**, the economic facts against agreement, and the testimony about pricing communications from the same people who insisted that no agreement was reached. This array of evidence could not reasonably support any finding of a five-year conspiracy.

IV. IF JUDGMENT IS NOT ENTERED FOR DOW, THE COURT SHOULD ORDER A NEW TRIAL[18]

Under Federal Rule of Civil Procedure 59(a), the district court has broad discretion to grant a new trial. The rule authorizes a new trial "for any reason for which a new trial has heretofore been granted in an action at law in federal court." *Id.* More specifically, a new trial may be granted if the district court concludes the "claimed error substantially and adversely" affected the moving party's rights. *Sanjuan v. IBP, Inc.*, 160 F.3d 1291, 1297 (10th Cir. 1998). In considering a motion for new trial, the district court does not view the evidence in the light most favorable to the verdict; the inquiry is instead focused on whether the claimed error "substantially and adversely" affected the party's rights. *Henning v. Union Pac. R.R. Co.*, 530 F.3d 1206, 1217 (10th Cir. 2008).[19]

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[18] If the Court orders a new trial, that new trial should not include any claims based on purchases prior to November 24, 2000 for at least two reasons. First, the jury clearly found for Dow with respect to such claims with its answer to Question 3. At a minimum, judgment should be entered in favor of Dow with respect to the claims of all Class members whose purchases were made *only* before November 24, 2000. Second, separate and apart of from the jury's answer to Question 3, Plaintiffs failed to prove their fraudulent concealment claim at trial, and Dow is entitled to judgment as a matter of law with respect to that claim. *See* Dkt.2785-1 at 21-23.

[19] In addition to the reasons set out in detail below, Dow is entitled to a new trial because Dr. McClave and Dr. Solow were permitted to testify based on the erroneous denial of Dow's *Daubert* motions.

A. A new trial should be ordered because the essential parameters of any conspiracy found by the jury cannot be ascertained from the verdict

The jury found that Class Plaintiffs had not proven any overcharges on any products prior to November 24, 2000. As discussed in Section I, above, this finding and an examination of the entirety of the record and surrounding circumstances makes clear that the jury decided that a conspiracy of uncertain inception and duration(s), but less than five continuous years, existed. In addition to these temporal aspects of the alleged conspiracy, the product or products covered by the conspiracy, the identity of the purchaser or purchasers injured by the conspiracy, as well as the transaction or transactions impacted by the conspiracy are also all unknowable. Because these essential findings were not set out in the verdict, Dow is entitled to a new trial.

Without knowing the essential contours of any conspiracy found by the jury, entry of judgment is not possible on behalf of any class member, including the class representatives. Whether or not each class member was injured and suffered damages as Class Plaintiffs asserted were questions the jury was required to decide. The jury's determinations, if any, cannot be ascertained from the verdict. The transactions to which the overcharge can be applied (or the extent of the overcharge) cannot be determined. Moreover, this is not a situation where the mechanical application of some formula could be used to distribute the aggregate damages figure recorded on the verdict. One cannot determine what class members or products or purchases to which any formula might be applied. Nor can these determinations be made by another fact finder in a subsequent proceeding. That would violate Dow's Seventh Amendment and Due Process rights. *See In re Rhone-Poulenc Rorer Inc.,* 51 F.3d 1293, 1303 (7th Cir. 1995) ("The right to a jury trial in federal civil cases, conferred by the Seventh Amendment, is a right to have juriable issues determined by the first jury impaneled to hear them . . . and not reexamined by another finder of fact.").

Furthermore, as discussed above, while this case was tried as a class action, that did not alter Class Plaintiffs' obligation to prove a violation of the Sherman Act with respect to *each* class member. The proof requirements for a cause of action are not obviated or lessened when the action is brought on behalf of a proposed class. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613 (1997) (Rule 23 "must be interpreted in keeping with . . . the Rules Enabling Act, which instructs that rules of procedure 'shall not abridge, enlarge or modify any substantive right,' 28 U.S.C. § 2072(b)."); *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2561 (2011). From the information in the verdict form, one cannot determine which if any class member has proven a Sherman Action violation with respect to any particular transaction.

Finally, as noted, the verdict does not permit a determination of which class members were injured or the amount of any damage. Without such information, the distribution of the aggregate damages found by the jury would be akin to an impermissible fluid recovery.[20] Numerous courts have rejected fluid recovery in class actions. *See Abrams v. Interco Inc.*, 719 F.2d 23, 31 (2d Cir. 1983); *Windham v. Am. Brands, Inc.*, 565 F.2d 59, 72 & n.41 (4th Cir. 1977); *Kline v. Coldwell Banker & Co.*, 508 F.2d 226, 233-34 (9th Cir. 1974); *Dumas v. Albers Med., Inc.*, No. 03-0640-CV-W-GAF, 2005 WL 2172030 (W. D. Mo. Sept. 7, 2005) (noting that fluid recovery is "not appropriate when it is used to assess the damages of the class without proof of damages suffered by individual class members"); *Al Barnett & Son., Inc. v. Outboard Marine Corp.*, 64 F.R.D. 43, 55 (D. Del. 1974) (finding fluid recovery inappropriate in antitrust action because "average awards erode due process").

[20] Fluid recovery is "the distribution of unclaimed or unclaimable funds to persons not found to be injured but who have interests similar to those of the class." *In re NASDAQ Market-Makers Antitrust Litig.*, 169 F.R.D. 493, 525 (2d Cir. 1996).

For all these reasons, the foregoing voids in part of the verdict preclude entry of judgment for any class member and necessitate a new trial (if judgment for Dow is not entered). As the Tenth Circuit has recognized, where jury instructions and verdict forms are potentially misleading and the verdict is susceptible to multiple interpretations, a new trial is required. *See Unit Drilling Co. v. Enron Oil & Gas Co.*, 108 F.3d 1186, 1193 (10th Cir. 1997). This is particularly true where the jury may have awarded damages based on an impermissible damage model or theory of recovery, *see, e.g., Fox Motors, Inc. v. Mazda Distributors (Gulf), Inc.*, 806 F.2d 953, 961 (10th Cir. 1986), and where the ambiguous result could have been prevented by asking the jury a few questions. "Only by asking the jury to clarify its verdict could the court have determined the jury's 'true decision.'" *Unit Drilling Co.,* 108 F.3d at 1191 (quoting *Resolution Trust Corp. v. Stone*, 998 F.2d 1534, 1548 (10th Cir. 1993)). "Parties who entrust the resolution of their disputes to the legal system are entitled to no less." *Id.* Dow requested that such clarifying questions be posed to the jury in this case, through the alternative verdict form Dow proposed prior to trial, through the special interrogatory it requested during the jury's deliberations and by requesting clarification of the verdict before the jury was discharged. Trial Tr. at 5320-5321. Accordingly, a new trial should be ordered here.

B. A new trial should be ordered because of errors in the instructions and verdict form

In this case, three types of errors related to jury instructions and the verdict form necessitate a new trial. First, the instructions given to the jury incorrectly framed legal issues on which the jury based its decision. Second, the Court declined to provide any instruction to the jury on several essential questions and declined to submit the verdict form that Dow requested. Third, the general verdict cannot stand because it cannot be determined whether the jury relied on an improper ground for its decision.

Errors in the instructions given to the jury require a new trial when (1) there is "substantial doubt whether the instructions, considered as a whole, properly guided the jury in its deliberations, and (2) when a deficient jury instruction is prejudicial." *Townsend v. Lumbermens Mut. Cas. Co.*, 294 F.3d 1232, 1242 (10th Cir. 2004) (internal citations omitted). The judgment must be reversed if the "jury might have based its verdict on the erroneously given instruction." *Rural Water Dist. No. 4 v. City of Eudora*, 659 F.3d 969, 975 (10th Cir. 2011). "Reversal is necessary even if that possibility is very unlikely." *Wankier v. Crown Equip. Corp.*, 353 F.3d 862, 867 (10th Cir. 2003). "Only when the erroneous instruction could not have changed the result of the case can we say the error is harmless and does not require reversal. *Lederman v. Frontier Fire Protection, Inc.*, 685 F.3d 1151, 1159 (10th Cir. 2012).

The failure to submit a requested instruction may also be grounds for a new trial. A party is not entitled to a specific jury instruction on every correct proposition of law. However, when the other instructions do not establish a sound basis for an argument to the jury on the proposition, the failure to provide the requested instruction may be an abuse of discretion. *See Stoney v. Cingular Wireless LLC*, No. 10-1506, 2012 WL 2581024 (10th Cir. July 5, 2012).

Finally, errors in a verdict form will justify a new trial if there is substantial doubt that the jury was fairly guided. *United States v. Smith*, 13 F.3d 1421, 1424 (10th Cir. 1994). "The general rule, usually stated without qualification, is that when one of two or more issues submitted to the jury was submitted erroneously, a general verdict cannot stand because it cannot be determined whether the jury relied on the improper ground." *Farrell v. Klein Tools, Inc.*, 866 F.2d 1294, 1299 (10th Cir. 1989); *see also Allen v. Wal-Mart Stores, Inc.*, 241 F.3d 1293, 1298 (10th Cir. 2001) ("If this court concludes that the district court erroneously instructed the jury on

an improper theory and we are unable to determine with absolute certainty whether the jury relied on the erroneous instruction, a general verdict must be reversed.").

1. The Court erred by not instructing the jury that it must find for Dow unless Plaintiffs proved their claim of a five-year, four product, five company violation of the Sherman Act

Class Plaintiffs had complete control over the claim they alleged and pursued in this case. Armed with that freedom and following years of discovery, Class Plaintiffs defined their claim with specificity, asserting that Dow violated the Sherman Act by entering into a five year, four product, five party price-fixing conspiracy. That contention was presented to the jury in Instruction 12. Neither the Court's instructions nor the verdict form, however, provided guidance to the jury about what action to take if the jury found something "less" or "other" than what Class Plaintiffs alleged. Furthermore, although the jury unambiguously rejected Class Plaintiffs' claim, the verdict form did not permit the jury to state clearly what it otherwise decided. The result is certainty about the failure of Class Plaintiffs' claim, but ambiguity about everything else stated on the verdict form.

This result was not unavoidable; it was the product of Plaintiffs' insistence on trying its broader theory of conspiracy, and of error. Prior to trial, Dow submitted proposed instructions to the Court stating that the jury had been charged to decide a single class claim of defined scope, not a collection of individual claims and not a class claim of a different or lesser scope.

Dow's proposed instruction on Class Actions included the following language:

> Class Plaintiffs allege a single conspiracy to fix actual prices for all of the chemicals at issue charged to each and every member of the class. This claim is a classwide claim and must be proven for all products, all class members and for the entire period of the alleged conspiracy. It is not the purpose of this trial to decide claims of individual class members apart from the claims of the class as a whole. If you decide that each of the elements of the classwide claim have not been proven for all members of the class and the class as a whole, you must return a verdict in favor of Dow.

The Dow Chemical Company's Responses to Class Plaintiff's Proposed Jury Instructions and Dow's Proposed Jury Instructions (Dkt. 2690-2) at 19. Dow's proposed instruction on the Parties' Contentions included similar language:

> Class Plaintiffs allege that a single, overarching conspiracy existed between the major Urethane chemical manufacturers – BASF Bayer, Huntsman and Lyondell – to fix, raise or stabilize the actual prices for MDI, TCI, polyols and systems sold in the United States from January 1, 1999 through December 31, 2003, and that Dow violated Section 1 of the Sherman Antitrust Act by participating in this conspiracy. Class Plaintiffs further allege that, as a result of the conspiracy between Dow and the other urethane chemical manufacturers, Plaintiffs and the members of the Class suffered injury in the form of money damages in that they paid more for urethane chemicals than they would have paid if there had been no conspiracy.

Id. at 25. Consistent with these proposed instructions, the verdict form submitted by Dow expressly addressed each parameter of the class claim, asking the jury to identify the alleged conspirators, the product(s) affected by the alleged conspiracy, and the time period of the alleged conspiracy. Dow's Proposed Verdict Form & Written Questions (Dkt. 2696-1). Together, the proposed instruction language and verdict form would have provided jurors with guidance about the relationship between the scope of the claim, the evidence in the case and the verdict options. Additionally, completion of Dow's proposed verdict form would have yielded a clear record of the jury's findings on these essential issues.

At the instruction conference during trial, Dow reiterated its request and rationale for a verdict form like the one it had proposed. *See* Trial Tr. at 5165-68. Without it, Dow noted, the jury's conclusions could be difficult or impossible to ascertain. *Id.* at 5166. Use of a more detailed verdict form is particularly important under the circumstances of this case, which involves a precisely defined class claim based on an inflexible, five-year model for damages. *See id.* at 5165-68.

Dow's concerns have proven well founded. During deliberations, the jury sent a note to the Court (Dkt. 2798) indicating that it was struggling with this issue. Dow requested the Court to issue a special interrogatory specifically asking the jury "whether they have found a conspiracy in '99 or at any time prior to November 24 of 2000." Trial Tr. at 5318:4-11. After the jury returned its verdict, counsel for Dow requested that the Court ask the jury for more information about its findings—specifically, "what conspiracy period they actually found." Trial Tr. at 5320-21. The Court denied this request, as it had previously declined to use the instruction language/verdict form submitted by Dow, and to issue an interrogatory to the jury after they sent a note to the Court. Each of these was error. Each necessitates a new trial. *See Townsend*, 294 F.3d at 1242-43 (requiring new trial where district court refused to give instruction that could have altered outcome of trial).

2. The Court erred by issuing instructions on agreement/conspiracy that do not accurately frame the associated legal issues

To establish their claim, Class Plaintiffs were required to prove the existence of a five year conspiracy. As discussed below, the jury instructions failed to frame these essential legal issues properly.

- **The definition of agreement**

Instruction 14 explained the concept of "conspiracy," but it did so without providing adequate guidance about the definition of "agreement," which is the essence of any illegal conspiracy under the Sherman Act. *See* The Dow Chemical Company's Memorandum in Support of Dow's Proposed Jury Instructions (Dkt. 2690-3) at 7-8. By contrast, Dow's proposed instruction on the Sherman Act – Definition of Conspiracy (Dkt. 2690-2 at 34) properly states that an agreement is a meeting of the minds that requires two or more parties to make a conscious commitment to a common scheme. Without that deliberate and intentional

commitment, there can be no illegal conspiracy. *See In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 361 (3d Cir. 2004) ("The most important evidence will generally be non-economic evidence that there was an *actual, manifest agreement* not to compete.") (internal quotation and citation omitted) (emphasis added); *Williamson Oil Co., Inc. v. Philip Morris USA*, 346 F.3d 1287, 1299 n.10 (11th Cir. 2003) ("Although this meeting of the minds need not be formal, it must transpire."); *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 654 (7th Cir. 2002) (Posner, J.) ("[I]t is generally believed, and the plaintiffs implicitly accept, that an express, manifested agreement, and thus an agreement involving actual, verbalized communication, must be proved in order for a price-fixing conspiracy to be actionable under the Sherman Act."); *Champagne Metals v. Ken-Mac Metals, Inc.*, 458 F.3d 1073, 1082 (10th Cir. 2006) ("The essence of a claim of violation of Section 1 of the Sherman Act is the agreement itself.").

Instruction 14 also erroneously conflated *whether* the parties actually entered into an agreement with *how* such an agreement may be formed. For example, Instruction 14 stated that proving a conspiracy does not require evidence that the members of a conspiracy entered into "any formal or written agreement." The Court may have intended that statement to explain that an agreement may exist without an executed contract, but the jury could also have interpreted the language to mean that no agreement at all is required to find a conspiracy. In a very real and practical sense, a formal agreement is required before an illegal conspiracy can be found, even if the agreement is formed in an informal manner. That is the point of the instruction Dow submitted. The failure to explicitly define agreement for the jury without potentially contradictory language was error which warrants a new trial.

- **Evidence of competition**

Instruction 17 attempts to guide the jury in its assessment of evidence about competition. The instruction is erroneous because it fails to instruct the jury about the appropriate weight that should be given to evidence of competition. Evidence that Dow actually competed with its alleged co-conspirators is a direct defense to Class Plaintiffs' claim that Dow entered into an agreement *not* to compete. The language used by the Court in Instruction 17, however, minimized the role and value of such evidence by suggesting that competition may *not* be, a "defense" to the conspiracy claim. Dow's proposed Revised Instruction 17, provided to the Court at the instruction conference, would have made clear to the jury that evidence of actual competition was relevant to Dow's defense to class plaintiffs' claim that a conspiracy existed. Trial Tr. at 5155-58, 5175-76. The Court's failure to make clear the role and significance of evidence regarding competition was prejudicial and requires a new trial.

- **Tends to Exclude**

In a price-fixing case, the range of permissible inferences that may be drawn from ambiguous circumstantial evidence is limited. *See, e.g.*, *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 588 (1986) ("Antitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case."); *Monsanto Co. v. Spray-Rite Serv. Corp.,* 465 U.S. 752, 768 (1984) ("There must be evidence that tends to exclude the possibility of independent action . . . . That is, there must be direct or circumstantial evidence that reasonably tends to prove that [the parties] had a conscious commitment to a common scheme designed to achieve an unlawful objective."). The requirement that Class Plaintiffs must produce evidence that tends to exclude the possibility of independent action by the alleged conspirators is particularly important here because the urethanes chemicals market is an oligopoly. *See Brooke Group Ltd. v. Brown*

& Williamson Tobacco Corp., 509 U.S. 209, 227 (1993) ("[O]ligopolistic price coordination or conscious parallelism, describes the process, not in itself unlawful, by which firms in a concentrated market might in effect share monopoly power, setting their prices at a profit-maximizing, supracompetitive level by recognizing their shared economic interests and their interdependence with respect to price and output decisions."); *City of Tuscaloosa v. Harcros Chems., Inc.*, 158 F.3d 548, 571 (11th Cir. 1998) ("[C]onsciously parallel behavior by oligopolists does not in itself support an inference of agreement, of 'a meeting of the minds,' any more strongly than it supports an inference of legal price maintenance or leadership.").

As established at trial, in an oligopoly, similar or parallel conduct by competitors can be the result of either collusive or independent decisions. In order to avoid chilling the very competitive conduct that the antitrust laws are intended to protect, the jury should have been instructed that it must find for Dow unless Class Plaintiffs produced evidence that tended to exclude the possibility that Dow acted independently. Dow requested instructions that addressed this requirement, including instructions on "Sherman Act—Evidence of Conspiracy" and "Oligopoly." The Dow Chemical Company's Responses to Class Plaintiffs' Proposed Jury Instructions and Dow's Proposed Jury Instructions (Dkt. 2690-2) at 71-75. The Court declined Dow's request or to otherwise instruct the jury on these points. By doing so, the Court committed error justifying a new trial.

- **Jury Deliberations**

During its deliberations, the jury posed one question to the Court. The Court erred in its response. The jury's question asked the Court whether Instruction 24 was predicated on finding collusion existed prior to November 24, 2000. The specific example provided by the jury was "*i.e.*, if we found no conspiracy in 1999 but we found conspiracy and concealment after

November 24, 2000?" Trial Tr. at 5313. In response, the Court stated that the jury should reach the issue of fraudulent concealment only if it found that conspiracy had caused class plaintiffs to pay more for urethane chemicals than they would have paid absent a conspiracy at a time prior to November 24, 2000. Trial Tr. at 5314; Dkt. 2798. That response failed to instruct the jury that in order to find for Class Plaintiffs on their claim of conspiracy, the jury had to determine that a conspiracy existed for the entire time alleged by the class, 1999 through 2003. As noted above, Dow requested the Court to issue a special interrogatory to determine whether the jury had found a conspiracy in 1999 or at any time prior to November 24, 2000. Trial Tr. at 5318. If the jury had been issued that interrogatory and answered "No," then the Court should have entered judgment in favor of Dow, since Class Plaintiffs had failed to prove the class claim they alleged. Instead, the Court answered the jury's question in a way that allowed them to conclude that no conspiracy existed prior to November 24, 2000, but still award damages to class plaintiffs for some unknown period of time. In this case, it is clear that the jury not only might have based its verdict on the Court's incomplete answer to its question, but that it did precisely that. Accordingly, a new trial is warranted.

3. The Court erred by failing to use Dow's proposed jury instruction on document retention/destruction

In their opening statement, Class Plaintiffs argued, over Dow's objection, that the evidence would show that "Dow destroyed documents of Mr. Fischer and others" even though Stephanie Barbour had raised claims about possible antitrust violations. Trial Tr. at 170, 177. Permitting Class Plaintiffs to make that inflammatory and baseless assertion, and then failing to issue a curative instruction was error. That error prejudiced Dow and necessitates a new trial.

Prior to opening statements, Dow objected to Class Plaintiffs' demonstrative exhibits that indicated that Class Plaintiffs intended to feature alleged document destruction in their opening.

The Court overruled Dow's objection. Class Plaintiffs' contention that Dow had improperly destroyed documents in an effort to cover up alleged antitrust violations had no basis in the evidence and was improper. Dow subsequently requested curative relief from the Court on several occasions, but each request was denied.

First, Dow filed a motion seeking to exclude the testimony (by video) of Arthur Eberhart, who testified about Dow's record retention practices and specifically, retention and destruction of records related to witnesses in this case (including Stephanie Barbour and David Fischer). *See* Dkt. 2731. Class Plaintiffs represented to the Court that they were not arguing "spoliation" of evidence. Instead, they claimed that the evidence of Mr. Eberhart was related to their claim that Dow covered up its alleged conspiracy. But relabeling their contention did not alter the effect of Class Plaintiffs' argument that "Dow destroyed documents." Class Plaintiffs were still permitted to assert that Dow improperly destroyed documents, when the evidence was that Dow retained a snapshot of Ms. Barbour's computer and the destruction of any other documents took place pursuant to Dow's normal records management process. Evidence elicited by Class Plaintiffs from Mr. Eberhart was irrelevant and the prejudice created by such evidence (which painted an incomplete and misleading picture of Dow's treatment of the records of Ms. Barbour, Mr. Fischer and others) outweighed any supposed relevance.

Following the testimony of Mr. Eberhart, Dow again requested relief from the prejudice created by Class Plaintiffs' unfounded argument that Dow had "destroyed documents." Dow requested that the Court instruct the jury there was no basis for any inference that Dow had acted improperly with respect to destruction of any records. Trial Tr. at 1528-1529. Dow withdrew the request after the Court expressed its belief that such an instruction was premature; however,

both Dow and the Court acknowledged that Dow's request for such an instruction would be revisited. Trial Tr. at 1530.

Dow again requested a curative instruction in its Motion for Corrective Jury Instructions or, In the Alternative, for Leave to Add to Its Witness List (Dkt. # 2760). Specifically, Dow requested that the Court instruct the jury that the application of Dow's record retention policy to the records of Ms. Barbour, Mr. Fischer and Mr. Wood was standard and routine, and not improper or illicit. Such an instruction was necessary to counter the unfounded and incendiary allegation of class counsel in opening statement, as well as the confusing and incomplete testimony of Mr. Eberhart. The Court declined to give the requested instruction, leaving the jury with a misleading impression of the retention and/or destruction of documents in the case and leaving open the possibility that the jury would conclude that Dow destroyed documents that would have been favorable to Class Plaintiffs.

Finally, during the jury instruction conference with the Court, Dow again proposed a curative instruction relating to the standard and routine application of Dow's record retention process as it related to the files of Barbour, Fischer and Wood (Dkt. # 2792-4). The Court again declined to give this instruction, leaving unaddressed the taint of the Class Plaintiffs' baseless and inflammatory assertions about document destruction. The Court's failure to correct this error despite repeated requests from Dow was prejudicial error warranting a new trial.

4. The Court erred by failing to use Dow's proposed jury instruction on the 2004 investigation

Class Plaintiffs also were permitted to leave the jury with an incomplete and misleading picture of the 2004 investigation into certain complaints made by Stephanie Barbour. Dow requested that the Court instruct the jury that any references to the 2004 investigation should play no part in the jury's consideration of the case. The Court declined to give the requested

instruction, leaving the jury free to speculate about the nature of Ms. Barbour's complaints, the scope of the 2004 investigation and the results of the investigation.

Prior to trial, Dow sought leave to supplement its trial exhibit list to add certain documents relating to the 2004 investigation (Dkt. 2712). The documents at issue properly had been withheld during discovery, based on attorney-client privilege. However, once Class Plaintiffs notified Dow that they intended to call Dow's former in-house attorney, Lynn Schefsky, to testify regarding complaints made by Stephanie Barbour, it became apparent that Class Plaintiffs intended to offer an incomplete and misleading picture of the nature of Ms. Barbour's complaints and Dow's response to them. *See* The Dow Chemical Company's Memorandum in Opposition to Emergency Motion to Preclude Dow from Using Documents Relating to Barbour Complaints (Dkt. 2712). At that point, it became crucial for Dow to produce the privileged documents and request leave to use them at trial. The Court deferred ruling on Dow's request, but directed both parties to refrain from making any reference to the 2004 investigation until it ruled (Dkt. 2708).

As trial progressed, Dow continued to seek relief, in an effort to rebut the improper suggestion by Class Plaintiffs or any inference by the jury that Dow was improperly concealing information about the 2004 investigation. Prior to the testimony of David Fischer (by video), Dow requested that the jury be instructed that the content and conclusion of the investigation referenced in Mr. Fischer's testimony would not be permitted in evidence and that the jury should draw no inference for or against Dow as a result of that ruling. Trial Tr. at 896-900. The court refused to give any instruction concerning the 2004 investigation. *Id.* at 899-900. Dow raised the issue again in connection with the testimony of Marco Levi, *id.* at 2717, and the issue of the 2004 investigation was discussed at length with the Court prior to the testimony of Phil

Cook, *id.* at 4051-4068. Despite the danger that the jury would draw improper conclusions from Dow's failure to present evidence concerning the scope and results of the 2004 investigation, the Court declined to give any instruction. *Id.* at 4068. The Court's ruling resulted in Dow being penalized for its proper assertion of the attorney-client privilege and, as a result, was improper. *See Parker v. Prudential Ins. Co.*, 900 F.2d 772, 775 (4th Cir. 1990) (noting that "a client asserting the privilege should not face a negative inference about the substance of the information sought.").

Dow was not, as Class Plaintiffs suggested, attempting to affirmatively use the 2004 investigation to its advantage after having cloaked it with the attorney-client privilege. Instead, Dow sought only to prevent Plaintiffs from misleading the jury and falsely implying that the alleged antitrust violations to which Ms. Barbour testified in 2010 were the same as the complaints she raised during the 2004 investigation. During the jury instruction conference with the Court, Dow again requested that the jury be instructed that it should not speculate about the nature or results of the 2004 investigation and that any references to the investigation should not play any part in the jury's deliberations (Dkt. # 2792-3). The Court refused to give the requested instruction, Trial Tr. at 5165, and its failure to do so was prejudicial to Dow. Dow should not have been penalized for properly asserting the attorney-client privilege and the jury should have been instructed in a way that ensured it would not in any way hold the 2004 investigation against Dow.

C. Dow should have been permitted to introduce Larry Stern's testimony about his immunity agreement with the Department of Justice and subsequent financial windfall, which bore directly on Stern's motivations and credibility

The Court's decision to preclude Dow from introducing evidence related to the credibility and motivations of Larry Stern, notwithstanding that such evidence generally is deemed relevant

and admissible,[21] warrants a new trial. Specifically, Dow was barred from introducing testimony of Stern's immunity agreement with the DOJ and his significant financial windfall thereafter.[22] Preclusion of this evidence prejudiced Dow's ability to defend against Stern's allegations.

At trial, Class Plaintiffs relied heavily on Stern's testimony regarding alleged discussions he had with David Fischer (and others) at Dow and other industry counterparts related to future pricing and margins. Class Plaintiffs then used their economic expert, Dr. Solow, to reinforce Stern's testimony and tell the jury it represented evidence of conspiratorial activity. Indeed, Stern and his testimony were referenced over 40 times during the course of Dr. Solow's direct examination.[23] Class Plaintiffs thus were able to give the imprimatur of their expert to Stern's testimony, all without any challenge as to Stern's motives and credibility.

All witnesses refuted the alleged pricing discussions Stern described; Class Plaintiffs thus admitted their case was in part a credibility contest.[24] But, Class Plaintiffs were able to exploit the Court's *in limine* ruling to unfairly tip the credibility scales in their favor by casting doubt on the motives of each of these witnesses who refuted Stern's testimony, while safely trumpeting in

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[21] *See, e.g., United States v. Abel,* 469 U.S. 45, 52 (1984) ("Bias may be induced by a witness' like, dislike, or fear of a party, or by the *witness' self-interest*. Proof of bias is almost always relevant because the jury, as finder of fact and judge of credibility, has historically been *entitled to assess all evidence* which might bear on the accuracy and truth of a witness' testimony.") (emphasis added).

[22] Transcript of Motion *in Limine* Conference (Exh. 4), Tr. 54:3-55:6. (Jan. 9, 2013); Dkt. 2691.

[23] For example, Dr. Solow used Stern's testimony about statements allegedly made by Michael Parker, Dow's CEO, about future prices at a golf event to opine that trade associations provided a "fertile" ground for collusion. Trial Tr. at 2058:1-2059:6. He similarly recited Stern's testimony of supposed pricing discussions Stern had with Fischer at Bayer's facilities at Baywood to assert that the conduct in the industry was consistent with collusion. *Id.* at 2085:8-2086:12. These same incidents were highlighted by Class Plaintiffs in their opening and closing arguments. *Id*. at 186:18-187:17, 187:25-189:9, 5215:25-5217:9, 5219:23-5220:1.

[24] Trial Tr. at 5224:6-7 ("So you have a straight conflict of testimony.")

their opening and closing arguments the lack of evidence in the record of any motive for Stern to be dishonest:

> To believe Dow's story, you'll have to conclude that Miss Barbour, ***Mr. Stern***, Mr. Kirk, Miss Blumberg, Mr. Phalen, and a host of documents, that they're all lying. But there won't be evidence that they were lying. ***Why would they***?[25]

> The second thing you should look to is ***who has the motive*** to lie and who has the motive to tell the truth? Well, it doesn't take a scientist to understand that somebody who has been engaged in wrongdoing has a motive to deny being engaged in wrong doing. That's a simple thing…***But what is Stern's motive*** to come here and tell you not only that Mr. Fischer was engaged in illicit activity, but that he himself was engaged in illicit activity, and that his employer was engaged in illicit activity?...Well, ***there is no real motive***.[26]

The reality was that Stern *did* have a motive to be dishonest. Stern sought and obtained amnesty from the DOJ in exchange for his testimony. Under the DOJ Antitrust Division's leniency program, an individual applicant "*must* admit [his] participation in a criminal antitrust violation involving price fixing," before "[he] will receive a conditional leniency letter."[27] That conditional leniency letter was significant to Stern, as it allowed him to continue serving as chief executive officer of a new company that paid him over $40 million in three years. *See* Stern Depo. Tr. 1017:5-12, (Ex. 3). Stern admitted that without the DOJ amnesty, he would have been replaced as CEO. *Id*. at 1018:2-1019:2. In all likelihood, being prosecuted for antitrust

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[25] Trial Tr. at 214:17-22 (emphasis added).

[26] Trial Tr. at 5225:19-5226:14 (emphasis added).

[27] *See* "Frequently Asked Questions Regarding the Antitrust Division's Lenience Program and Model Leniency Letters," November 19, 2008, at 5; *see also id.* at 24 ("As with a corporate applicant, an individual leniency applicant is required to admit to his or her participation in a criminal antitrust violation.") (*available at www.justice.gov/atr/public/criminal/239583.htm*.); "Cornerstones of an Effective Leniency Program," Speech, Scott Hammond, U.S. Dep't of Justice, Nov. 22-23, 2004 ("The Individual Leniency Program is available to individuals who approach the Division on their own behalf … and report anticompetitive activity. Individuals who cooperate through this Program receive amnesty and a promise of non-prosecution for the anticompetitive activity they report.") (*available at www.justice.gov/atr/public/speeches/206611.htm)*.

violations would have deprived Stern not only of his salary, but also excluded him from a public offering the company was planning at the time. Stern further conceded he told his story to the DOJ to protect himself from being subject to the price fixing investigation the DOJ was conducting in the polyurethanes industry in December 2005 and in 2006. *Id.* at 1133:22-1134:9.

Given the financial incentives Stern had at stake without amnesty, (*id.* at 1014:2-17) it would have been reasonable for the jury to conclude he had a motive to embellish his story to the DOJ and subsequently stick to that story in the civil litigation after Class Plaintiffs promised they would not sue Stern in exchange for cooperation (*Id*. at 207:19-22). Stern's amnesty agreement with the DOJ and his financial incentives to pursue it were plainly relevant to his testimony and to the jury's evaluation of credibility and motive. It was for the jury to decide whether either provided Stern with a motive to embellish his testimony. *See, e.g.*, *Downey v. Deere & Co.,* No. 04-1359-MLB, 2006 U.S. Dist. LEXIS 8534, at *8-10 (D. Kan. Mar. 3, 2006) (plaintiff's financial motivation to fabricate claim was "highly relevant to a fair determination of his credibility and motive"); *Koch v. Koch Indus., Inc.,* No. 85-1636-C, 1992 WL 223826, at *15 (D. Kan. Aug. 24, 1992) ("It is a truism that evidence of bias is critical in evaluating the credibility of a witness."). It is reasonably likely the jury would have reached a different verdict had Dow been permitted to use Stern's own admissions to attack his credibility. This justifies a new trial. *See, e.g., United States v. Robinson,* 583 F.3d 1265, 1270-71 (10th Cir. 2009) (concluding a new trial was justified where there was a "reasonable probability" the result would have been different had the defendant been able to cross-examine primary witness using excluded evidence).

D. Dow is entitled to a new trial because the imposition of joint and several liability in this case is unconstitutional and otherwise inappropriate

As the Court is aware, Dow has challenged the constitutionality of awarding damages based on joint and several liability in this case. *See* Trial Tr. at 5162:16-5163:9; *see also* Dow's Responses to Class Plaintiffs' Proposed Jury Instructions and Dow's Proposed Jury Instructions, Dkt. 2690-2 at 55. Therefore, even if the trial record supported the jury's answer to Question 5 on the verdict form (which it does not), Dow would be entitled to a new trial because the imposition of joint and several liability in this case was unauthorized and inappropriate.

The federal antitrust statutes upon which Plaintiffs' claims are based do not authorize the imposition of joint and several liability. Instead, joint and several liability in federal antitrust cases is a creature of federal common law. While Dow acknowledges that many courts have presumed the legality of imposing joint and several liability on federal antitrust defendants despite that the remedy is not authorized by statute, Dow contests (1) the authority of courts to impose joint and several liability on federal antitrust defendants under any circumstances, and (2) the imposition of joint and several liability on Dow under the particular facts and circumstances of this case.

Dow's challenge to the general authority of courts to impose joint and several liability on federal antitrust defendants is straightforward: the remedies available to antitrust plaintiffs are expressly provided for by statute, and courts lack the authority to impose monetary sanctions for a Sherman Act violation beyond those specifically enacted by Congress.

Dow's challenge to the imposition of joint and several liability under the particular facts and circumstances of this case is based on several considerations. First, joint and several liability was not requested by Plaintiffs in the operative complaint in this case, filed in 2006. *See* Dkt. 307 at 18. That was Plaintiffs' operative pleading for more than six years, including the entire

discovery period, until the pretrial conference in July 2012. Although Plaintiffs included in the Pretrial Order an assertion that joint and several liability should be imposed, that belated assertion was insufficient to put Dow on notice of a potentially significant increase in its exposure without violating Dow's due process rights, and therefore came too late. Second, the unfettered application of joint and several liability to Dow in this case would violate the due process clause of the Fifth Amendment. As Dow has previously noted, at trial Plaintiffs asked for a monetary judgment that (after trebling) would exceed more than ten times the amount of alleged damages based on Dow's own sales. As with punitive damage awards, due process generally limits awards vastly disproportionate with actual effects of the defendant's own conduct. *See State Farm Mut. Automobile Ins. Co. v. Campbell*, 538 U.S. 408, 416, 417 (2003); *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 562-62 (1996). The due process problems here arising from the interplay of joint and several liability with trebling are exacerbated by the fact that federal courts do not recognize a right of contribution for liability under the federal antitrust laws. *See Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 646 (1981). The due process problems are further exacerbated here because Dow's exposure to both statutorily-authorized trebled damages combined with judicially-imposed joint and several liability does not take account of Dow's relatively limited role in the alleged misconduct. Because joint and several liability under federal antitrust law is a function of federal common law, courts can and should decline to impose joint and several liability—at all, or in part—based on an assessment of the relative role of the defendant in the contested conduct (and should issue jury instructions accordingly). In view of the foregoing, Dow contends that Jury Instruction No. 21 was erroneous, and that it is entitled to a new trial.

CONCLUSION

For the foregoing reasons, Dow respectfully requests that the Court (1) enter judgment in favor of Dow, or in the alternative (2) grant Dow a new trial and/or decertify the Class.

Respectfully submitted,

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Certificate of Service

On March 4, 2013, a copy of The Dow Chemical Company's Motion for Judgment as a Matter of Law or, In the Alternative, For a New Trial 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
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