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

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

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PRELIMINARY STATEMENT

Dow's post-trial briefs identified fundamental questions that are at the core of these post-trial proceedings, such as the effect of the jury's answers on the verdict form, particularly the answer to Question 3. Dow challenged Plaintiffs to address those questions head-on. Plaintiffs did not meet that challenge. Rather than directly engage the fundamental questions, Plaintiffs try to argue around them. These issues cannot be evaded, however. The necessity of confronting them squarely has been brought home by last week's Supreme Court decision in *Comcast Corp. v. Behrend*, -- S.Ct. --, 2013 WL 1222646 (Mar. 27, 2013). Focusing on many of the same issues as those before the Court here, including a regression model by Dr. McClave, the Supreme Court held that the class in *Comcast* could not be maintained because, among other things, Dr. McClave's model fell "far short of establishing that damages are capable of measurement on a classwide basis."

Dr. McClave's model here is equally deficient. When the jury answered "No" to Question 3 of the Verdict Form, it rejected Dr. McClave's fundamental premise that all variance between his modeled pricing and actual pricing is explained solely by collusion. That brings *Comcast* squarely into play here. Because of *Comcast*, as well as the additional grounds stated in Dow's briefs, the Court should enter judgment for Dow or at a minimum decertify the class and set aside the verdict.

ARGUMENT

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

Dow's motion for judgment on the verdict is driven by a simple syllogism:

(A) A single factual theory of the case was presented to the jury and the Court's instructions specifically charged the jury to resolve it—that there was an all-in, five-year conspiracy that caused classwide overcharges.

(B) The jury found that the claim presented to them had not been proven, a finding unequivocally expressed in the jury's negative answer to Question 3 on the verdict form, the jury's ultimate damage award, and in its unambiguous note to the Court.

(C) Therefore, the case is over.

Plaintiffs at various times attack, ignore or try to evade the components of this syllogism. None of these tactics is effective. None alters the syllogism or the conclusion it compels.

A. The "All or Nothing" Conspiracy Theory Was Plaintiffs' Sole Claim

Dow's opening brief ("JMOL/NT Mtn.") (Dkt. 2809), at 4-5, recounted in detail how the five year, all-in conspiracy theory was asserted early on by Plaintiffs and carefully preserved by both the Plaintiffs and the Court up through the commencement of trial. None of these facts is contradicted in Plaintiffs' opposition ("JMOL/NT Opp.") (Dkt. 2816). With equal specificity, Dow made the same demonstration with respect to the trial presentations and evidence, including Plaintiffs' claim of a five-year, all-in model of injury and damages. JMOL/NT Mtn. at 5-10. Again, Plaintiffs cite no record of any different trial theory.

Plaintiffs now insist that the "all or nothing" theory of conspiracy is actually Dow's post-trial invention and not the theory Plaintiffs pursued throughout the case.[1] JMOL/NT Opp. at 13-15. In support, Plaintiffs point to Dow's expression of concern over the possibility that Plaintiffs would waffle on their all or nothing theory as the trial progressed. *Id.* at 14. But that concern proves the opposite of what Plaintiffs urge: it proves that the all-in theory was Plaintiffs', not

[1] Plaintiffs note that Dow challenged the conspiracy evidence for different periods of time within the full five year period. JMOL/NT Opp. at 14-15. But Dow's approach was entirely consistent with Dow's attack on the five-year conspiracy. Dow moved for summary judgment on the full conspiracy and argued at trial that the many failures of proof for certain years, products, and suppliers all demonstrated that the five-year conspiracy could not be proven.

Dow's, and that Dow consistently insisted that a specific theory be put to the jury for resolution. *See also id.* at 4.

Plaintiffs also contend the Court told the jury that it was free to find for Plaintiffs based upon a conspiracy different from the one stated in the Pretrial Order. *Id.* at 8-12. Yet the instruction Plaintiffs single out does not even address the nature and scope of the conspiracy they alleged. Rather, Instruction 14 is a standard instruction referring to proof of "means and methods," as further reflected in the ABA instructions and other citations in Plaintiffs' footnote 1.[2]

Furthermore, Plaintiffs' argument utterly ignores Instruction 12, which defined the conspiracy claim the jury was charged with resolving. Instruction 12 carefully and precisely states the contention at issue: Dow was alleged to have entered "**a**" price fixing conspiracy, "**that** conspiracy existed at least as early as January 1999…." and Plaintiffs suffered injury "as a result of **that** conspiracy." Jury Instructions (Dkt. 2797) at 13 (emphasis added). There was only **one** conspiracy theory that lasted for **at least** five years.

B. Plaintiffs Fail to Harmonize the Verdict, Note and Record

The jury's answers to Questions 1, 2 and 3 reveal that the jury did not find actual injury to all class members from a five-year conspiracy. When those answers are considered with the jury's note and the record, the only conclusion is that the jury rejected the contention that a five-year conspiracy existed.

The jury's findings must be "construed in the light of the surrounding circumstances and in connection with the pleadings, instructions, and issues submitted." *Harvey v. Gen. Motors Corp.*, 873 F.2d 1343, 1347 (10th Cir. 1989). The Court must "attempt to harmonize the

[2] Instruction 17, also cited by Plaintiffs, likewise does not purport to describe the conspiracy at issue.

answers, if it is possible under a fair reading of them." *Id.* (quoting 9B Wright & Miller, Federal Practice and Procedure: Civil § 2510 (3d ed. 2012). In its opening brief, Dow sought to harmonize all of the answers in the verdict with the jury's pre-verdict note and the entirety of the record. Plaintiffs made no such effort. Rather, they assert that the jury's note cannot even be considered. JNOV/NT Opp. at 11-12. That is not the law.

In the Tenth Circuit, jury notes should be considered in order to interpret civil verdicts. *See Audiotext Commc'ns Network, Inc. v. U.S. Telecom, Inc.*, 156 F.3d 1243 (10th Cir. 1998).[3] Citing two criminal cases, Plaintiffs assert that courts may not consider the note, or *any* evidence outside of the verdict. Criminal verdicts, however, are governed by different considerations and law. In criminal cases, the courts do not need to resolve potential conflicts in verdicts. *United States v. Powell*, 469 U.S. 57, 64-66 (1984) (holding that inconsistent verdicts are permissible in the criminal context because the Government cannot correct errors due to the Double Jeopardy Clause and the jury's prerogative to be lenient towards a criminal defendant); *see also United States v. Espinoza*, 338 F.3d 1140, 1147 (10th Cir. 2003) (cited by Plaintiffs) ("There are sound reasons, however, not to concern ourselves with the consistency of jury verdicts *in criminal*

[3] Plaintiffs attempt to distinguish *Audiotext Commc'ns Network* because the jury note was drafted after the verdict. The court in *Audiotext* drew no such distinction. Nor did the court appear to believe it was doing anything remarkable in considering the jury's comments. No matter when or how a message is communicated, the law is clear that it may be considered at the post-verdict motion stage for the purposes of determining whether the jury's verdict is consistent.

Plaintiffs also cite two cases which are notable because the absence of a note or equivalent indication of intent was reason to let a verdict stand. *See Midwest Underground Storage, Inc. v. Porter*, 717 F.2d 493, 501 (10th Cir. 1983) (declining to reverse the district court's entry of a jury verdict subject to two plausible interpretations, one of which enabled the verdict to be upheld, where the jury gave no outward signals to suggest which view it adopted); *Yeager v. United States*, 557 U.S. 110, 122 (2009) (refusing to consider why a jury was hung when the jury left no clues to explain its failure to reach a verdict).

cases.") (emphasis added).[4] Regardless, the jury's answer to Question 3, even without the jury note, confirms that the jury rejected Plaintiffs' theory of conspiracy.

C. Plaintiffs Should Not Be Permitted to Change Their Claim

Plaintiffs' implicit request that they be permitted to amend their theory of the case now should be rejected out of hand. The obvious prejudice to Dow was recited in its opening brief. Plaintiffs' only response is that Dow was "on notice" of the "key facts" that might support an unspecified conspiracy of unknown but shorter duration. JMOL/NT Opp. at 13. But the issue is not notice of "key facts," but rather notice of the specific contention that the jury was told to decide. Rule 15 and the most basic Due Process and Seventh Amendment rights foreclose Plaintiffs' efforts to avoid the jury's rejection of Plaintiffs' own conspiracy claim.

As explained in Dow's opening brief at 5, 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). The only claim preserved in the Pretrial Order here is the five-year conspiracy reflected in Instruction 12. Tellingly, Plaintiffs make no attempt to distinguish this doctrine or argue that changing their legal theory after trial would be consistent with Rules 15 and 16.

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[4] Even in the criminal context, many courts have allowed consideration of a jury note for interpretative purposes. *See United States v. Ailsworth*, 138 F.3d 843 (10th Cir. 1998) (considering a note written on the verdict form).; *United States v. Zavala*, 541 F.3d 562 (5th Cir. 2008) (using a jury note to determine that the jury relied on the impermissible piece of evidence such that its admission was not harmless); *United States v. Southwell*, 432 F.3d 1050, 1055 (9th Cir. 2005) (inferring that the jury's verdict was not unanimous due to its note to the judge); *United States v. Ristovski*, 211 F.3d 1271, at *7 (6th Cir. 2000) (inferring that a jury had been "seeking reassurance" from the court based on its note); *United States v. D'Angelo*, 598 F.2d 1002, 1004 n.3 (5th Cir. 1979) (noting that consideration of jury notes is appropriate where there is a question "as to what the jury's verdict actually was or as to whether or not it was unanimous").

Claims not preserved in the pretrial order are eliminated from the action because otherwise the defendant is denied its due process right to notice of the claim it must defend. *See Deere & Co. v. Johnson*, 271 F.3d 613, 622 (5th Cir. 2001) (stating that any analysis of "trial of unpled issues" "in the absence of express consent" must "be viewed on a case-by-case basis and in light of the notice demands of procedural due process," and noting that "***due process concerns are most acute when a party seeks a pleading amendment post-verdict***") (emphasis added); *Doubleday & Co., Inc. v. Curtis*, 763 F.2d 495, 502 (2d Cir. 1985); *Cioffe v. Morris*, 676 F.2d 539, 542 & n.8 (11th Cir. 1982). Accordingly, courts have refused to impose liability based on **theories** not disclosed pretrial, even when the "key" facts were known to the defendant. For example, in *Jimenez v. Tuna Vessel "Granada,"* 652 F.2d 415, 415, 419-20 (5th Cir. 1981), the plaintiff "generally alleged unseaworthiness" of a vessel as the cause of his injury, and the district court went on to find that the combination of weather and working conditions rendered the vessel unseaworthy. However, the plaintiff's "sole theory of recovery," as stated in the pretrial order, was that the vessel was unseaworthy due to actions of the navigator that, under the circumstance of the weather and working conditions, caused plaintiff injury. *Id.* at 415-16. The district court rejected plaintiff's theory and imposed liability based upon a different theory of unseaworthiness. *Id.* at 418-19. The Fifth Circuit found that because "[a]ll of the evidence upon which the court relied" in finding liability "on unpled grounds[,] was relevant in one degree or another to the issue made in the pleadings," it followed that "fair notice of the unpleaded theory" was "not present" such that "the notice demands of procedural due process" required the judgment of the district court to be reversed and remanded. *Id.* at 421-22. Put differently, a plaintiff may not change its theory post-trial when at trial "plaintiff sought to establish his version of the fall, while defendant sought to show that it took place in some other way." *Id.* at

418. The court in *Jimenez* thus rejected the very argument that Plaintiffs now make, *i.e.*, that notice of the facts is sufficient when notice of the theory of liability is absent.[5]

Plaintiffs also argue that notice of a broader conspiracy includes notice of a lesser conspiracy. JNOV/NT Opp. at 13 & n.6. The criminal cases Plaintiffs cite for this contention, however, are entirely consistent with Dow's argument. They arise from the Government's practice of charging criminal defendants with multiple overt acts of criminality, any one of which would be sufficient to satisfy the elements of the crime charged. All these cases establish is that when multiple theories are disclosed pre-trial and presented to a jury, the jury can reject one theory and adopt another. *See United States v. Miller*, 471 U.S. 130, 134 (1985) ("Miller's indictment properly alleged violations of 18 U.S.C. § 1341, and it fully and clearly set forth a number of ways in which the acts alleged constituted violations. The facts proved at trial clearly conformed to one of the theories of the offense contained within that indictment . . . ."); *United States v. Coughlin*, 610 F.3d 89, 104, 106 (D.C. Cir. 2010) (defendant could be convicted of one fraud and not another in alleged "scheme of many parts"; "We agree with the defendant that, for the government to prevail on the 'narrower scheme' theory on appeal, it must have presented the jury with the possibility of finding such a scheme at trial.").[6]

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[5] *Accord Koch v. Koch Indus. Inc.*, 203 F.3d 1202, 1215, 1217-18 (10th Cir. 2000) ("[A]t the close of their case," plaintiffs moved to amend the pretrial order to add a theory based upon evidence presented by the defense. The Tenth Circuit affirmed the district court's denial of plaintiffs' motion, stating that lack of consent to the trying of the new theory meant that "this court need not undertake a Rule 15(b) prejudice analysis.").

[6] The same is true of other cases cited by Plaintiffs. *United States v. Caldwell*, 589 F.3d 1323, 1333 (10th Cir. 2009) (defendant "admits that the government presented sufficient evidence to prove Caldwell was involved in two separate drug conspiracies"); *Ailsworth*, 138 F.3d at 849 ("Although the second superseding indictment charged a broad conspiracy among seven individuals to possess and distribute cocaine base or crack cocaine . . ., it also alleged many specific offenses which made up that widespread conspiracy. The jury in this case found Defendant guilty of six underlying substantive offenses. The jury believed that Defendant conspired to commit three of those offenses . . . ."); *see also United States v. Allmendinger*, 706

The only claim presented to the jury here was whether Plaintiffs had proven their claim of a five-year conspiracy that impacted all class members. In answering "No" to Question 3, the jury rejected that claim. Judgment must therefore be entered for Dow.

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

The McClave Model cannot survive the jury's verdict. As Dow has explained, the McClave Model predicted damages across the entire 1999-2003 period, yet the jury found no injury for at least the period prior to November 24, 2000. That means "something else" must have caused the "variance" between actual prices and the model's predicted prices in that period. But the McClave Model does not control for that "something else." As a result, the jury could not rely upon the McClave Model to award damages for the period after November 24, 2000, because it does not calculate damages resulting from the alleged illegal conduct.

Dow's opening brief provided extensive case law to support this common-sense proposition, and just last week, the Supreme Court in *Comcast* further confirmed Dow's arguments by rejecting another McClave model that failed to isolate damages resulting from the alleged illegal conduct at issue. 2013 WL 1222646, at *7. The plaintiffs in *Comcast* alleged

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F.3d 330, 335-36, 340 (4th Cir. 2013) (defendant made "no claim that the amendment [to the indictment, which amendment defendant had affirmatively sought before trial] surprised him or hindered his defense").

The remaining cases cited in footnote 2 are not relevant. *See United States v. Suntar Roofing, Inc.*, 897 F.2d 469, 476 (10th Cir. 1990) (considering claim of inconsistent verdicts); *Blankenship v. Herzfeld*, 661 F.2d 840, 846 (10th Cir. 1981) (pre-trial order and theory of liability were the same conspiracy); *Cackling Acres, Inc. v. Olson Farms, Inc.*, 541 F.2d 242, 246-47 (10th Cir. 1976) (rejecting argument that verdict was internally inconsistent); *Union Carbide & Carbon Corp.*, 300 F.2d 561, 587 & n.12 (10th Cir. 1961) (jury answered specific interrogatories detailing the damages suffered in each time period corresponding to "respective members of the class"); *In re TFT-LCD (Flat Panel) Antitrust Litig.*, MDL No. 1827, 2012 WL 4858836, at *4 (N.D. Cal. Oct. 11, 2012) (considering issue preclusion questions); *In re Scrap Metal Antitrust Litig.*, No. 02-CV-844, 2006 WL 2850453, at *3 n.7 (N.D. Ohio Sept. 30, 2006) (defendant abandoned challenge to sufficiency of proof on the issue of conspiracy).

four theories of antitrust harm and sought to prove damages with a model by Dr. McClave that did not distinguish the damages attributable to each theory. *Id.* at *3. The lower courts certified a class based on only one of those four theories. *Id.* The Supreme Court reversed, holding that Dr. McClave's damage model could not support class certification because of its "inability to bridge the differences between supra-competitive prices in general and supra-competitive prices attributable to" the single certified theory of harm. *Id.* at *7. The Court explained that damage models "must measure only those damages attributable to" the alleged theory of harm and that "prices whose level above what an expert deems 'competitive' has been caused by factors unrelated to an accepted theory of antitrust harm are not 'anticompetitive' in any sense relevant here." *Id.* at *5, 7.

Ever since they committed to produce a model that met the requirements of Rule 23, Plaintiffs have made the McClave Model the centerpiece of their case. But, the jury rejected it with its answer to Question 3 on the Verdict Form. *Comcast* and the other authority cited by Dow make clear that the McClave Model provides no evidentiary support for Plaintiffs' claim.

A. Plaintiffs' Statistical Model Must Demonstrate a Specific Causal Nexus Between Challenged Conduct And Actual Prices

The issue addressed by the Supreme Court was whether Dr. McClave's multiple regression model was able to "establish that damages are susceptible of measurement across the entire class for purposes of Rule 23(b)(3)." *Id.* at *5. While noting as a preliminary matter that such calculations need not be exact, the Court stated that "any model supporting a 'plaintiffs damages case must be consistent with its liability case, particularly with respect to the alleged anticompetitive conduct,'" *id.* (quoting ABA Section of Antitrust Law, Proving Antitrust Damages: Legal and Economic Issues 57, 62 (2d ed. 2010)) and reiterated its instruction in *Dukes* that the analysis of whether this was so must be "rigorous." *Id.* (citing *Wal-Mart Stores,*

Inc. v. Dukes, 131 S. Ct. 2541, 2551-52 (2011)). In the case before it, the Court determined that the McClave model was not designed to accomplish the necessary task and therefore could not sustain certification of a class.

The Court reasoned that the crucial "first step in a damages study is the translation of *the legal theory of the harmful event* into an analysis of the economic impact *of that event*." *Id.* at *7 (quoting Federal Judicial Center, Reference Manual on Scientific Evidence 432 (3d ed. 2011) (emphasis added by Court). But both courts below "ignored that first step entirely," as had Dr. McClave. His model "calculated damages resulting from 'the alleged anticompetitive conduct as a whole' and did not attribute damages to any one particular theory of anticompetitive impact." *Id.* at *7. "In other words, the model assumed the validity of all four theories that respondents attributed to petitioners' actions," even though only one of them remained in the case. *Id.* at *6. The result was that the model was unable "to bridge the differences between supra-competitive prices in general and supra-competitive prices attributable" to the one remaining theory of distortion. *Id*. at *7. (See Figure 1, filed as Appendix C.) The Court found that this failure to isolate the impact of the conduct at issue from the price impact "caused by factors unrelated to an accepted theory of antitrust harm" resulted in a model that was fatally flawed. *Id.*

B. As In *Comcast*, Dr. McClave Admitted Here That His Model Was Not Specifically Tied To Dow's Alleged Misconduct

The same essential defect lies at the core of the model advanced by Plaintiffs here. In this case too, Plaintiffs advanced more than one theory of anticompetitive conduct at the time Dr. McClave designed and applied his multiple regression model. Two theories of collusion were reported in Dr. McClave's own report, one on prices and the other to allocate customers and markets. McClave Rpt. at 3 (Dkt. 2707-5). It was not until more than a year after Dr. McClave finished his work that Plaintiffs decided not to pursue the second theory. Pretrial Order at 4-5

(July 10, 2012) (Dkt. 2374). Because the McClave Model does not distinguish the impact of the alleged collusion on prices from other non-competitive conduct such as alleged customer and market allocation, it does not reflect or allow for Plaintiffs' decision. This is precisely the kind of defect addressed in *Comcast.* The scope and significance of the defect expanded further at trial. The trial record shows not one but several factors that could account for the price variance that Dr. McClave purported to measure with his model, including:

- Differences between the benchmark period and conspiracy period affecting price negotiations, including capacity utilization and dramatically different market conditions (Trial Tr. at 3131:20-25, 3132:24-3133:18, 3187:4-3188:14, 3212:20-3214:7, 3242:16-25, 3253:10-3254:15, 4737:10-17, 4745:1-4748:9, 4749:8-4755:14, 4756:17-4758:3, 4822:14-4823:8);[7]

- Over-fitting of the model during the benchmark period (Trial Tr. at 4874:6-23, 4995:16-4996:7);

- Oligopolistic interdependence, which both Dr. Solow and Dr. McClave admitted could produce supra-competitive prices (*Id*. at 2350:25-2351:6, 3044:21-3045:5).

The McClave Model had no way to measure the impact of **any** kind of collusion. Dr. McClave admitted this on cross, repeatedly. Asked what accounted for the variance between predicted and actual prices during the alleged conspiracy period, Dr. McClave testified that his model "doesn't explain the difference"; it only shows "a variance that is not explained by those factors [that he controlled for]." *Id*. at 3000:18-21, 3001:7-9.

Therefore, the model certainly did not gauge the impact of specific anti-competitive conduct at issue. Nothing in the model actually measured the relationship between price increase announcements and actual prices, which was the heart of Dr. Solow's testimony regarding the

[7] The fact that Plaintiffs disputed or sought to minimize the evidence of differences does not change the analysis under *Comcast*. In *Comcast* too, all of the allegations of wrongful conduct were contested. The importance of those allegations resided not in whether they were proven true, but that the model was not designed to distinguish any impact that flowed from the sole theory of wrongful conduct upon which the class certification was predicated.

collusive agreement in this case. Indeed, Dr. Solow admitted that the model did not establish or quantify any relationship between price announcements and actual prices: "I will agree with you that there's no relationship [between price announcements and actual prices] in Dr. McClave's report." *Id*. at 2215:20-23, 2217:8-12).

Dr. McClave himself then acknowledged that his model was not even designed to establish linkage to the wrongful conduct alleged in this case:

> Q. And your model – your model doesn't have any place that captures these particular events, does it?
>
> A. **The model itself is not supposed to capture cartel events**. It's supposed to look at competitive events.

Id. at 3147:6-11 (emphasis added).[8] This same model failure in *Comcast* resulted in class certification being reversed.

C. The Jury's Verdict Confirmed The Failure Of McClave's Model

The sufficiency of the evidence to prove causation of injury also must be addressed in the context of the jury's decision. That decision not only has the effect given to it as a matter of law, it also was given a role by Dr. McClave himself. He acknowledged that the operation of his model was entirely dependent upon the jury's determination that there was a conspiracy affecting prices during the period at issue; his model purported to show only that the "competitive factors" that Dr. McClave chose for his model did not explain prices in the 1999-2003 period very well, and left determining the ***cause*** of the lack of fit to the jury. *Id*. at 3015:22-25, 3016:1-11 (McClave). The impact of the jury's rejection of a five-year conspiracy, and its further rejection

[8] While Dr. McClave insisted (without citing any statistical or scientific test) that he had "ruled out" competition as an explanation on variance (Trial Tr. at 2999:9-16, 3040:23-3041:6, 3113:13-21, 3152:5-16, 3153:8-21), this (a) did not even purport to confine variance to the alleged conspiracy and (b) still rested on the assumption that 1999-2003 was the same as 2004-2008 (*Id*. at 2994:2-11).

of actual injury ("overcharge") over five years, are both clear. While Plaintiffs incorrectly dispute that the former occurred, they cannot escape the answer to Question 3 and its impact on the proof of causation.

Over all five years of the alleged conspiracy, the McClave Model equates all statistical variance with collusive over-charges. As Dr. McClave acknowledged repeatedly, his model was fixed and unchanging after it was developed based upon the benchmark years. *Id*. at 2988:2-2990:3, 2991:17-23, 2995:22-2996:6, 2996:24-2997:3. It was then simply "applied" to the conspiracy years. *Id*. at 2990:4-9, 2992:4-15, 2994:2-11, 2999:20-3000:1. The model was neither tailored to nor changed by any feature of all or any portion of the conspiracy years. **All** variance resulting from application of the model was equated to "overcharge." *Id*. at 2859:22-2860:10. The model made no distinction between pre- and post-November 24, 2000; that date is irrelevant to the McClave Model. He simply quantified his damages for the two periods because of Dow's statute of limitations defense.

By answering "No" to Question 3 on the verdict form, the jury rejected the notion that variance equates with overcharges. In that answer, the jury stated that there were no overcharges for at least the period prior to November 24, 2000. So, to adopt one of Dr. McClave's terms, "something" beyond collusion was responsible for the variance. *Id*. at 3040:23-3041:6. But if that is so, it necessarily follows that the model also cannot be used to estimate damages for the post-November 24, 2000 time period. The variance is either caused entirely by collusion or it is not. The jury found it was not.

This one, crucial finding means that the entire output of the model has no value for any period of time. Its assumed linkage of price variance with collusive overcharges has been rejected by the trier of fact. (This is illustrated in the diagram at page 19 of Dow's opening

brief). Under *Comcast* and Dow's other authorities, the model therefore is insufficient as a matter of law to establish causation.

The logic of this conclusion is simple and cannot be avoided by Plaintiffs.

First, Plaintiffs search for cover under the purported legal rule that they need not seek all or nothing relief. JMOL/NT Opp. at 8-12. This argument misses the point entirely. The point is not what Plaintiffs could have done under the law, but rather what they actually did. And in actuality, their model evidence **was** all or nothing when it came to variance. Again, **all** variance was assumed to be due to collusion and to represent overcharge.

Second, Plaintiffs insist that the fact of injury is different from damages. *Id.* at 22-23. In this case, the modeled variance (the "overcharge") was proffered both as the measure of damages and as proof of injury per Instruction 19 and the Verdict Form. Because the jury rejected the equation of variance and overcharge, proofs of injury and damages both fail.

Third, Plaintiffs suggest that the jury might have found periods of competition during the conspiracy period. *Id.* at 23-24. This argument too misses the mark. The model itself reflected periods of competition. The issue is not whether the model sometimes showed competition but, rather, whether the periods **when the model showed variance** were collusive. The jury found that this was not true during at least the period prior to November 24, 2000.

Finally, Plaintiffs insist that they do not need the McClave Model in any event because the "non-econometric" evidence is sufficient to sustain their case. *Id.* at 16-19, 33. But the testimony of their own expert belies this contention. While Plaintiffs reprise the evidence "summarized" by Dr. Solow and argue that it demonstrates injury in fact, Dr. Solow himself conceded that he relied upon the McClave Model to establish "impact." *Id.* at 2125:4-16. Indeed, the McClave Model is indispensable to his analysis:

Q. And if we come to your report when it relates to pricing, I don't think that there's a single number in your report other than what's found in a document, a historical document; true?

A. I think that's correct, yes.

***

Q. Isn't it true that if you didn't have Dr. McClave's work in this case your analysis would be incomplete?

A. Yes, I think so.

Q. And that means that in order for your analysis under this process to be complete it has to have all three parts; correct?

A. It would have to have all three parts, but there's more to the performance than simply Dr. McClave.

Q. Okay. So not only do you need Dr. McClave you need other parts of performance, otherwise, the analysis is not complete; correct?

A. Yes.

Id. at 2159:21-25, 2184:6-17. In this respect, Dr. Solow was right. The model alone purported to demonstrate a difference between the prices actually charged and the prices that would have been charged "but for" the alleged conspiracy. There simply is no other evidence of "but for" prices.

D. Plaintiffs Failed to Prove Injury to Each Class Member

The McClave Model also fails to establish that each class member was injured. (*See* Figure 2, filed as Appendix D.) Both this failure and its cause were starkly demonstrated at trial.

The pricing process in the urethanes industry was not conducive to class treatment. Memorandum In Support Of Dow's Motion For Judgment As A Matter Of Law at 13-20 (Dkt. 2788). Put simply, pricing negotiations were conducted customer by customer. Trial Tr. at 3495:5-17, 4290:13-4291:17. Dr. Solow admitted as much. *Id*. at 2212:11-19. This was not, therefore, an industry where a formula could capture damages sustained by each class member,

and no such formula was presented at trial. Plaintiffs nonetheless chose to aim for the fences, prosecuting claims that spanned thousands of customers and over a million transactions.

Dr. McClave began by gathering a lot of data. And in the end, at trial, he certainly claimed that he had achieved Plaintiffs' goal of proving the **aggregate** impact of a five year all-in conspiracy and the resulting **aggregate** damages. More critically to proof of injury to **each** class member, Dr. McClave tried to underscore the granularity of his model by (a) highlighting its fit to his input data (*id*. at 2894:21-2895:9, 2845:6-20, 2912:19-2919:12) and (b) illustrating the specificity of model output by producing damage figures for the three class representatives, purportedly precise to the last digit (*id*. at 2900:13-2901:2).

The first of the unanswered flaws in this picture is that the three class representative damage figures were both the beginning and the end of Plaintiffs' proof regarding specific class members. Not a single overcharge figure for any other class member was put into evidence. Instead, Plaintiffs proffered only eight huge aggregate damage figures, four for the full five years and four for the period beginning November 24, 2000. *Id*. at 2965:6-2966:4, 289:15-2900:12. Four overcharge percentages also were presented, one for each product line. *Id*. at 2890:21-2891:8 (MDI); 2893:4-12 (TDI); 2893:3-19 (polyols); 2933:1-22 (systems). Each of the four was simply an **average**. Of course, applying those overcharge percentages to all customers would mean that some would receive more than what the model indicated, some less, and some coincidentally would get an amount equal to what the model showed. *Id*. at 4919:17-4920:1, 4923:3-13). Even taken at face value, this classwide evidence did not demonstrate actual injury to each class member. (*See* Figure 3, filed as Appendix E.) Instead, that evidence could not address much less establish the ultimate fact required by substantive law—actual injury to specific Plaintiffs.

Looking beyond the face of the numbers presented, the undisputed evidence further showed that those numbers masked further disconnections with individual class members.

First, as set out in Dow's opening brief, the model was applied to only 25% of the Class members. Again, this is undisputed.

Second, for 75% of Class members, ostensible proof of injury was pursued solely through Dr. McClave's extrapolation. Plaintiffs do not deny the fact, extent, or impact of this extrapolation. They say that other evidence shows injury (JMOL/NT Opp. at 25) but there is no other evidence of overcharge for any specific class member or group of class members. They say that the issue should have been raised during the *Daubert* briefing (*id.* at 26). But, the issue here is sufficiency of the evidence, not just admissibility—a distinction emphasized in *Comcast*. *Comcast*, 2013 WL 1222656, at *4 n.4 (explaining that failure to "make an objection to the admission of Dr. McClave's testimony under the Federal Rules of Evidence . . . does not make it impossible for [defendants] to argue that the evidence failed 'to show that the case is susceptible to awarding damages on a class-wide basis.'").

Plaintiffs also say that extrapolation is a routinely used method. JMOL/NT Opp. at 26. That may be true for some purposes, but extrapolation and proof of what happened at the individual customer level are 'apples and oranges' unless formulas govern pricing classwide. That was not true in the urethanes industry. Plaintiffs finally insist that the extrapolation was justified because the modeled transactions were a "reliable sample." *Id.* at 26-27. As a matter of law, sampling cannot be used to establish class-wide injury to class members. *Wal-Mart*, 131 S.Ct. 2541 (2011). And, again, there is no evidence in this case of any process that was followed to define a representative sample. As Dr. McClave acknowledged, the line between modeled and extrapolated transactions was drawn simply on the basis of which transactions had data that

passed the requirements for application of the model. Trial Tr. at 2925:22-2926:12, 2927:3-2928:13, 2948:6-8). All other transactions were extrapolated. In the case of Systems, there was no model and no representative sample at all. *Id*. at 2929:16-21, 2934:1-4 (McClave); 4925:2-8 (Ugone). McClave's formulaic extrapolation of Systems injury was pure *ipsi dixit*—and particularly improper here, given that Dr. McClave found numerous instances of zero or negative overcharges among the transactions he did model, whereas his extrapolation method guaranteed that every single "extrapolated" transaction would result in a positive overcharge.

E. Plaintiffs' Failure To Prove Damages

Because the McClave Model is Plaintiffs' sole vehicle for proving both classwide injury and classwide damages, the unresolved problems described above in connection with proof of injury warrant judgment as a matter of law on damages as well. Plaintiffs have responded with general rules that courts have used to afford antitrust plaintiffs latitude in proving damages, but, on the record in this case, those rules provide no protection against Dow's motion.

The critical and unrebutted facts in this case are that (a) Plaintiffs had vast data available to them and they used that data to develop damage proof which purported to be accurate down to the last dollar; (b) they elected to specify a damage model that was not designed to distinguish price impacts due to illegal conduct from the impact(s) of other factors affecting price; (c) in the evidence they presented to the jury, Plaintiffs elected to run the model for the five-year conspiracy, resulting in only two aggregate figures: one with and one without the impact of the statute of limitations; and (d) there is no record evidence that any data relevant to the damage estimate was unavailable to the Plaintiffs as a result of the wrongdoing they sought to prove at trial.

These facts are a complete answer to the law Plaintiffs cite in their opposition papers. Cases reciting the latitude accorded plaintiffs emphasize the absence of more precise proof. *See*

Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123-24 (1969); *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264 (1946). Such latitude is not an excuse where the damages proofs purport to be precise.

Similarly, plaintiffs in antitrust cases are held to the choices they make regarding how to construct their damages estimates. *See El Aguila Food Prod., Inc. v. Gruma Corp.*, 131 F. App'x 450, 451-54 (5th Cir. 2005) (finding plaintiffs' damages model to be inadequate, and therefore affirming a take-nothing judgment in favor of defendants, "[b]ecause the plaintiffs failed to offer evidence of damages and causation sufficient to sustain a rational judgment in their favor"); *Chrysler Credit Corp. v. J. Truett Payne Co., Inc.*, 670 F.2d 575 (5th Cir. 1982) ("Even if we held that Payne had presented substantial evidence of violation and injury and could invoke the standard of lenity, we would nonetheless conclude that Payne's evidence was insufficient. As we indicated, Payne relied on nothing more than the mere fact of alleged price difference and the hypothesized effect of the difference on its business. In calculating the going concern value, the plaintiff's expert failed to document his basic assumptions or to consider local market conditions. On this ground as well Chrysler was entitled to a directed verdict.") (citations omitted); *Herman Schwabe, Inc. v. United Shoe Mach. Corp.*, 297 F.2d 906, 912 (2d Cir. 1962) (affirming a directed verdict and dismissal of the complaint after explaining that "the leap required to derive any rational conclusion from the expert's dat[a] was too great to allow a jury to take.").

Nor does the basic principle requiring that "the wrongdoer shall bear the risk of the uncertainty which his own wrong has created," *Bigelow*, 327 U.S. at 265, relieve plaintiff from presenting a reasonable factual basis for damages where the necessary information is in fact available. *See id*. at 264 ("In such a case, even where the defendant by his own wrong has prevented a more precise computation, the jury may not render a verdict based on speculation or

guesswork."). Crucially, in this case, there is **no** evidence that wrongful conduct deprived Plaintiffs of information necessary to prove damages.

And, finally, just as actual injury must be proven to be the result of illegal conduct, the same is true of damages. In *MCI Communications*, for example, the court explained that "[i]t is a requirement that an antitrust plaintiff must prove that his damages were caused by the *unlawful* acts of the defendant." *MCI Commc'ns Corp. v. Am. Tel. & Tel. Co.*, 708 F.2d 1081, 1161 (7th Cir. 1983) (emphasis in original). MCI relied on a lost profit study to prove damages, but the study did not "establish any variation in the outcome depending on which acts of AT&T were held to be legal and which illegal." *Id*. at 1162. The jury, therefore, "was left with no way to adjust the amount of damages to reflect lawful competition from AT&T." *Id*. at 1163. The court ultimately held that, "while not necessarily hearsay, the lost profits study and the assumptions it contains lack a foundation from which a jury could reasonably have determined the damages which were found in the instant case." *Id*. at 1166.[9]

The jury's award of damages changes none of this. That award is flawed on its face, for several reasons:

- No one knows what conspiracy finding predicated the award. The duration, the products covered, the suppliers involved and the customers affected – all are unknown and unknowable. Without knowing the nature and scope of the wrongdoing, it is impossible to determine what evidence actually supported any calculation of damages resulting from the wrong.

[9] Similarly, in *Coleman*, the court held that it could not "permit a jury to speculate concerning the amount of losses resulting from unlawful, as opposed to lawful, competition." *Coleman Motor Co. v. Chrysler Corp.*, 525 F.2d 1338, 1353 (3d Cir. 1975). The court explained that "[p]laintiff's own experts conceded that the damage figures they tendered were attributable at least in part to the lawful competition of Chrysler's factory dealerships. On the evidence adduced, the jury rationally could not have reduced these figures to reflect only losses due to unlawful competition." *Id*.

- The jury's damage number corresponds to no damage number presented to them at trial. Moreover, the evidence from Dr. McClave was clear that the model had to be run in order to produce damage figures. He repeatedly insisted that any attempt to take the model apart and draw a conclusion would be inconsistent with the model. *See, e.g.*, Trial Tr. at 2934:14-2964:20, 2987:4-10, 3135:5-14.

- Plaintiffs argue that the jury was free to make adjustments by up to 25% because Dr. McClave showed how certain of Dr. Ugone's criticisms would have changed the overcharge percentages, and Plaintiffs even go so far as to suggest that the damages awarded could be reached by adopting one of those criticisms. JMOL/NT Opp. at 31-32. But Dr. McClave's testimony regarding the impact of Dr. Ugone's criticisms related to the entire five-year model run. There was no evidence that the same numbers would apply if the model were run over any other period. As importantly, Dr. McClave never testified that his rebuttal of Dr. Ugone could be used to calculate damages.

More fundamentally, while these and other obstacles to any use of the jury award are set forth in Section IV below, addressing the need for a new trial, the fact that the jury awarded damages does nothing to mitigate Plaintiffs' underlying failure of proof on damages and the resulting support for judgment in Dow's favor as a matter of law.

III. NO REASONABLE JUROR COULD FIND AN ILLEGAL AGREEMENT BETWEEN DOW AND ITS COMPETITORS ON THE EVIDENCE

Plaintiffs offered insufficient evidence at trial for a reasonable jury to find that Dow entered any "conscious commitment to a common scheme designed to achieve an unlawful objective." *Monsanto Co. v Spray-Rite Service Corp.*, 465 U.S. 752, 768 (1984). Although a price fixing agreement "need not be formal or in writing," JMOL/NT Opp. at 33, Plaintiffs still must prove a "commitment," not just general discussions among competitors, even about price, that are unconnected to actual pricing activity.[10] Plaintiffs must prove that "commitment" either

[10] Plaintiffs cannot fall back on something less than an agreement to fix prices. Plaintiffs proceeded to trial under a *per se* theory, *see* Pretrial Order §§ 6b, 8c n.5, and by doing so assumed the risk that their claim would be dismissed if it did not qualify. *See, e.g., In re Insurance Brokerage Antitrust Litigation*, 618 F. 3d 300, 317 (3d Cir. 2010) ("If the court determines that the restraint at issue is sufficiently different from the per se archetypes to require application of the rule of reason, the plaintiff's claims will be dismissed."); *see also Texaco v.*

through (1) direct proof of an agreement; or (2) indirectly through parallel conduct and "plus factors." Here, there is no direct evidence of an agreement. To the contrary, the direct evidence presented by the very witnesses who Plaintiffs rely on is that there was no such agreement. Nor can a conspiracy be inferred from the circumstantial evidence because it does not "tend to exclude the possibility" of lawful conduct. *See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986). Here, it does not show (1) parallel conduct on actual pricing; or (2) a connection between Dow's alleged communications with other defendants and actual pricing. The evidence also does not show the broad, "all in" conspiracy that Plaintiffs alleged or any narrower conspiracy that could support the jury's damage award.

A. Plaintiffs' Theory of the Case

Nowhere in their arguments about agreement do Plaintiffs even mention the definition of the agreement they are alleging. As summarized by Dr. Solow, the Plaintiffs alleged a five year, "all in" agreement to (a) "coordinate" price increase announcements; (b) "try" to make them stick and (c) "punish" cheaters by "selectively" competing with them. As Dr. Elzinga explained, the alleged agreement was in essence an agreement to do what companies in an oligopoly would do anyhow without collusion: (a) set prices by reference to the expected conduct of competitors, including in "lockstep"; (b) "try" to get those prices in negotiations with customers; and (c) compete with those who competed with them." Thus, the evidence must be tested rigorously for whether it "tends to exclude" non-collusive conduct.

B. No Reasonable Jury Could Find an Agreement Based on Direct Evidence

Plaintiffs' key witnesses testified that they were not involved in any agreement *See* Trial Tr. at 802:20-23; 803:17-24; 843:24-844:15 (Barbour); 215:17-216, 397:16-21 (Stern); 1419:14-

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Dagher, 547 U.S. 1, 4, 7 n.2 (2006) (noting Ninth Circuit dismissal of *per se* claims when rule of reason applied with approval).

120:16 (Dineen); 543:25-544:4, 545:1-6 (Blumberg); 654:13-660:18 (Phelan). Plaintiffs say that the testimony that there was no "agreement" does not count because agreement is only a legal concept. But "agreement" in common usage refers to precisely what the law requires: commitment. Indeed, Plaintiffs rely on the testimony of Stephanie Barbour that someone else used the word "agreement." They also suggest that the same witness should be believed where the testimony is favorable to Plaintiffs (e.g., Stern's testimony that he called Dow, discussed pricing, and who said what to whom) but ignored when it is not (e.g., Stern's testimony that they did not reach an agreement). No reasonable jury could find an agreement on these facts.

Plaintiffs' efforts to bend the meaning of "direct" evidence should be rejected as well. Plaintiffs try to characterize testimony from Dow's Stephanie Barbour, Bayer's Michelle Blumberg, and Bayer's Gerald Phelan as "direct evidence" of a price fixing agreement. JMOL/NT Opp. at 44. But these witnesses recounted only what someone else said about a conversation with a third party. *See* Trial Tr. 689:18–690:21 (Barbour), 548:2–25 (Blumberg), 606:23-607:14 (Phelan). That is not direct evidence because the recipient must "draw[] his own inferences from the words used by" the alleged conspirator, *Superior Offshore Int'l, Inc. v. Bristow Grp., Inc.*, 490 F. App'x 492, 498 (3d Cir. 2012), and such testimony calls for the jury to draw further inferences, *see Champagne Metals v. Ken-Mac Metals, Inc.*, 458 F.3d 1073, 1083 (10th Cir. 2006) (direct evidence "is explicit and requires no inferences").

Nor does this evidence show that Dow participated in the alleged all-in conspiracy. Barbour's testimony at most says that Dow's Levi had an "agreement" with BASF and Bayer sometime in 2003 about TDI prices. Trial Tr. 689:18-690:21. It does not say there was an

agreement on TDI at any other time, on MDI, polyols, or systems, or with Huntsman or Lyondell. And Blumberg's and Phelan's testimony has no connection to Dow.[11]

C. No Reasonable Jury Could Infer Agreement from the Circumstantial Evidence Cited in Plaintiffs' Opposition or Presented at Trial

The undisputed economic evidence disproves Plaintiffs' alleged conspiracy. A reasonable jury thus could not have inferred a conspiracy from circumstantial evidence. Further, to infer an agreement, Plaintiffs must prove parallel conduct and "plus factors" that exclude the possibility of lawful conduct. JMOL/NT Mtn. at 38; *see Matsushita* 475 U.S. at 588. Plaintiffs fail to prove either.

i. The Economic Evidence Does Not Demonstrate a Conspiracy

Plaintiffs entirely ignore the undisputed economic evidence that disproves their alleged conspiracy to "coordinate" price increase announcements and to "try" to make them stick.

Plaintiffs offer no economic evidence proving such a conspiracy. Dr. McClave performed no economic analysis about the relationship between price increase announcements and actual prices. Dr. Solow testified about the industry structure, but he admitted that structure is not the same as conduct. He further admitted that he performed no analysis of actual prices or the relationship of price increase announcements to actual prices. Plaintiffs thus have no economic support for their claim that the price increase announcements "stuck."

In contrast, Dow offered extensive economic evidence showing there was no conspiracy. Dr. Elzinga demonstrated that actual prices were negotiated individually. Through a systematic analysis of the pricing data and the price increases announcements, he showed that only in rare

[11] Blumberg's testimony does not refer to an agreement at all and at most says that sometime in 2002, Bayer's Friedrich talked to some unspecific competitor about MDI. Trial Tr. at 548:2-25. Phelan's at most says that sometime in 2002, he believed Friedrich had some unspecified "understanding" with certain unspecified competitors about MDI. Trial Tr. at 606:23-607:14; 611:20-620:19.

cases did actual prices track the price increase announcements. Dr. Elzinga also testified that during the alleged conspiracy, demand was flat and costs were increasing, and that, as a matter of basic economics, prices therefore could not have gone down, conclusively rebutting Plaintiffs' allegation that a conspiracy prevented prices from falling. Testimony from Wood and Dawson about market conditions confirmed Dr. Elzinga's analysis. Wood explained the economic factors that drove actual pricing during the alleged conspiracy period, in particular explaining that weak demand empowered customers to refuse price increase requests and that Dow's profitability fell. Dawson explained the different market dynamics during the 2004-2008 period.

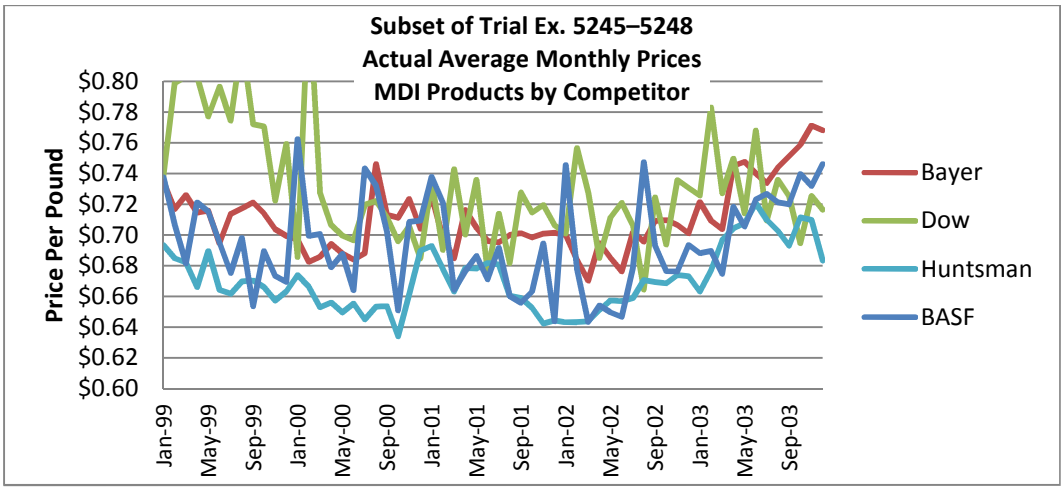
ii. The Evidence Does Not Demonstrate Parallel Pricing

No reasonable jury could have found parallel pricing by the defendants, and without it, Plaintiffs failed to provide sufficient evidence for a reasonable jury to find a conspiracy. *See, e.g., Burtch v. Milberg Factors Inc.*, 662 F.3d 212, 228–29 (3d. Cir. 2011). In fact, the evidence shows that the defendants' actual pricing was anything but "lockstep."

Plaintiffs wrongly assert that "the fact of lockstep pricing is undisputed" when discussing impact and ignore the issue altogether in discussing agreement. *See* JMOL/NT Opp. at 16, 46-47. But Plaintiffs offered no evidence of parallel pricing. Their core pricing evidence was Dr. McClave's model. But Dr. McClave did not present to the jury any information about pricing by individual suppliers, much less parallel pricing; rather, he presented only average pricing across all defendants. Nor can the model be relied upon "in light of the model's inability to bridge the differences between supra-competitive prices in general and supra-competitive prices attributable" to the alleged conspiracy. *See Comcast*, 2013 WL 1222646, at *7. Nor did Dr. Solow testify about parallel pricing, except to admit it could occur without collusion. In the end, Plaintiffs' wishful assertion of "lockstep pricing" in their opposition brief reveals its yearning for a case they would have liked to prove but never did, because it simply was not there.

Dr. Elzinga presented the jury with the only comprehensive evidence of actual prices during the alleged conspiracy. *See* Trial Ex. 5245–5258; Trial Tr. at 4446:24-4457:23. Figure 4 below, for example, reproduces a portion of Trial Exhibits 5245-5248, showing each suppliers' monthly average MDI prices from November 24, 2000, to December 31, 2003. The suppliers' average prices differ, sometimes by more than $0.10 per pound; move in different directions; and fluctuate from month-to-month.[12] This is the opposite of parallel pricing.

Figure 4: Comparison of Defendants' Average MDI Prices



It is also beyond dispute that prices within each company vary significantly across customers because of individual negotiations. *See, e.g.,* Trial Tr. 2211:24–2212:15 (Solow); Trial Tr. 4735:14-4736:1 (Dawson explaining that urethane "prices are negotiated" "all the time"); *See also id.* at 2519:17-22 (Levi); 3286:6-11 (Wood); 3495:5-17 (Beitel); 3902:11-3907:22 (Kirk); 4201:1-17, 4202:23-25 (MacCleary); 5113:21-5115:12 (O'Brien).

iii. The Evidence Does Not Demonstrate Parallel Price Announcements or that Any Parallel Price Announcements Affected Prices

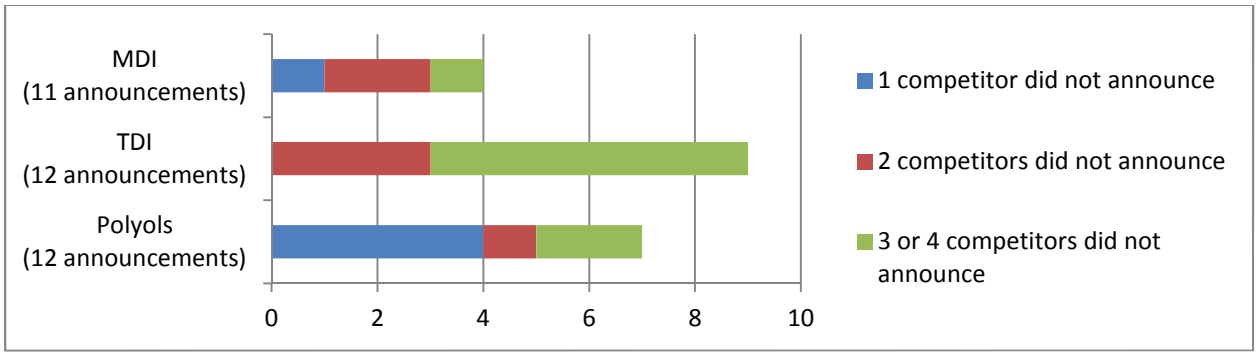
Plaintiffs also cannot rely on price increase announcements to satisfy the parallel conduct requirement. Many of the suppliers announced price increases of similar amounts in proximity

[12] Appendixes A and B present the same information for TDI and polyols.

to one another even in periods Plaintiffs concede were competitive, such as 2004. *See* Tr. 4768:24-4771:2, 4817:19-4818:2, 4818:3-4819:24. Thus, merely because price increase announcements occur close in time and are similar in amount does not support a conspiracy. At most, that would suggest "following the leader," not any agreement to raise prices in "lockstep."

Nor were the price increase announcements so closely in "lockstep" as to make a conspiracy more likely than not. Rather, in a majority of months where at least one defendant announced a price increase would be effective, one or more defendants did not. Figure 5 below summarizes the evidence from Trial Ex. 2112 and Trial Exhibits 5245–5258.

Figure 5: Number of Defendants that Did Not Announce a Price Increase Would be Effective in a Month Where Another Defendant Announced a Price Increase Would be Effective (Nov. 24, 2000 to Dec. 31, 2003)



In addition, "parallel" price increase announcements would not support an inference of an agreement on actual pricing without proof that the announcements were connected to actual prices. *See, e.g., In re Baby Food Antitrust Litig.*, 166 F.3d 112, 125 (3d Cir. 1999). As Dr. Solow put it, an agreement on price announcements without an agreement on actual prices "wouldn't be much of a cartel." Trial Tr. 2254:12–18 (Solow). The record evidence does not show such a connection. Instead, it shows that even when the suppliers made price increase announcements near in time to one another, their actual pricing after those announcements was not parallel. To illustrate, Dow's MDI prices actually *decreased* after 6 of Dow's 8 price increase announcements between November 24, 2000 and December 31, 2003.

Dr. Solow's testimony also cannot provide the required connection between price increase announcements and actual pricing. Dr. Solow admitted on cross-examination that he has "not done an empirical statistical analysis" of the "relationship between announced prices and the actual prices," and agreed that Dr. McClave also did not "quantif[y] any relationship between announced prices and actual prices." Trial Tr. at 2212:24-4.[13] He also testified that his analysis would be "incomplete" without Dr. McClave's model. Trial Tr. at 2184:6-8. This failure of proof is fatal to Plaintiffs' case.

iv. The Evidence Does Not Connect Plus Factors to the Alleged Parallel Conduct, Much Less to Any Effect on Actual Prices

The lack of parallel pricing should end the case. In addition, Plaintiffs must prove additional "plus factors" to permit a reasonable jury to infer a conspiracy because parallel conduct by itself typically just reflects each company acting in the same way they would have without a conspiracy. *See* JMOL/NT Mtn. at 38–44, *Matsushita*, 475 U.S. at 588.

Dr. Solow agreed that selectively competing against competitors that break with a stable industry price level, Trial Tr. at 2268:7-23, monitoring competitors' prices, Trial Tr. at 2262:3-

[13] Instead, Dr .Solow's testimony on impact consisted of simply reading select parts of three documents into the record. But this does not involve applying any expertise and is therefore not helpful to the jury, and so is entitled to no weight beyond that of the documents themselves. *See Andrews v. Metro North Commuter R.R., Co.*, 882 F.2d 705, 708 (2d Cir. 1989); *In re Fosamax Prods. Liab. Litig.*, 645 F. Supp. 2d 164, 192 (S.D.N.Y. 2009). The documents themselves are hearsay, Plaintiffs introduced no evidence of how the authors arrived at the information, and the documents appear to reflect subjective speculation about pricing, not objective data. The only document that relates to Dow is a March 8, 2002, presentation that claims a price announcement for TDI and poylols was "working," but provides no information on actual prices. Solow Demonstrative at 37 (quoting Trial Ex. 1666). Yet the data shows that Dow polyol prices went *down* $0.02 in April 2002 and that Dow TDI prices went up by only $0.02. And the very next line of the document — which Plaintiffs omitted — explains that prices are higher because "Volume – Its up and demand is strong…a good year????" Trial Ex. 1766. Increased volume is the opposite of what would occur with a cartel, which raise prices by restricting output. Moreover, none of the documents connects price announcements to actual prices. Even if they did, all are from 2002, and so cannot provide that connection in any other year.

10, and adopting a "price over volume" strategy, Trial Tr. at 2074:13-22, were all consistent with lawful oligopolistic behavior. But evidence that is equally consistent with "conscious parallelism by itself is not enough to support an antitrust conspiracy case." *See, e.g., Market Force Inc. v. Wauwatosa Realty Co.*, 906 F.2d 1167, 1172 (7th Cir. 1990).

Plaintiffs have not proven the required "plus factors." Plaintiffs point to two examples between Nov. 24, 2000, and Dec. 31, 2003, where Dr. Solow claimed that one defendant complained to another about the other's pricing. JMOL/NT Opp. at 48 & n.18. The first involved BASF complaining to Dow that Dow was "not sticking with the price increase" on MDI at a particular customer. *Compare* Trial Tr. 2123:5-24 (Solow testimony), *with* Trial Tr. 691:24-694:10 (Barbour testimony). This evidence affirmatively shows that Dow was *not* increasing prices in concert with other suppliers. The second involved only BASF and Bayer, so does not support a conspiracy involving Dow. Trial Tr. at 2118:3-2120:25.

The other "plus factors" are alleged communications between certain suppliers. JMOL/NT Opp. at 47. But "evidence of informal communications among several parties does not unambiguously support an inference of conspiracy." *See Wauwatosa*, 906 F.2d at 1173. Plaintiffs must instead show "a high level of interfirm communications." *See Twombly v. Bell Atlantic Corp.*, 425 F.3d 99, 114 (2d Cir. 2005) *rev'd on other grounds* 550 U.S. 544 (2007). That is especially true here where Plaintiffs have alleged a conspiracy affecting many separate price negotiations, thousands of transactions, multiple products, and multiple years. As detailed below, a close examination of the evidence reveals only sporadic communications insufficient to show any conspiracy at all. *Blomkest Fertilizer, Inc. v. Potash Corp. of Sask. Inc.*, 203 F.3d 1028, 1033-34 (8th Cir. 2000) (en banc) (finding "roughly three dozen price verifications" over a seven-year period "sporadic" and affirming summary judgment for defendants on conspiracy

claim); *Krehl v. Baskin-Robbins Ice Cream Co.*, 664 F.2d 1348, 1357 (9th Cir. 1982) (finding a dozen communications about prices over a seven-year period "sporadic" and affirming dismissal of price fixing claims).

Plaintiffs also fail to connect the alleged communications to the alleged parallel conduct or to changes in prices. Without that, no reasonable jury could find an agreement. *See In re Baby Food*, 166 F. 3d at 125. Defendants did not have a consistent pattern of communications surrounding their price increase announcements, a consistent pattern of all making price increase announcements, or a consistent pattern of actual price increases after the effective date of the price increase announcements.

D. The Evidence of Dow's Communications with Other Defendants Does Not Support Any Conspiracy that Could Support the Damage Award

Plaintiffs alleged a five-year conspiracy involving all five defendants and spanning MDI, TDI, polyols, and systems. The evidence of communications detailed below would not permit a reasonable jury to infer this broad conspiracy, and therefore Plaintiffs' claims fail. Nor is there any reasonable basis to award damages on any narrower conspiracy.

i. The Evidence Does Not Support a Conspiracy on Any Product

The jury had no reasonable basis to award the amount of damages that it did because it could not have found a conspiracy on any of MDI, TDI, and polyols.[14]

[14] The damages on systems are derivative of and presuppose a conspiracy on MDI, TDI, and polyols. Trial Tr. at 2929:25-2932:10 (McClave). In any event, Plaintiffs point to only two instances of alleged contacts. First is the testimony from Barbour that Dow "was not sticking with the price increase," as discussed above. JMOL/NT Opp. at 36; Trial Tr. at 691:24-694:10. Second is a meeting between BASF's Bernstein and Dow's Fischer on November 14, 2002, before BASF announced a price increase on MDI and systems. JMOL/NT Opp. at 43; Trial Tr. at 1846:8-1847:25. But Dow did not announce a price increase for systems in Nov. 2002. *See* Trial Ex. 2112, at 15.

a. Evidence Does Not Support a Conspiracy on MDI

On MDI, the undisputed evidence is that Stephanie Barbour was in charge of MDI for Dow from 2000 until February 2004, Trial Tr. at 744:16-745:7, 746:15-746:24, and that she did not participate in the alleged conspiracy, Trial Tr. at 802:20-23; 803:17-24; 843:24-844:15. The pricing evidence summarized above corroborates Barbour's testimony that Dow did *not* conspire on MDI, showing that when Dow announced price increases, Dow's average MDI prices *decreased* on 6 of 8 occasions after the effective date. *See* Trial Ex. 5247.

In any event, Plaintiffs cite only four instances of alleged contacts between Dow and other defendants about MDI between November 24, 2000, and December 31, 2003. Especially given the pricing evidence, four contacts over three years is too sporadic to show that Dow conspired on MDI. *See, e.g., Blomkest*, 203 F.3d at 1033-34; *Krehl*, 664 F.2d at 1357.

These four instances also do not support a price-fixing conspiracy. The first is Barbour's testimony that Dow "was not sticking with the price increase," which as discussed above undermines Plaintiffs' claims. The others involve contacts with other defendants, but Plaintiffs provide no evidence that pricing was discussed and these contacts were not followed by parallel pricing.[15] First, Plaintiffs allege that BASF's Bernstein called Dow's Fischer on March 14, 2002, and that Dow then announced an MDI price increase effective on April 1. JMOL/NT Opp. at 43, Trial Tr. at 1568:1-7; 1546:22-1547:6. But in April 2002, Dow's actual MDI prices went *down*. *See* Trial Ex. 5247. Second, Plaintiffs allege that Bernstein met with Fischer on November 14, 2002, "a few days before [a] price increase" announcement. JMOL/NT Opp. at 43, Trial Tr. at 1845:17-1847:25. But Bernstein testified, without challenge, that the meeting

[15] Nor could a reasonable jury assume that pricing was discussed. Indeed, Dow had legitimate, procompetitive reasons to communicate with other suppliers. Among other things, they bought and sold products from each other, engaged in joint ventures, and cooperated on safety and environmental initiatives.

was to discuss BASF potentially licensing Dow's technology to help with TDI waste disposal, not pricing. Trial Tr. at 1847:15-1849:24. In any event, Dow's MDI prices went *down* in January 2003 when the announcements were to take effect. *See* Trial Ex. 5247. Third, Plaintiffs allege that on March 7, 2003, Huntsman phone records show calls to Dow and BASF. JMOL/NT Opp. at 44, Trial Tr. 2102:9-2103:9. But MDI prices did not increase in parallel in April 2003 when the announcements were to take effect. Dow's MDI prices increased by only $0.01, only one-quarter of BASF's and Bayer's price increases of $0.04. *See* Trial Exs. 5245-5247.

b. Evidence Does Not Support a Conspiracy on TDI

Plaintiffs cite only four pieces of evidence of contacts between Dow and other defendants about TDI between November 24, 2000, and December 31, 2003. First, they allege that on February 10, 2002, Fischer called BASF's Bernstein the day before Dow announced a TDI and polyol price increase. JMOL/NT Opp. at 43, Trial Tr. at 1784:6-1785:12. But in March 2002 when the announcements were to take effect, Dow's polyol price went *down* by $0.02. *See* Trial Ex. 5256. Second, they allege that Dow's Levi talked to BASF, Bayer, and Lyondell on August 5 and 6, 2002, and announced a price increase for TDI and polyols on August 6. JMOL/NT Opp. at 43; Trial Tr. 2625:14-2626:8, 2632:18-2634:25. But in September 2002 when the announcements were to take effect, Lyondell increased TDI prices by only $0.01, one-sixth of Dow's $0.06 increase, and BASF's polyols prices went *down*. *See* Trial Exs. 5253, 5251, and 5254.

Otherwise, Plaintiffs point only to vague, hearsay testimony from Barbour that in 2003 Levi said he had "an agreement" with competitors on TDI and vague testimony that, at unspecified times, she was present at meetings where Levi briefed Fischer about unspecified contacts with unspecified competitors, JMOL/NT Opp. at 36, Trial Tr. 689:18-690:21; 707:11-

709:17; and an alleged phone call from Bayer's Stern to Fischer on an unidentified date in 2001 or 2002 where Stern mentioned "Bayer's intention to raise both polyol and TDI prices," JMOL/NT Opp. at 37, Trial Tr. at 325:24-329:5. Plaintiffs offer nothing to connect these conversations even to price increase announcements, let alone actual pricing.

c. Evidence Does Not Support a Conspiracy on Polyols

Plaintiffs point to only four instances of alleged contacts among Dow and other defendants about polyols between November 24, 2000, and December 31, 2003.[16] Each contact overlaps with an alleged contact on MDI or TDI, and thus fails to support a conspiracy for the reasons described above. The evidence falls especially short because polyols are not a single product, so any conspiracy would have had to fix prices across a number of polyols with different characteristics and pricing. Some polyols, for example, are mixed with MDI to create "rigid" foams, while others are mixed with TDI to create "flexible" foams.

d. Plaintiffs' Attempts to Group the Evidence Together Fail

Trying to sidestep these deficiencies, Plaintiffs combine evidence about all products. However, even taking all products together, Plaintiffs muster only eight pieces of evidence related to Dow, all unconnected to actual parallel pricing. Conflating the evidence ignores that these products have different prices, customers, and characteristics, and contradicts the legal principle that proof of a conspiracy on one product does not permit the inference of a conspiracy on another. *See, e.g., In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 378 (3d Cir. 2004) (affirming summary judgment on alleged conspiracy "to fix prices of automotive replacement

[16] Specifically, (1) Davies talking to BASF about Dow "not sticking with the price increase," which undermines Plaintiffs' case; (2) one phone from Stern to Fischer somewhere from 2001 to mid-2002, which is unconnected to any parallel pricing; (3) one phone call from Fischer to Bernstein in February 2002, after which Dow's price for polyols went down in March 2002, *see* Trial Ex. 5256; and (4) the August 2002 contacts between Levi, BASF, Bayer, and Lyondell, after which Bayer's price for polyols went down in Sept. 2002, *see* Trial Ex. 5255.

glass," while reversing summary judgment on alleged conspiracy "to fix the prices of flat glass"); *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 664 (7th Cir. 2002) (evidence the defendant conspired to fix prices for lysine and citric acid "cannot be used as evidence that it participated in a conspiracy to fix the price of HFCS").

Plaintiffs also cite to evidence solely related to other suppliers. But that evidence does not bear on whether Dow participated in the alleged conspiracy.

They also cite two pieces of evidence unrelated to a specific product, time, or customer.[17] Such general evidence is insufficient to support a finding that Dow participated in a conspiracy as to the specific products at issue in the November 24, 2000, to December 31, 2003, time period. *See In re Citric Acid Litig.*, 191 F.3d 1090, 1104-05 (9th Cir. 1999) (testimony in a previous trial of "discussions regarding the bidding price for certain [citric acid] accounts with someone from Cargill" did not "possess the requisite specificity to withstand summary judgment" in Cargill's favor); *cf. In re Elevator Antitrust Litig.*, 502 F.3d 47, 50 (2d Cir. 2007) (granting motion to dismiss where conspiracy was alleged in general terms only, "without any specification of any particular activities by any particular defendant").

ii. The Evidence Does Not Support a Conspiracy Involving Lyondell

The only evidence Plaintiffs cite regarding Lyondell between November 24, 2000, and December 31, 2003, is a single phone call on August 5, 2002, from Dow's Levi to Lyondell's Portella. JMOL/NT Opp. at 43; Trial Tr. 2625:14-2626:8, 2632:18-2634:25. Nothing in the record indicates what was discussed during that call. In any event, as discussed above, in September 2002 when the announcements were to take effect, Lyondell increased TDI prices by

[17] Specifically, Plaintiffs point to (1) Bayer's Stern testifying to 8-15 conversations with Dow's Fischer, JMOL/NT Opp. at 37, Trial Tr. at 330:16-331:6; and (2) Bayer's Kirk testifying that Fischer told him Dow intended to raise urethane prices, JMOL/NT Opp. at 38, Trial Tr. at 1307:3-1308:1.

only $0.01, one-sixth of Dow's $0.06 increase, and BASF's polyols prices went down. *See* Trial Exs. 5253, 5251, and 5254. Thus, no reasonable jury could have found that Lyondell participated in the conspiracy.

But Dr. McClave did not present the jury with separate damages by company or any method to estimate separate damages by company.[18] The jury thus had no reasonable basis to award damages for a conspiracy that did not include Lyondell. *See, e.g.*, *R.S.E., Inc. v. Pennsy Supply, Inc.*, 523 F. Supp. 954, 970-71 (M.D. Penn. 1981) ("Guesswork based upon the studies of an expert cannot form the foundation of a damage award. In short, plaintiff failed to provide sufficient evidence to the jury that would provide it with the raw data it would need to arrive at a damage award without resorting to guesswork or speculation."); *Lemon v. Harlem Globetrotters Int'l., Inc.*, 437 F. Supp. 2d 1089, 1106-07 (D. Ariz. 2006) ("In effect, Plaintiffs seek to make damages experts out of jurors, asking them to determine Plaintiff-specific percentages.... Such an undertaking, unaided by expert testimony, cross-examination, and counter-experts, would be tantamount to inviting the jurors to engage in speculation and conjecture.").

iii. The Evidence Does Not Support a Conspiracy Starting November 24, 2000

Dr. McClave did not present the jury with separate damages for any period shorter than November 24, 2000, to December 31, 2003. The jury thus had no reasonable basis to award damages for a shorter conspiracy. But a reasonable jury could not have found a conspiracy that spanned November 24, 2000, to December 31, 2003. The first contacts that Plaintiffs point to after November 24, 2000, did not even involve Dow and occurred on March 8, 2001. JMOL/NT

[18] Dr. McClave presented certain overcharge percentages by company, but they are insufficient to allow the jury to assess damages by company because Dr. McClave did not present (1) an overcharge percentage for Lyondell; (2) an overcharge percentage that was limited to the post-Nov. 24, 2000 period; or (3) the aggregate sales by company to which the overcharge percentage would have had to be applied to get to a damage figure.

Opp. at 42; Trial Tr. 1728:22-1730:19, 1733:19-23. The first contact after November 24, 2000, that involves Dow is a February 2002, phone call between Fischer and BASF's Bernstein. *See* JMOL/NT Opp. at 43, Trial Tr. at 1783:10-19. The jury could not have prorated the damages Dr. McClave presented for a shorter conspiracy period without speculation or guesswork because, under Dr. McClave's model, the gap between the actual and predicted prices is not constant over time, and so the damages for each day, month, or year will differ.

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

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

If the Court does not enter judgment for Dow, a new trial is required. The claims of Class members who purchased urethanes chemicals prior to November 24, 2000 only have been adjudicated in favor of Dow. Consequently, no judgment can be entered in favor of the entire Class as it has been defined.[19] As for transactions on or after November 24, 2000,[20] one cannot determine from the verdict which purchase(s) by which Class member(s) were violations of the Sherman Act. While the answer to Question 1 suggests the jury found a conspiracy of some kind, the answers to the remaining questions affirmatively establish that the parameters of that

[19] The certified Class includes direct purchasers of urethanes chemicals from January 1, 1999 through December 31, 2004. Memorandum and Order (Dkt. 708). No evidence was introduced at trial on which a judgment could be based for Class members who purchased urethanes chemicals only in 2004. For this additional reason, judgment cannot be entered for the entire Class as it is defined.

[20] The November 24, 2000 date in Question 3 is not tied to anything in the evidentiary record. There is no allegation or evidence that anything occurred or changed as of that date such that one could conclude that every transaction on or after November 24, 2000 was impacted by the alleged conspiracy. The November 24, 2000 date appears to have been selected because of the fraudulent concealment theory advocated by Plaintiffs, a theory the jury never reached. As a result and because of the jury's answer to Question 3, no liability can arise for transactions prior to November 24, 2000, but the opposite conclusion cannot be reached for transactions on or after that date. As explained in the text, one cannot determine from the verdict what transactions on or after November 24, 2000 give rise to liability and/or damages.

conspiracy are something other than what the Class alleged. The inception(s) and duration(s) of the conspiracy as well as the product(s), purchaser(s) and transaction(s) that were the subject of any conspiracy cannot be determined from the verdict. Without this information, neither liability to nor damages for any Class member can be found[21]—and no judgment for any Class member can be entered.[22]

Plaintiffs argue nonetheless that "Dow is not entitled to a particularized set of answers that reflect all of the jury's reasoning." JMOL/NT Opp. at 50. While it was error not to use the verdict form proposed by Dow (Dkt. 2696-1), Plaintiffs' argument misses the point; it does not address the actual verdict form used at trial. For the reasons already explained, the answers given by the jury on that verdict form necessitate a new trial.

Plaintiffs also suggest that Federal Rule of Evidence 606(b) "preclude[s] inquiry into the kinds of questions Dow poses in its brief." JMOL/NT Opp. at 50-51; *see also id.* at 49 (asserting that Dow is questioning how the jury reached its result). By its terms, Rule 606(b) does not apply here. Dow has never sought to have a juror testify, much less testify about the prohibited topics listed in Rule 606(b)(1). Dow instead sought clarification of the verdict, a type of questioning that is not barred by Rule 606(b). The Tenth Circuit made this clear in *Unit Drilling Co. v. Enron Oil & Gas Co.*, 108 F.3d 1186, 1192 (10th Cir. 1997). In that case, the Tenth

[21] As noted in Dow's opening brief at 45, the Seventh Amendment bars another jury from filling in the holes in the verdict. Because of the Seventh Amendment and to protect Dow's due process rights, a new trial is required on all issues. In response, Plaintiffs simply assert that the verdict raises no constitutional concerns. Response at 49 n.19. They are half right. Constitutional concerns do not bar entry of judgment for Dow. But, no judgment may be entered against Dow on the verdict absent, among other things, additional information that cannot be obtained without violating Dow's rights.

[22] By explaining in detail why no judgment can be entered for any Class member, Dow does not suggest that the jury considered or the trial involved any claim other than the Class claim alleged in Instruction 12. Rather, Dow provides this explanation to demonstrate the extent of the consequences of the jury's answer to Question 3.

Circuit distinguished between questions about the content of deliberations and questions seeking clarification of the verdict. While the former may be inadmissible under Rule 606(b), the Tenth Circuit expressly approved questioning to clarify the verdict. *Id.* In this case, Dow requested that the jury be questioned to clarify the verdict and it was error not to do so.

Finally, Plaintiffs deny that the jury's verdict raises any concerns about fluid recovery, which refers to "situations in which injured class members are unknown and unknowable." JMOL/NT Opp. at 51-52. They assert that Dr. McClave's model calculates the injury and damages sustained by each Class member and conclude that this case therefore does not involve a fluid recovery. *Id.* Again, Plaintiffs are incorrect. Moreover, even if Dr. McClave's model were sound, the jury rejected it, finding that the model neither established injury throughout the class period nor calculated damages remotely close to the amount of the verdict.

Furthermore, regardless of Dr. McClave's model or any other evidence, neither liability to nor damages for any individual Class member can be discerned from the verdict. In other words, the verdict leaves it unknown or unknowable which Class members have been injured and on what transactions. As a result, the damages found by the jury cannot be distributed. The verdict creates a situation where the aggregate damages awarded by the jury cannot be distributed to injured Class members (because they are unidentified) in the amount of their respective damages (because they are unknown and cannot be determined without knowing what transaction(s) in what time period(s) caused injury).[23] The jury's responses to the erroneous

[23] Plaintiffs cite *Uselton v. Commercial Lovelace Motor Freight*, 9 F.3d 849, 854-55 (10th Cir. 1993), to argue that Dow does not have standing to raise the fluid recovery issue. Response at 52. In *Uselton*, counsel for certain class members were awarded fees from a common fund. Class counsel objected to this award of fees, but the Tenth Circuit held that class counsel did not have standing to object because "the fee awarded to objecting counsel came out of the common fund remaining after payment of class counsel's fee. Only the plaintiff class, none of whose members is a party to this appeal, could be considered aggrieved by that award." *Id.* This

verdict form thus created a situation akin to an impermissible fluid recovery. *See In re Scrap Metal Antitrust Litig.*, 527 F.3d 517, 534 (6th Cir. 2008) (finding no fluid recovery where damages could be distributed to injured class members in the amount of their respective damages); *In re NASDAQ Market-Makers Antitrust Litig.*, 169 F.R.D. 493, 526 (S.D.N.Y. 1996) (same). Accordingly, a new trial is required.

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

i. The Court erred by not instructing the jury that it must find for Dow unless Plaintiffs prove their claim as alleged

The jury rejected the conspiracy asserted by Plaintiffs. That is certain and not in dispute. The jury found, however, that a conspiracy of some undefined scope existed. The jury was not instructed, however, on what action it should take if it found something "less" or "other" than what Plaintiffs alleged. The failure to provide this instruction to the jury, including the instructions proffered by Dow, was error necessitating a new trial.

Plaintiffs argue that "the law does not require the jury to make specific factual findings regarding each factual element of the conspiracy or else return a verdict for Dow." JMOL/NT Opp. at 53. To the contrary, this is exactly what the law requires. Unless the jury found that Plaintiffs had proven the conspiracy they asserted, it was required to enter judgment for Dow. Here, the jury rejected the purported conspiracy alleged by Plaintiffs, but awarded damages anyway. By not instructing the jury that it was charged with deciding only the claim alleged by Plaintiffs and that any failure of proof with respect to that claim required judgment for Dow, the Court erred and a new trial is required.

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holding is irrelevant to this case, which does not involve a collateral challenge by an unaffected entity.

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

The jury instructions did not properly frame the legal issues essential to Plaintiffs' claim and their assertions to the contrary lack merit.

The definition of agreement. As explained in Dow's opening brief, at 51-52, Instruction 14 did not provide adequate guidance about the definition of "agreement." It lacks language proposed by Dow that "an agreement is a meeting of the minds that requires two or more parties to make a conscious commitment to a common scheme." *Id*. Plaintiffs now contend that the language in Instruction 14 is "substantially similar to the language proposed by Dow" and "reflects a correct statement of the law." JMOL/NT Opp. at 54. Nowhere did Instruction 14 state that a meeting of the minds must exist or that a meeting of the minds requires a conscious commitment to a common scheme. The failure to provide that instruction to the jury was error.

Evidence of competition. Plaintiffs write: "Dow argues that the Court erred in instructing the jury that, where there is an illegal conspiracy, 'it is no defense that the manufacturers actually competed in some respects with each other.' Dow Brief at 53." JMOL/NT Opp. at 54-55. That is not the argument Dow made. Instruction 17 is erroneous because it failed to instruct the jury about the significance of evidence of competition. JMOL/NT Mtn. at 54. Evidence of competition directly bears on the threshold question of whether Dow entered into an agreement not to compete and that the jury could conclude from evidence of competition that Dow never entered into a conspiracy.

Tends to Exclude. The jury should have been instructed to find for Dow unless Plaintiffs produced evidence that tended to exclude the possibility that Dow acted independently.

Matsushita, 475 U.S. at 588, and *Monsanto*, 465 U.S. at 768. Plaintiffs maintain that Instructions 14, 15 and 28 capture the substance of *Matsushita* and *Monsanto*. JMOL/NT Opp. at 55. That is incorrect. None of these instructions contains the "tends to exclude" language that was necessary for the jury to understand and apply.[24]

Jury Deliberations. In their Response, Plaintiffs do not dispute or even address Dow's argument that the Court's response to the jury's note was erroneous. Instead, they contend that the note is irrelevant, JMOL/NT Opp. at 11-12, and argue that the decision whether to submit the special interrogatory requested by Dow was within the Court's discretion, *see id.* at 53 & 53 n.22. As explained above in section I.B., the jury's note *is* relevant and cannot simply be ignored. Furthermore, the Court did respond to the jury's note. Its response was erroneous. The failure to submit the interrogatory requested by Dow was also, and is independently, erroneous.

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

Over Dow's objection, Plaintiffs were allowed to make the inflammatory argument to the jury that Dow destroyed documents. Dow repeatedly requested that a curative instruction be issued. The decision not to do so was an error requiring a new trial.

Although they insist that they never argued spoliation to the jury, JMOL/NT Opp. at 58, Plaintiffs argued that Dow destroyed documents even though Stephanie Barbour had raised claims about possible antitrust violations. Trial Tr. at 170:23-25, 177:6-10. No wordplay by Plaintiffs alters the substance of what they argued or mitigates its effect.

[24] Plaintiffs also allege that Dow has asserted in a brief that the "tends to exclude" standard requires Plaintiffs to exclude any possibility of independent conduct. JNOV/NT Opp. at 56. This allegation has nothing to do with the jury instructions Dow requested. The Dow Chemical Company's Responses to Plaintiffs' Proposed Jury Instructions and Dow's Proposed Jury Instructions (Dkt. 2690-2) at 72.

Plaintiffs also contend that they were entitled to assert that Dow destroyed documents to cover up the alleged conspiracy. But during closing argument Plaintiffs made no such argument about Dow. By that time, the damage was done. By that time, Plaintiffs had been permitted to argue document destruction in opening and to introduce evidence insinuating improper document destruction by Dow—all without any guidance from the Court placing the application of Dow's document retention/destruction policies in proper context. And, by that time, it was clear that no evidence remotely suggested that Dow had destroyed any documents as part of a cover up or that Dow's application of its document retention policy was anything other than routine.

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

Plaintiffs contend that, because no evidence of the 2004 investigation was introduced at trial, the Court properly denied Dow's request to instruct the jury that the 2004 investigation should play no part in its deliberations. JMOL/NT Opp. at 60. Contrary to Plaintiffs' contention, they introduced testimony related to the 2004 investigation including: Ms. Barbour wrote a letter to Phil Cook in 2004 outlining her complaints as she was preparing to leave Dow, Trial Tr. at 924-25; Ms. Barbour also met with Mr. Cook about her concerns, *id.*; Mr. Cook wrote Ms. Barbour that Dow was going to conduct an investigation into her complaints, *id.*; Tom McCormick was asked to conduct an investigation into Ms. Barbour's 2004 allegations, *id.* at 951; Mr. Fischer was questioned as part of the 2004 investigation, *id.* at 984-990.

Left unsaid, however, was the substance of Ms. Barbour's 2004 complaints as well as the extent and outcome of Dow's investigation. That left the jury free to speculate incorrectly that (a) Ms. Barbour made the same complaints in 2004 that she raised in the excerpts from her 2010 deposition that were introduced at trial, and (b) Dow did not present the results of its investigation at trial because the results were unfavorable. Such speculation should not have

been permitted because it penalized Dow for its proper assertion of the attorney-client privilege. *See Parker v. Prudential Ins. Co.*, 900 F.2d 772, 775 (4th Cir. 1990). During trial, Dow repeatedly requested an instruction to remedy this situation. *See, e.g.*, Trial Tr. at 896-900, 2717, 4051-068 and 5165; Dkt. 2792-3. The Court erroneously declined each of these requests.

C. A new trial should be ordered because evidence relating to Larry Stern's credibility should not have been excluded

The preclusion of evidence relating to Larry Stern's credibility and motivations warrants a new trial for several reasons. First, contrary to Plaintiffs' assertion, Dow is not raising a "new" argument. JMOL/NT Opp. at 61. Dow consistently argued that Mr. Stern had significant incentives to exaggerate, slant and/or fabricate his testimony to the Justice Department and during his deposition.[25] The Antitrust Division's policy that an amnesty applicant must admit to some criminal antitrust violation underscores this point.[26] Mr. Stern's significant motivations to embellish his testimony provide the "logical connection" between the precluded evidence and the credibility of Stern's testimony. *See* Stern Mtn. at 5-6; JNOV/NT Mtn. at 61-62.

Second, Plaintiffs contend this evidence would have been of "marginal value to the jury's evaluation" of Mr. Stern's credibility, JMOL/NT Opp. at 62, but this is incorrect. Mr. Stern was one of two key witnesses relied upon by Plaintiffs and a chief accuser against Dow, particularly

[25] *See* Response to Motion in Limine to Preclude Evidence or Reference to the Closing of the Department of Justice Criminal Investigation ("Stern Mtn.") (Dkt. 2634) at 4, 6; Tr. of 1/9/13 *In Limine* Conference at 52 ("[W]hat we are saying is that…he (Stern) has a bias to tell the story in his deposition in this case in the same way he had the bias to tell the Justice Department at the time that they needed enough to decide that they would give him amnesty. They don't give you amnesty if you come in and say, I'm a Boy Scout; I didn't do anything.")

[26] The cases cited by Plaintiffs do not hold otherwise. In both cases, the party raising the issue either had not requested the desired relief or had expressly waived it during the pretrial conference. *See Alexander v. Riga*, 208 F.3d 419, 434 (3rd Cir. 2000); *De Puy, Inc. v. Biomedical Eng'g Trust*, 216 F. Supp. 2d 358, 376 (D.N.J. 2001). Here, in contrast, the admissibility of Stern's testimony was presented to the Court in a motion *in limine* and discussed at length during the pre-trial conference.

with respect to David Fischer. Furthermore, Dr. Solow relied on Mr. Stern's accusations. JNOV/NT Mtn. at 60.

Finally, to bolster the impact of Mr. Stern's testimony and exploit the Court's *in limine* ruling, Plaintiffs argued to the jury – in both their opening statement and closing arguments – that Mr. Stern lacked *any* motive to lie. *E.g.*, Trial Tr. 5225:19-5226:14. Because of the *in limine* ruling, however, Dow was deprived of the ability to present critical evidence directly refuting this argument. The jury should have been allowed to consider Mr. Stern's immunity agreement with the government and the tens of millions of dollars he admitted receiving to weigh the credibility of his testimony.

D. A new trial should be ordered because the imposition of joint and several liability in this case is unconstitutional and otherwise inappropriate

Plaintiffs do not dispute that the federal antitrust statutes do not authorize imposition of joint and several liability. Such relief is unconstitutional and inappropriate in this case.

Plaintiffs argue, however, that courts interpreting other federal statutes have held that joint and several liability does not violate due process. JMOL/NT Opp. at 63. But CERCLA, 42 U.S.C. § 9607, and RCRA, 42 U.S.C. § 6928, the statutes at issue in the cases Plaintiffs rely upon are not analogous. Neither permits recovery of treble damages and, therefore, a defendant to a CERCLA or RCRA action is not subject to the same risk or fact of a disproportionate and excessive damages verdict such as Dow faces here.

Plaintiffs did not plead damages under a joint and several liability theory. The Federal Rules are clear that while a plaintiff may not be required to plead *legal* theories, a plaintiff is required to plead the *relief* it seeks. Fed. R. Civ. P. 8(a)(3). Plaintiffs cite no authority to the

contrary.[27] Moreover, Fed. R. Civ. P. 54(c) is inapplicable here because no statute or law otherwise entitles Plaintiffs to damages under a joint and several liability theory.[28]

Finally, Plaintiffs cannot rebut Dow's argument that imposition of joint and several liability would result in a monetary judgment that is vastly disproportionate with the actual effects of any alleged conduct in violation of Dow's due process rights under the Fifth Amendment.[29] *See State Farm Mut. Auto Ins. Co. v. Campbell,* 538 U.S. 408, 416-17 (2003); *BMW of North America, Inc. v. Gore,* 517 U.S. 559, 562-63 (1996).

Conclusion

For the foregoing reasons, Dow requests the Court to enter judgment in favor of Dow, or in the alternative, grant Dow a new trial and/or decertify the Class.

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[27] *See SEC v. Whittemore,* 659 F.3d 1, 10 (D.C. Cir. 2011) (noting that the Commission *had made* a specific request for joint and several liability in its disgorgement application); *Zokari v. Gates,* 561 F.3d 1076 (10th Cir. 2009) (affirming district court decision to deny *pro se* plaintiff in Title VII case to assert wage-law claim not set forth in complaint; joint and several liability not at issue). Plaintiffs claim to have put Dow "on notice" because they referred to "joint and several liability" in a number of pleadings. JNOV/NT Opp. at 64. None of those pleadings, however, states that Plaintiffs were in fact pursuing damages for joint and several liability against Dow.

[28] Plaintiffs rely on *In re Universal Serv. Fund Tel. Billing Practices Litig.,* 02-MD-1468-JWL, 2009 WL 435111 (D. Kan. Feb. 20, 2009). In that case, however, the Court permitted plaintiffs' belated attempt to recover pre-judgment interest because New York law expressly authorized it. *Id.* at *12. Here, no statute entitles Plaintiffs to damages from joint and several liability.

[29] In response, Plaintiffs cite for example, *Aspen Highlands Skiing Corp. v. Aspen Skiing Co.,* 738 F.2d 1509 (10th Cir. 1984). JNOV/NT Opp. at 65. In *Aspen*, however, the Tenth Circuit recognized that in some cases a new trial based on a grossly excessive damages verdict was warranted. *Id.* at 1526. Plaintiffs also cite *Hess Oil Virgin Is. Corp. v. UOP, Inc.,* 861 F.2d 1197 (10th Cir. 1988), and *Coats v. Penrod Drilling Corp.,* 61 F.3d 1113 (5th Cir. 1995). Response at 65. Neither case is analogous. Neither case involves a conspiracy. *Hess Oil* permitted joint and several liability for a negligence action under the laws of the Virgin Islands while *Coats Penrod* permitted joint and several liability under *maritime* law.

Respectfully submitted,

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Certificate of Service

On April 5, 2013, a copy of REPLY MEMORANDUM IN SUPPORT OF THE DOW CHEMICAL COMPANY'S MOTIONS FOR JUDGMENT ON THE VERDICT AND AS A MATTER OF LAW, OR FOR A NEW TRIAL 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. The document was also served via email on counsel for plaintiffs.

On April 7, 2013, a copy of CORRECTED REPLY MEMORANDUM IN SUPPORT OF THE DOW CHEMICAL COMPANY'S MOTIONS FOR JUDGMENT ON THE VERDICT AND AS A MATTER OF LAW, OR FOR A NEW TRIAL was filed with the Court through the ECF system, which provides electronic service of the filing to all counsel of record who have registered for ECF notification in this matter.

s/ Brian R. Markley
Attorney for The Dow Chemical Company