IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

IN RE: URETHANE ANTITRUST LITIGATION	)	**Civil Action No. 04-MD-1616-JWL** **MDL No. 1616**
This Document Relates to All Polyether Polyol Cases	)	

CLASS PLAINTIFFS' SUR-REPLY MEMORANDUM ADDRESSING *COMCAST CORP. V. BEHREND* AND OPPOSING THE DOW CHEMICAL COMPANY'S MOTIONS FOR JUDGMENT AS A MATTER OF LAW, A NEW TRIAL, AND DECERTIFICATION OF THE CLASS

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PRELIMINARY STATEMENT

Plaintiffs respectfully submit this memorandum regarding the Supreme Court's recent decision in *Comcast Corp. v. Behrend*, 133 S.Ct. 1426 (2013).

For decades, courts have recognized that horizontal price-fixing cases are paradigmatic examples of when Rule 23(b)(3) classes are appropriate. Experience at trial confirms why that is so. Based on common evidence, the jury found that Dow conspired to fix the prices of urethane chemicals, causing direct purchasers to pay higher prices than they otherwise would have. These common facts established Dow's liability and damages as to the entire Class. And as you would expect from a price-fixing conspiracy of this scale and duration, the jury found that the aggregate damages were substantial: more than $400 million. Quite simply, the class process worked exactly as designed.

Dow nonetheless argues that because of *Comcast*, this Court must enter judgment as a matter of law or decertify the Class at the 25th hour, undoing the last eight years of litigation, overriding the jury's verdict, and effectively exonerating Dow from its massive and multi-year price-fixing scheme. But *Comcast* does not support these radical results.

By its own terms, *Comcast* involved the "the straightforward application of class-certification principles." *Id.* at 1433. It "provide[d] no occasion" for the Court to alter the substantive law of antitrust injury and damages or the settled law of class certification in price-fixing cases. *Id*. Furthermore, the errors identified in *Comcast* did not occur here. Indeed, *Comcast* involved an unusual procedural posture and a complex theory of monopolization, based on conduct for which there was no intuitive or recognized method for proving class-wide injury and damages. This case, by contrast, is a straightforward price-fixing conspiracy with an obvious theory of antitrust injury—the conspiracy injured the Class by manipulating prices directly—and well-established methods for proving damages.

Comcast thus affords no basis for upsetting the jury's verdict under Rule 50 or the Court's prior rulings under Rule 23. The Court's decision to certify the Class was and remains correct. The Court's *Daubert* analysis of Dr. McClave's opinions was and remains correct. And the extensive evidence and authority summarized in Plaintiffs' initial post-trial brief amply supports the jury's verdict for purposes of Dow's pending motions. *See* Dkt. No. 2816.[1]

BACKGROUND—SUMMARY OF *COMCAST*

The plaintiffs in *Comcast* represented a putative class of cable television subscribers in Philadelphia. 133 S.Ct. at 1430. The defendant was Comcast, the area's dominant cable provider. *Id.* The plaintiffs alleged a series of antitrust violations—under both Section 1 and Section 2 of the Sherman Act—which, according to the plaintiffs, allowed Comcast to obtain an unlawful monopoly "cluster" in the relevant market. *Id.* There were no allegations of price-fixing.

The conduct at issue in *Comcast* was complex and spanned a range of legal and factual theories, including, *inter alia*, challenges to geographic swap transactions with other cable

[1] Consistent with the Court's Order (Dkt. No. 2831), Plaintiffs have limited this supplemental memorandum to Dow's arguments related to *Comcast*. Plaintiffs note, however, that Dow improperly raised for the first time in its reply brief a series of arguments relating to the supposed insufficiency of evidence on the element of conspiracy. *See* Dkt. No. 2826 ("Dow Reply Br."), at 25-36 (raising new issues relating to parallel pricing, plus factors, the evidence of conspiracy by product group, Lyondell, and a conspiracy starting on November 24, 2000). Although each and every one of these arguments is wrong on the merits, *see* Dkt. Nos. 2637 (Court's summary judgment opinion) and 2816 (Plaintiffs' initial post-trial brief), they should not be considered because Dow raised them for the first time on reply. *See, e.g.*, *United States v. Perez-Jacome*, No. 06-20021, 2012 WL 3245452, at *2 (D. Kan. Aug. 9, 2012) ("In accepting a reply, the court will deny or exclude summarily all arguments and issues first raised in a reply."); *Nkemakolam v. St. John's Military Sch.*, 876 F. Supp. 2d 1240, 1245 (D. Kan. 2012) ("As a preliminary matter, the Court does not entertain arguments made for the first time in a reply brief."); *P.S. v. Farm, Inc.*, 658 F. Supp. 2d 1281, 1295 (D. Kan. 2009) ("Nor will the Court consider a separate argument . . . because TFI did not make this argument until it submitted its reply brief."); *Liebau v. Columbia Cas. Co.*, 176 F. Supp. 2d 1236, 1244 (D. Kan. 2001) ("Courts in this district generally refuse to consider issues raised for the first time in a reply brief.").

companies and several distinct theories of monopolization. *Id.* The plaintiffs advanced four theories of antitrust injury: overcharges caused by Comcast's (i) exclusion of satellite competition; (ii) exclusion of competing (non-satellite) "overbuilder" cable networks; (iii) restrictions on subscribers' ability to access "benchmarking" information on competitive market prices; and (iv) use of monopoly bargaining power to negotiate better rates with content providers without passing the savings through to subscribers. *Id.* at 1430-31.

At the class certification stage, "[t]he District Court held, and it [was] uncontested," that "to meet the predominance requirement respondents had to show . . . that the damages resulting from [the alleged] injury were measureable 'on a class-wide basis' through use of a 'common methodology.'" *Id.* at 1430. This stands in contrast to the ordinary rule, which is that "individual damage[s] calculations should not scuttle class certification under Rule 23(b)(3)." 2 W. Rubenstein, Newberg on Class Actions § 4:54, at 205 (5th ed. 2012).

To carry this burden, the *Comcast* plaintiffs introduced evidence at the class certification stage relating to their various theories of liability and a damage analysis performed by Dr. McClave. 133 S.Ct. at 1430-31. To estimate the overcharge attributable to all four theories of antitrust injury, Dr. McClave compared cable prices paid by the class to cable prices in a number of competitive benchmark regions, *i.e.*, counties in which (i) Comcast's market share was lower, (ii) satellite market share was higher, and (iii) overbuilder market share was higher. *Behrend v. Comcast Corp.*, 264 F.R.D. 150, 181-83 (E.D. Pa. 2010).

The district court accepted Dr. McClave's analysis and certified the class, but in the course of doing so rejected three of the plaintiffs' four theories of class-wide injury. *Id.* at 162-81. In particular, the Court held that plaintiffs could not establish antitrust injury using common proof of decreased satellite penetration, lack of benchmark competition, or monopoly bargaining

power. *Id.*

Having rejected three of the plaintiffs' four basic theories, the one that remained was Comcast's allegedly unlawful deterrence of "overbuilding." *Id.* at 174. The district court accepted the overbuilding theory of common antitrust impact, approved Dr. McClave's analysis as a common methodology for damages, and certified the class. *Id.* The court of appeals affirmed, "finding it unnecessary to decide" at the class certification stage whether the original damages model was sufficiently tied to the remaining liability case to allow for "a just and reasonable inference" of damages on the merits. 133 S.Ct. at 1433.

The Supreme Court reversed. First, the Court reiterated the established rule that class certification requires rigorous analysis under Rule 23, and that this rigorous inquiry may "overlap with the merits of the plaintiff's underlying claim." *Id.* at 1432 (quotation marks omitted). Second, the Court held that the plaintiffs' model did not measure damages on a class-wide basis, a failure that defeated Rule 23(b)(3) predominance because of the concession that class-wide proof of damages was required. *Id.* at 1433; *see also id.* (the case "provide[d] no occasion" for discussion or analysis of "substantive antitrust law"); *see also* Part II.A., *infra*.

The Court reversed because the model did not measure "only those damages attributable" to the plaintiffs' actionable theory of liability. *Id*. Because the *Comcast* model relied on competitive benchmark counties in which Comcast had considerably lower market share and in which satellite providers were competing more effectively (thus holding down price), the Court emphasized that the supra-competitive pricing estimated by the model might well have resulted from conduct no longer at issue. *Id.* at 1434. Such overcharges, the Court explained, would not be "the result of the wrong" and would not be "anticompetitive" in any relevant sense. *Id*. Thus, the Court concluded that it would be impossible for a jury to draw a reasonable inference

of illegal class-wide overcharge from the model originally submitted to the district court. Because the court of appeals found it unnecessary at the class certification stage to resolve whether a jury could have drawn a reasonable inference as to class-wide damages caused solely by the "overbuilder" conduct still at issue, the Supreme Court reversed the order granting class certification. *Id.* at 1432.

ARGUMENT

I. *COMCAST* DOES NOT UNDERMINE THE JURY'S VERDICT HERE

A. *Comcast* Did Not Disturb the Standard for Sufficiency Challenges or Require Courts to Ignore Jury Verdicts When Evaluating Certification

Comcast was decided at the class certification stage of the case. The district court certified the class, and the court of appeals granted a petition for interlocutory review. In affirming the district court's order, the court of appeals deemed it unnecessary to resolve, at the class certification stage, whether the plaintiffs' remaining liability theory was causally connected to the original damage estimate, believing that question was properly reserved for the merits. *Comcast*, 133 S.Ct. at 1432. The Supreme Court reversed based on "the straightforward application of class certification principles," holding that Rule 23 required consideration of whether the plaintiffs could establish their claims using common proof of liability and damages, even if that inquiry overlapped with the merits. *Id.* at 1433.

The posture here could hardly be more different. After a full and fair trial, the jury has resolved, based on all the evidence, precisely the question of causation the court of appeals declined to address in *Comcast*. Pursuant to the Court's instructions, the jury found that Dow participated in a price-fixing conspiracy that caused injury and damage to the Class. The Class, in other words, established its claims on the merits using common proof at trial, just as Rule 23

contemplates.[2]

The issue for the Court at this stage is whether Dr. McClave's model, along with the rest of the trial record, provided sufficient evidence for a jury to conclude that the price-fixing conspiracy caused Plaintiffs as a Class more than $400 million in damages. *Comcast* does nothing to change the standard for sufficiency review. And by that well-settled standard, Dow's challenge falls far short. *See J. Truett Payne Co., Inc. v. Chrysler Motor Corp.*, 451 U.S. 557, 565-66 (1981) (jury is permitted to draw reasonable inferences of antitrust injury and damages); *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000) (verdict is entitled to wide deference).

B. *Comcast* Did Not Disturb the Substantive Law of Antitrust Damages Under Which Dr. McClave Applied Standard Methodology for Price-Fixing Claims

Dow also appears to argue that Comcast altered the well-settled substantive law of antitrust. But *Comcast*, on its face, disavows that reading. *See* 133 S.Ct. at 1433 (case "provide[d] no occasion" for analysis of "substantive antitrust law"). Indeed, the Supreme Court cited with approval the seminal *Story Parchment* case, under which reasonable inferences and estimates of damages will suffice. *Id.* (citing *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555 (1931)); *see generally J. Truett Payne*, 451 U.S. at 565-66 (1981) (collecting cases); Dkt. No. 2816, at 15 and 28-30 (explaining standard).

At the heart of the Court's concern in *Comcast* was a basic disconnect between the plaintiffs' theory of liability and theory of damages. 133 S.Ct. at 134. *Comcast* was a novel and

[2] By trying to extend *Comcast* to such a different procedural context, Dow is essentially asking this Court to ignore the jury's own evaluation of several merits issues, including whether Dr. McClave's model appropriately measured aggregate damages on a class-wide basis. But if *Comcast* makes anything clear, it is that merits determinations matter under Rule 23. *See* 133 S.Ct. at 1433 (merits are pertinent to certification inquiry). Here, those merits determinations have been resolved by the jury.

complex monopolization claim involving four distinct theories of injury. For purposes of class certification, the causation issues required exhaustive testimony from numerous experts to address whether, how, and to what extent the various types of monopoly conduct had impacted customers in the relevant market. 264 F.R.D. 150. Based on the certification record, the district court rejected three of the plaintiffs' four theories as incapable of establishing class-wide injury. *Id.* at 190-91. Yet the original damage model was left unchanged. *Id.* This left the Supreme Court majority to question whether the damages quantified by the model were caused by the particular antitrust harm that was actionable (the "overbuilder" theory)—or by a different injury, or by the "combined effects of multiple forms of alleged antitrust harm." 133 S.Ct. at 1434; *see also id.* at 1434-35 ("The permutations involving four theories of liability and 2 million subscribers located in 16 counties are nearly endless.").[3]

This case presents none of these difficulties, and all damages were properly tied to the liability theory. As an initial matter, this is a horizontal price-fixing case, which involves a straightforward and widely-accepted methodology for damages modeling. The standard approach used to estimate price-fixing damages is multiple regression analysis, a statistical technique used to model factors such as supply, demand, cost, and other variables that drive competitive market prices. By controlling for these factors, regression models can be used to estimate "competitive" (*i.e.*, "but for") market prices in the relevant industry. In cartel cases, the difference between estimated competitive prices and the actual prices charged by the conspirators represents the overcharge. This methodology is well-accepted as supporting a

[3] Because the liability theories of the case changed, the *Comcast* model suffered from an issue commonly observed in monopolization litigation. Courts have long emphasized that monopolization plaintiffs must distinguish between overcharges caused by unlawful as opposed to lawful monopoly behavior. *See, e.g.*, Dkt. No. 2809 (Dow brief collecting inapposite monopolization authority to this effect).

reasonable inference of class-wide overcharge in price-fixing litigation. *See, e.g.*, Dkt. No. 2816, at 19-22 (collecting cases); Dkt. No. 2428, at 9 (same); IIA Phillip E. Areeda et al., Antitrust Law ¶¶ 394-95, at 386 (3d ed. 2007) ("The differences between the predicted prices [from the regression model] and the actual prices charged during the conspiracy period are inferred to be the overcharges due to the conspiracy.").

The specific type of regression analysis employed by Dr. McClave here, known as "forecasting," is also well-accepted. *Id.*; *In re Linerboard Antitrust Litig.*, 497 F. Supp. 2d 666 (E.D. Pa. 2007); *In re Polypropylene Carpet Antitrust Litig.*, 93 F. Supp. 2d 1348 (N.D. Ga. 2000). In the price-fixing context, forecasting models can be used to compare prices in the same industry during a competitive period to prices during the conspiracy period. Using multiple regression analysis, the model first estimates an equation that explains competitive period prices. The equation is then applied to the conspiracy period to estimate overcharges, if any. Dow's own expert, Dr. Ugone, agrees that forecasting is an accepted methodology for estimating overcharges in cartel litigation. Trial Tr. at 4930:20-4932:9.

Consistent with this well-established methodology and the facts of the conspiracy claim presented to the jury, Dr. McClave used urethane industry prices during the competitive years 2004-2008 as a benchmark. By modeling prices for the same products sold by the same Defendants to the same basic group of customers in the same oligopoly industry during a time period immediately after the conspiracy ended (and thus a period free of the alleged anticompetitive conduct), Dr. McClave was able to specify a model that estimated competitive urethane chemical prices with exceptional statistical reliability. *See* Dkt. No. 2816, at 19-22 and 30-32 (summarizing Dr. McClave's testimony). Dr. McClave's models fit the data very closely during the competitive period, accounting for all key price drivers in the industry (cost, capacity,

demand, customer and product variables) and therefore allowing a reasonable inference of variance caused by collusion when the model was applied to the conspiracy period. *Id.* The model also accounted for the oligopoly structure of the industry. By using a competitive oligopoly period as the benchmark, the model was able to forecast what prices should have been in the same oligopoly industry (absent collusion) during the conspiracy period.[4]

C. There Is No Disconnect Between Plaintiffs' Liability Case and Plaintiffs' Damages Case

Comcast does not cast doubt on the validity of Dr. McClave's methodology here. First, the theory of liability and the theory of damages are straightforward, and the causal connection direct: Dow conspired to fix prices and, as a result, prices were impacted. *Comcast*, in contrast, involved four distinct theories of injury, each of which required detailed expert analysis to establish a causal link between the challenged monopoly conduct (*e.g.*, Comcast's refusal to supply regional sports programming to satellite competitors, or its bargaining practices with content providers) and class-wide damages. The *Comcast* plaintiffs were unable to do so for three of their four theories. Here there is only one simple theory of injury—price-fixing having a direct effect on price—and so there is no mismatch "between supra-competitive prices in general and supra-competitive prices attributable to the [theory alleged]." 133 S.Ct. at 1434.

The model specified by Dr. McClave in this case isolates the result of the harm by controlling for all the key variables and comparing the same commodity chemical prices in the same industry during a non-conspiracy period to prices during the conspiracy period. This

[4] The validity of such a model is testable. As explained in Plaintiffs' *Daubert* papers, and by Dr. McClave at trial, econometricians use standard tests to determine whether a forecasting model reliably explains the competitive period data and, therefore, can be applied reliably to the conspiracy period. Dkt. No. 2428, at 11-13; Trial Tr. at 2912:8-2919:12. Dr. McClave's models incorporated economically sensible variables, were supported by Defendants' contemporaneous documents and data, and passed all the standard tests with flying colors. *Id.*

approach posed no concern that (as in *Comcast*) the benchmark was selected in a manner that estimated damages not caused by the conspiracy. Furthermore, the causal connection lacking in *Comcast* was established here on the merits at trial; the jury's verdict is supported by extensive evidence (not solely Dr. McClave's testimony) showing class-wide injury. *See* Part I.D, *infra*.

Nor is there any basis for Dow's assertion that distinct "market and customer allocation" conduct alleged in the Complaint may have caused part of the overcharge estimated by Dr. McClave. *See* Dow Reply Br., at 10-12. In *Comcast*, the Supreme Court was concerned that the damage estimate may have included "overcharges" attributable to theories of liability that the district court rejected. Here, in contrast, there is no indication that Dr. McClave's urethane damage estimates were inflated by "market and customer allocation" conduct distinct from the conspiracy established at trial. Dow does not even attempt to argue otherwise. *Id*. Dow cites not a shred of evidence showing that a distinct market and customer allocation conspiracy existed beyond the conspiracy evidence presented at trial, influenced the outcome of the model, or caused any of the overcharge estimated by Dr. McClave. There is no such evidence, and thus no factual basis for concluding that the overcharge estimated by Dr. McClave was attributable to customer and market allocation separate from the conspiracy found by the jury. Accordingly, the basic problem that concerned the Court in *Comcast*—that the damage model inflated overcharges by including conduct that was not actionable—is not present here.

Dow instead attempts a sleight of hand. Dow starts by analogizing the rejected liability theories in *Comcast* to Plaintiffs' allegation of "market and customer allocation" in the Complaint, but then, rather than arguing that market and customer allocation caused the overcharge estimated by the urethane models, Dow pivots to a series of unrelated merits criticisms of Dr. McClave that have been raised before and rejected, both by the Court under

Daubert and by the jury at trial. For example, Dow says the price "variance" during the conspiracy period might have been caused by "different market conditions" or "over-fitting of the model" or "oligopolistic interdependence." *Id.* at 11. Dow also challenges the causal connection between the transaction prices modeled by Dr. McClave and the announced prices coordinated by the cartel, *id*., as well as Dr. McClave's extrapolation methodology. *Id.* at 17.

But *Comcast* in no way suggests that a price-fixing defendant prevails by raising *any* criticism of a model or alternative explanations for the overcharge after a jury has rejected those very same criticisms after a full and fair trial on the merits. *Comcast* instead states a familiar and less-demanding rule: "Calculations need not be exact, but at the class-certification stage (as at trial), any model supporting a plaintiff's damages case must be consistent with its liability case, particularly with respect to the alleged anticompetitive effect of the violation." 133 S.Ct. at 1433 (citation omitted). The model here satisfies that standard, and whether and to what extent to credit the model are fact issues for the jury. Here the jury considered the parties' competing evidence, including Dow's own experts and Dow's cross-examination of Dr. McClave, and resolved the disputes in Plaintiffs' favor. *See, e.g.*, Trial Tr. at 3157:19-3159:3 (industry conditions were substantially similar throughout 1999-2008); *id.* at 4423:12-4425:1 (industry was at all relevant times an oligopoly); *id.* at 4497:21-4498:19, 4792:14-4797:14 (primary drivers of industry pricing throughout 1999-2008 were precisely the variables included in the models: raw material costs, capacity and demand); *id.* at 3148:6-3150:10 (models reflected announced prices coordinated by the cartel); *see also In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 656 (7th Cir. 2002) ("sellers would not bother to fix list prices if they thought there would be no effect on transaction prices"); Dkt. No. 2816, at 25-27 (evidence and authority supporting extrapolation).

The jury was entitled to credit Plaintiffs' evidence, reject Dow's criticisms about the damages model, and award Class damages accordingly.

D. The Verdict Did Not Invalidate the Damages Model Under *Comcast*

Dow relies on *Comcast* to assert that the jury's verdict somehow invalidates Dr. McClave's model, but *Comcast* has no relevance to this issue. *See* Dow Reply Br. at 12-15; *compare* Dkt. No. 2816, at 23-24 (addressing this argument). According to Dow, a jury verdict finding a price-fixing conspiracy, overcharge injury to the Class, and $400 million in damages should be read to invalidate across-the-board the very expert analysis that, along with other evidence, supported that determination. Dow cites *no* authority for upsetting the verdict on this basis, Dow Reply Br. at 12-15, and the well-accepted law affording wide deference to the jury's findings is to the contrary. Dkt. No. 2816, at 1, 15 (collecting authority).

Instead, Dow attempts improperly (i) to isolate Dr. McClave's analysis from the record as a whole; (ii) to misrepresent his opinions and testimony; and (iii) to re-litigate its criticisms of Dr. McClave on the merits, relying on Dow's interpretations of various disputed facts, all of which were presented and resolved by the jury at trial. Dow is wrong on all counts.

For example, Dow asserts that "Plaintiffs have made the McClave model the centerpiece of their case." Dow Reply Br. at 9. But it is fundamental that in reviewing the evidence supporting the jury's verdict (expert and otherwise), the trial record must be considered as a whole and all inferences must be drawn in favor of the nonmoving party. *See Reeves*, 530 U.S. at 150-51. Dow ignores the fact that extensive proof independently supports Dr. McClave's analysis, reinforcing the causal nexus that was lacking in *Comcast*. *See* Dkt. No. 2816 (detailing evidence on conspiracy, impact and damages, all of which is consistent and mutually reinforcing).

Where, as here, Dr. McClave's damage model was consistent with and supported by independent evidence showing (i) a pattern of collusive lockstep industry price increase announcements applicable to all products and class members for whom Dr. McClave's analysis showed overcharge; (ii) an industry structure conducive to successful collusion having class-wide impact; (iii) a conspiracy orchestrated by senior executives with pricing authority for all regions, products and customers; (iv) witness testimony establishing widespread impact from the collusive price increases at issue; (v) contemporaneous documents to the same effect; and (vi) the relevant, reliable and admissible testimony of an experienced expert economist (Dr. Solow) concerning the nature and scope of the conspiracy and its widespread impact on nearly all class members, the jury was more than justified in finding class-wide impact and crediting Dr. McClave's estimate in awarding damages. *See* Dkt. No. 2816, at 16-33 (summarizing evidence more extensively). All of this proof corroborates Dr. McClave's analysis and supports the jury's verdict, establishing on the merits the causal connection that was lacking at the class certification stage in *Comcast*. *Id.*; *see also Perkins v. Standard Oil Co. of Cal.*, 395 U.S. 642, 648 (1969) ("If there is sufficient evidence in the record to support an inference of causation, the ultimate conclusion as to what that evidence proves is for the jury.").

Dow also mischaracterizes Dr. McClave's testimony in attempting to sever the causal link between its price-fixing conduct and the damages awarded by the jury, asserting that Dr. McClave "admitted" no causal connection between the conspiracy and his modeled overcharge. Dow Reply Br. at 11. But Dr. McClave admitted no such thing. His testimony was simply that statistical analysis was not *definitive* on the question of causation but that, by controlling for other competitive market variables, the models allowed a reasonable inference of injury caused by the cartel. *See* Dkt. No. 2816, at 20-21. As Dr. McClave explained, it was "ultimately for

you [the jury] to decide" whether the conspiracy in fact caused the overcharge estimated by his models. *See* Trial Tr. at 2827:21-2828:5. This testimony was consistent with hornbook antitrust, econometric, and evidentiary principles. *See, e.g.*, page 8, *supra* (quoting Areeda treatise).

Similarly, Dow has no answer to Dr. McClave's testimony that the model could be applied reliably to the subset of the conspiracy period spanning November 24, 2000 through December 31, 2003 and that his model estimated approximately $496 million in class-wide overcharges for that period. Dkt. No. 2816, at 30-33. Dr. McClave's testimony in this respect was consistent with the jury's verdict.[5]

Contrary to Dow's exclusive focus on Dr. McClave, the jury considered extensive proof on all aspects of Plaintiffs' price-fixing claim and was entitled to weigh the evidence (expert and otherwise) as a whole and render its verdict accordingly. In doing so, the jury was entitled to credit Plaintiffs' liability evidence in part, Dow's evidence in part, Plaintiffs' experts in part, Dow's experts in part, and so on, and ultimately reach its conclusions on liability and damages based on the record as a whole. *See* Dkt. No. 2816, at 22-24 and 28-33. That is what juries do. Verdicts do not have to be all or nothing. For all of these reasons, Dow is wrong to speculate that the jury somehow rejected Dr. McClave's model when the jury plainly *credited* Plaintiffs' evidence, including Dr. McClave's testimony, in awarding significant damages to the Class. The trial record taken as a whole is more than sufficient to support the verdict on damages.

[5] As Plaintiffs have explained, the jury was entitled to accept criticisms of Dr. McClave leveled by Dow and its experts and adjust its damage award accordingly. *See* Dkt. No. 2816, at 32-33. Dr. McClave testified that even if Dr. Ugone's criticisms were accepted by the jury, they would only reduce the damage number by approximately 20%. *Id.* And indeed, the jury's verdict was approximately 20% less than Dr. McClave's estimated damages for the period from November 24, 2000-December 31, 2003. *Id.*

E. The Court's *Daubert* Analysis Determined that Dr. McClave's Opinions Were Relevant and Reliable for Purposes of Proving Class-Wide Overcharge

The substance of Dow's post-trial argument is that Dr. McClave's testimony was not relevant or applied reliably to the facts. As such, the Court's pre-trial ruling under *Daubert v. Merrill Dow Pharmaceuticals*, 509 U.S. 579 (1993) is squarely on point. The central question addressed by the parties under *Daubert* was the relevance and reliability of Dr. McClave's analysis—that is, whether his testimony could be used reliably to show class-wide injury and damages at trial. *See Kumho Tire Company, Ltd. v. Carmichael*, 526 U.S. 137, 141 (1999) (issue under *Daubert* is relevance and reliability as applied to the facts). The Court denied Dow's motion. Dkt. No. 2649. Because the Court's *Daubert* ruling answered the basic question of relevance and reliability as to Dr. McClave, and his testimony at trial confirmed the correctness of that ruling, Plaintiffs respectfully submit that the Court should reaffirm its *Daubert* holdings for purposes of *Comcast*.

Again, the posture in *Comcast* was the converse of Dow's posture here. In *Comcast*, the defendant did not file a *Daubert* motion, and the Supreme Court held that a defendant's failure to do so at the class certification stage would not necessarily preclude a challenge to the damage model under Rule 23. 133 S.Ct. at 1431 n.4. Here, in contrast, Dow actually filed a *Daubert* motion—failing to raise numerous issues Dow now emphasizes post-trial—and the Court squarely addressed the relevance, reliability and fit of Dr. McClave's analysis in that context. Nothing in *Comcast* countenances such a waiver or relieves Dow of its obligation to raise all claimed *Daubert* arguments in its *Daubert* motion. *See generally Layne Christensen Co. v. Bro-Tech Corp.*, 871 F. Supp. 2d 1104, 1110 (D. Kan. 2012) (denying post-trial motion to strike expert testimony where pretrial *Daubert* motion did not address the issue).

II. *COMCAST* DID NOT CHANGE THE REQUIREMENTS OF RULE 23

Dow's renewed argument for decertification is equally erroneous. *See* Dkt. No. 2824, Reply Brief Supporting Motion to Decertify the Class ("Dow Decert. Reply Br."). *Comcast* turned on "the straightforward application of class-certification principles." 133 S.Ct. at 1433.[6]

Under these established principles, the Court's decision to certify the Class was and is correct. It is clear that "the questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). As the Court noted years ago, "it is widely recognized that . . . horizontal price-fixing claims are particularly well suited to class-wide treatment because of the predominance of common questions." Docket No. 708, at 14 (collecting authority). After rigorous scrutiny of the class certification record, the Court concluded that "class resolution is superior to other available methods for the fair and efficient adjudication of this lawsuit." *Id.* at 25. The trial has validated that determination.

A. Plaintiffs Have Not Conceded That Individual Damage Issues Defeat Class Certification

At the outset, *Comcast* is an unusual case where class certification as a whole was dependent on the validity of the damages model. This was only true because both parties in *Comcast* had conceded that, to satisfy Rule 23(b)(3), damages had to be proven "on a class-wide

[6] Dow tries to magnify the import of *Comcast* by noting that the Supreme Court granted, vacated and remanded two cases for further consideration in light of *Comcast*. *RBS Citizens, N.A. v. Ross*, No. 12-165, 2013 WL 1285303 (U.S. Apr. 1, 2013) *Whirlpool Corp. v. Glazer*, No. 12-322, 2013 WL 1285305 (U.S. Apr. 1, 2013). Dow is grasping at straws. The Supreme Court's action does not indicate anything about whether these decisions are correct or suggest that *Comcast* is broader than the opinion itself indicates. The "GVR" procedure is used routinely when the Court issues a decision that may (or may not) bear directly on a pending petition for *certiorari*. *Tyler v. Cain*, 533 U.S. 656, 666 n.6 (2001) (explaining that procedure is not a determination on the merits). It is for the lower courts to determine in the first instance the extent to which the class certification principles applied in *Comcast* bear on the particular issues in *Ross* and *Whirlpool*. *See* Robert L. Stern, Eugene Gressman et al., Supreme Court Practice 319 (8th ed. 2002).

basis" through use of "common methodology." 133 S. Ct. at 1430. When the Supreme Court questioned the model in *Comcast*, the unusual remedy was to decertify. But unlike in *Comcast*, Plaintiffs in this case—even while maintaining that they can and have shown damages using class-wide proof—have never conceded the necessity of that showing for class certification. Nor has this Court made such a ruling. The Court has noted correctly that the mere "possibility that individual issues may predominate the issue of damages … does not defeat class certification." Dkt. No. 708, at 23. And as set forth above, the jury here actually reviewed the common evidence of aggregate injury and found that damages were measurable on a class-wide basis. Decertification here thus would be a manifestly inappropriate remedy for Dow's complaints, which in any event are baseless.

B. The Model Here is Valid and Dow's Criticisms Do Not Undermine This Court's Certification Order

Dow's substantive challenge to Dr. McClave has been addressed above. In terms of Rule 23, the Court's decision to certify the Class was and is correct because common issues predominate.

Given the unusual procedural posture in which Dow's class certification arguments are being raised—a motion for decertification being considered by the Court after full discovery, *Daubert* rulings, a trial on the merits, and a verdict finding Dow liable for conspiracy, class-wide injury and damages based on common proof—the factual record supporting class certification is extensive and even stronger than it was when the Court certified the Class in the first instance. Rule 23(b)(3) predominance is supported, for example, by the Court's original class certification record and analysis, the Court's *Daubert* and summary judgment orders, the trial record as a whole, and Plaintiffs' initial post-trial brief summarizing the common proof supporting the verdict. In short, Plaintiffs in fact proved their case using common proof at trial.

In terms of resolving Dow's specific *Comcast* arguments relating to Dr. McClave, the following facts support a finding of Rule 23 predominance:

- Dr. McClave's multiple regression "forecasting" methodology is standard and well-accepted for purposes of estimating overcharges in price-fixing cases, a point accepted by Dow's expert, Dr. Ugone. Trial Tr. at 4930:20-4932:9.

- Dr. McClave's models controlled for the variables that explained prices in the urethanes industry during the relevant period, including capacity, cost, demand, and more. Controlling for those variables, the models estimated class-wide overcharge caused by the conspiracy, supporting, along with other evidence presented at trial, a reasonable jury inference of class-wide injury and damages. Dkt. No. 2816, at 20-21 (summarizing trial testimony).

- Dr. McClave applied his models at the individual customer level, finding widespread injury across products, manufacturers, geographic regions, and customers, including large and small customers. *Id.*

- Dr. McClave's models showed overcharge for the vast majority of individual Class members, *representing approximately 99.8% of all Class sales by dollar value*. Dkt. No. 2752, at 13-15 (summarizing evidence in response to Dow's motion to decertify).

- Based on his experience, qualifications and the totality of his analysis, Dr. McClave testified that nearly all members of the Class were injured by the conspiracy. Dkt. No. 2816, at 6, 20-21 (collecting transcript citations).

- Dr. McClave's opinions were consistent with extensive common proof of liability and impact presented at trial, including conspiracy evidence, the expert testimony of Dr. John Solow, and independent evidence showing that the conspiracy caused widespread overcharge injury to members of the Class, including common proof (by exhibits, witness testimony and Dr. Solow) that the price increase announcements (the object of the conspiracy) were generally successful. *See* Dkt. No. 2816, at 16-22.

For these and other reasons found in the trial record, Dr. McClave's analysis, conclusions and testimony at trial—when considered in context with Plaintiffs' proof as a whole—permitted the jury to draw a just and reasonable inference regarding the existence of individual injury for all or nearly all Class members and the aggregate overcharge damages caused by the conspiracy in which Dow participated.

C. "Each and Every" Class Member Is Not the Law

Dow contends that *Comcast*—read in conjunction with the Rules Enabling Act and due process requirements—required individualized proof of injury and damages for every single class member. Dow Decert. Reply Br., at 7-10. More specifically, Dow's position is that the presence of a small number of relatively small Class members with zero damages according to Dr. McClave's analysis (collectively representing *less than 0.2%* of total Class sales) defeats certification and recovery of any damages for the thousands of Class members demonstrably injured by the conspiracy. But Dow has not explained how its substantive rights were prejudiced given that (i) extensive common evidence supported a finding of individual injury for all or nearly all Class members; and (ii) the so-called "zero impact" customers emphasized by Dow by definition contributed nothing to Plaintiffs' overcharge estimate. Dow's argument reads as if the jury awarded some portion of damages based on the zero damage members of the Class, but that is simply untrue. These small Class members are termed "zero damage" customers for a reason—they added not a penny to Dr. McClave's estimated damage totals or to Dow's liability.

In any event, *Comcast* does not even address—much less take the radical step of holding—that class certification requires injury for each and every class member. Dow fails to cite a single case in which class certification has been denied in price-fixing litigation because a small number of class members were uninjured. The law is to the contrary. *See* Dkt. No. 2752, at 8-18. Nor has Dow identified any authority supporting its remarkable position that cartels may freely conspire to fix prices without risk of class action liability under Rule 23 provided they take care to avoid injuring some small fraction of customers. That would yield absurd results—and vitiate the private enforcement of Section 1—yet represents the substance of Dow's position. *Cf. Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 625 (1997) ("Predominance is a test readily met in certain cases alleging . . . violations of the antitrust laws."); *Hawaii v. Standard*

Oil Co. of Cal., 405 U.S. 251, 266 (1972) ("class actions . . . are definitely preferable in the antitrust area"); Dkt. No. 708, at 14 ("it is widely recognized that the very nature of horizontal price-fixing claims are particularly well-suited to class-wide treatment").[7]

D. Dow's Motion for Decertification Was Dilatory

Finally, Dow asserts in passing that *Comcast* somehow excuses Dow's dilatory tactics in waiting until the eve of trial to move for decertification. Dkt. No. 2824, at 3, 21. But *Comcast* does not address let alone excuse such waiver. *See* page 15, *supra*. For the reasons previously explained, and as found by other courts under similar circumstances, *see* Dkt. No. 2752, at 3-7, Dow's decertification motion should not be granted after a jury verdict finding Dow liable to the Class based on common evidence.

CONCLUSION

Plaintiffs respectfully request that the Court deny Dow's motions for judgment as a matter of law, for a new trial, and for decertification of the Class.

[7] Finally, the mere fact that Dr. McClave's model did not find an overcharge for a small number of Class members does not mean those Class members were not injured. *See* Dkt. No. 2752, at 14 n.10. The jury was presented with other ample evidence permitting a reasonable inference that every Class member was in fact injured, including the six categories of evidence in addition to Dr. McClave's testimony set forth at pages 12-13, *supra*.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that on this 19th day of April, 2013, I caused the foregoing Class Plaintiffs' Sur-Reply Memorandum Addressing *Comcast Corp. v Behrend* and Opposition to the Dow Chemical Company's Motions for Judgment As a Matter of Law, A New Trial, and Decertification of the Class to be electronically filed with the clerk of the court by using the CM/ECF system which will send a notice of electronic filing to all counsel who have registered for receipt of documents filed in this matter.

/s/ *Gerard A. Dever*
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