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' REPLY MEMORANDUM IN SUPPORT OF CLASS PLAINTIFFS' MOTION TO AMEND THE JUDGMENT AND OPPOSING THE DOW CHEMICAL COMPANY'S MOTION TO AMEND THE JUDGMENT

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

FEDERAL STATUTES AND RULES

OTHER AUTHORITY

INTRODUCTION

Dow's most recent post-trial filing—opposing Plaintiffs' motion to amend the judgment and supporting Dow's motion to amend the judgment—is largely a restatement of various Dow arguments the Court has considered and rejected before. *See, e.g.*, Dkt. Nos. 2879, 2649, 2637, 708. Such arguments are unavailing, however, because a motion to alter or amend the judgment does not "permit a losing party to rehash or restate arguments previously addressed or to present new legal theories that could have been raised earlier." *Wilkins v. Packerware Corp.*, 238 F.R.D. 256, 262-63 (D. Kan. 2006); *see also Servants of Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000); *Coffel v. Astrue*, No. 11-1347-JWL, 2012 WL 5831194 (D. Kan. Nov. 16, 2012).

As in its prior submissions, the core of Dow's position is that price-fixing conspiracy claims simply cannot be tried on a class-wide basis using common proof of injury and aggregate class damages. Instead, Dow says Plaintiffs were required to prove their claims with an inherently individual showing of customer-by-customer injury. As this Court has already held, that is not the law. *See* Dkt Nos. 2879 ("Post-Trial Opinion"), 2649, 2637, 708. Consistent with long-settled antitrust and Rule 23 authority, Plaintiffs established their price-fixing claims using extensive common proof of class-wide injury, including evidence showing that all or nearly all individual class members were injured. *See* Post Trial Opinion, at 13-15. Contrary to Dow's argument, the proof presented at trial was more than sufficient to establish Dow's liability as found by the jury. *Id.*

Dow also contends that the verdict—*i.e.*, the jury's determination that Dow (1) conspired to fix prices, (2) injured the Class, and (3) caused overcharge damages of $400,049,039—is insufficient to support the Court's entry of final judgment. According to Dow, the jury's unambiguous verdict on these essential elements of a Sherman Act price-fixing claim should be set aside for lack of more specific factual findings on the details of the conspiracy. But Dow has

yet to cite any authority for that remarkable proposition, and the law is squarely to the contrary. *See* Post-Trial Opinion, at 19 ("Dow has not identified any authority requiring such specific jury interrogatories.").

Dow's remaining arguments about the final judgment and proposed Plan of Allocation—concerning Due Process, the Seventh Amendment, the Rules Enabling Act, and the mechanics of trebling and distributing damages to the Class—are equally baseless. Dow cites no authority remotely on point on any of these issues. Dow is wrong to suggest, moreover, that the Plan of Allocation somehow overcompensates uninjured class members in violation of Dow's rights. The Plan of Allocation is consistent in all respects with both the proof presented at trial (*i.e.*, that all or nearly all class members were injured) and the verdict itself, which found Dow liable to the "Class" for $400,049,039 damages during the period November 24, 2000-December 31, 2003. There can be no overcompensation in violation of Dow's rights when the jury has quantified the precise injury and damage Dow caused to Class members, thereby fixing Dow's liability under the Sherman Act for purposes of final judgment. Dow's liability, in other words, is resolved definitively on the merits by the verdict, such that the Plan of Allocation does not concern Dow at all. *See* Part II, *infra*.

For the reasons previously explained by Plaintiffs and discussed by the Court, an amended final judgment should be entered on the verdict in the amount of $1,060,847,117.[1]

[1] To address various matters discussed herein, Plaintiffs have attached a revised proposed form of judgment as Exhibit A, as well as a redlined version attached as Exhibit B to show alterations from Plaintiffs' earlier submission (Dkt. No. 2885, at 10-16).

ARGUMENT

Dow and Plaintiffs are in agreement on several points. The parties agree that the final judgment should be offset by $139.3 million for prior settlements. *See* Dow Br. at 13. The parties agree that the judgment should specify or describe the members of the Class pursuant to Rule 23(c)(3)(B), *see* Dow Br. at 5 n.2, and Plaintiffs attach a proposed amended judgment incorporating the operative class definition to that effect. The parties agree to defer issues on fees and costs pending appeal on the merits, Dkt. No. 2899, rather than seeking a ruling at this juncture. *See* Dow Br. at 13. And the parties agree that entry of final judgment must comport with Rule 58.[2]

Dow nonetheless unleashes a host of objections to the Court's entry of final judgment and Plaintiffs' proposed Plan of Allocation. The objections merely rehash Dow's previously rejected argument that price-fixing conspiracy class actions necessarily require individual, customer-by-customer proof of injury and damages. If Dow were correct about that, there would be no price-fixing class actions under Rule 23—and the law, of course, is to the contrary. Dow cannot square its position with decades of authority holding that such cases are classic examples of when Rule 23(b)(3) certification is proper, because direct purchasers can, in fact, establish their claims using precisely the types of common proof on which Plaintiffs relied here. *See, e.g.*, *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");

[2] Dow suggests that the Clerk's May 15, 2013 entry of Judgment (Dkt. No. 2880) may have been ineffective under Fed. R. Civ. P. 58(b)(2), *see* Dow Br. at 1 n.1, and thus could delay its appeal. As a practical matter, however, that is a non-issue. Dow's 30-day period for filing a notice of appeal will not begin to run until the Court rules on the parties' motions to amend the judgment, and the Court-approved entry of an Amended Final Judgment will supplant the Clerk's earlier entry of judgment. *See* Fed. R. App. P. 4(a)(4)(A).

Messner v. Northshore University HealthSystem, 669 F.3d 802, 815 (7th Cir. 2012) ("[I]n antitrust cases, Rule 23, when applied rigorously, will frequently lead to certification.") (internal quotes and citation omitted); 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").

Nothing in Dow's latest filings affords any basis for reconsidering the Court's recent ruling that sufficient evidence supports the verdict such that entry of final judgment is warranted.

I. THE VERDICT SUPPORTS ENTRY OF JUDGMENT

A. There Is No Basis for Reconsidering the Court's Verdict Form

Dow first revisits its argument that the jury was required to return specific factual findings concerning, for example, the inception, duration, participants, products, and other factual details of the conspiracy. Dow Br. at 3. This Court has already and correctly rejected this contention: "Dow has not identified any authority requiring such specific jury interrogatories." Post-Trial Opinion, at 19.

The form of verdict is committed to the sound discretion of the District Court. *See* Dkt. No. 2816, at 10-11 and 49-52. And where, as here, the Court's verdict form correctly stated the law and was properly tailored to the required substantive elements of Plaintiffs' price-fixing claim, there is no basis for Dow's assertion of error. *Id.* A district court is "under no obligation to require the jury to return special verdicts or to answer special interrogatories. The decision whether to do so [is] within the court's discretion." *Martinez v. Union Pac. R.R. Co.*, 714 F.2d 1028, 1032 (10th Cir. 1983); *see also* 9B Wright & Miller, *Federal Practice and Procedure*: Civil 3d § 2505 (2008) (same).

B. There Is No Basis for Reconsidering the Court's Ruling that Sufficient Evidence Supports the Verdict

Dow next argues that the verdict was "indeterminate" and "ambiguous" as to Plaintiffs'

"***entitlement*** to relief." Dow Br. at 3-4 (emphasis Dow's). But Dow's reading of the verdict finds ambiguity where none exists, as the verdict is perfectly clear. Plaintiffs were required to prove three substantive elements to establish their entitlement to relief under the Sherman Act—(1) Dow's participation in a price-fixing conspiracy, (2) injury to the Class, and (3) damages—and the jury's verdict provides clear answers on each question. *See* Dkt. No. 2799 (jury verdict); Dkt. No. 2637, at 4 (elements of price-fixing claim). There is no "indeterminacy" or "ambiguity" on the essential substantive elements of the claim. *See also* Post-Trial Opinion, at 10-11 (rejecting Dow's argument that Plaintiffs were required to prove all conspiracy facts alleged); Dkt. No. 2816, at 8-12 (briefing this issue at length).

The question for purposes of entering final judgment is simply whether the evidence supports the jury's verdict for the Class. On this issue, Dow invites the Court to again reconsider its various arguments on the merits. For example, Dow again challenges Dr. McClave's testimony that nearly all individual class members were injured in the aggregate amount of $496,680,486 for the period November 24, 2000 through December 31, 2003—and accordingly asserts that it was error to enter judgment "in favor of the plaintiff class" for that period. According to Dow, any judgment based on such testimony violates Dow's rights under the Due Process Clause and the Rules Enabling Act.

The Court has already rejected the substance of these arguments, all of which relate to the sufficiency of the evidence. *See* Post-Trial Opinion. Re-packaging them as due process issues does not make Dow's contentions any more correct or persuasive. First, extensive proof (not solely Dr. McClave's testimony) supports the jury's finding on the element of injury. *Id.* at 13. Based on the trial record as a whole—including but not limited to the testimony of both Dr. Solow and Dr. McClave that nearly all individual class members were injured by the

conspiracy—a reasonable jury could have imposed class action liability on Dow in a manner consistent with the Sherman Act, Rule 23, Due Process, and the Rules Enabling Act. *Id.* That Plaintiffs' common proof comports with Due Process and all other relevant authority is precisely why "it is widely recognized that the very nature of horizontal price-fixing claims are particularly well suited to class-wide treatment[.]" Dkt. No. 708, at 14.

Second, beyond the element of injury, Plaintiffs' proof of aggregate class-wide damages was consistent with accepted authority and raised no constitutional or statutory issues. Price-fixing plaintiffs are subject to a relaxed burden of proof on the element of damages, under which reasonable estimates and aggregate proof will suffice. *See, e.g.*, Dkt. No. 2797, at 26 (Jury Instruction No. 20); *J. Truett Payne Co., Inc. v. Chrysler Motors Corp.*, 451 U.S. 557, 565-66 (1981) (flexible burden of proof); *In re Scrap Metal Antitrust Litig.*, 527 F.3d 517, 534 (6th Cir. 2008) (approving aggregate class damage estimate). "In fact, aggregate judgments have been widely used in antitrust, securities and other class actions." *In re NASDAQ Market-Makers Antitrust Litig.*, 169 F.R.D. 493, 525-26 (S.D.N.Y. 1996). "In many cases, the class representative in an antitrust suit may prove the amount of damages for the entire class . . . thus eliminating the need for individual damage proofs during trial. This approach allows the named plaintiff to show the total class damages caused by the defendant's unlawful conduct. The aggregate class damage approach has obvious case management advantages. By eliminating individual damage proofs at trial, the length, complexity and attendant costs of litigation are greatly reduced." *Id.* (internal citations and quotation marks omitted).[3]

[3] *See also In re Pharmaceutical Indus. Avg. Wholesale Price Litig.*, 582 F.3d 156, 197 (1st Cir. 2009) ("The use of aggregate damages calculations is well established in federal court and implied by the very existence of the class action mechanism itself . . . . Thus, to the extent that AstraZeneca argues that the district court's decision to use an aggregate damages

Furthermore, the specific damage methodology credited by the jury here—multiple regression analysis used to estimate the class-wide overcharge caused by price-fixing—is the standard approach used for proving cartel damages, having been accepted time and again in similar matters. *See, e.g.*, Dkt. No. 2649; *Scrap Metal*, 527 F.3d at 529; *In re EPDM Antitrust Litig.*, 256 F.R.D. 82, 95 (D. Conn. 2009) ("In an antitrust suit, plaintiffs will generally use multiple regression analysis to demonstrate that . . . class members paid a higher price than the basic economic principles of supply and demand would otherwise dictate, thus demonstrating collusive behavior was at work."); Dkt. No. 2428, at 9 (Plaintiffs' *Daubert* briefing collecting extensive authority).

Dow would have the Court supplant decades of Rule 23 and antitrust authority with a new rule under which only a customer-by-customer showing can support a reasonable jury inference of class-wide injury and damages. Such an approach would eviscerate the utility of Rule 23 in price-fixing cases. Dow cites no relevant authority for that radical proposition, which is contrary to the Court's decisions throughout this case.

The jury's damage award is likewise far removed from "fluid recovery." *See* Dow Br., at 4 (citing inapposite "fluid recovery" cases). Fluid recovery refers to a situation, typically arising at the class certification stage, in which large numbers of injured class members are both

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methodology violated Rule 23 or the company's due process rights, AstraZeneca's challenge fails in the starting gate."); *id.* at 195 ("it would quickly undermine the class-action mechanism were we to find that a district court presiding over a class action lawsuit errs every time it allows for proof in the aggregate"); 3 Newberg on Class Actions § 10:2 (4th ed. 2002) ("Proof of aggregate monetary relief for the class is feasible and reasonable under various circumstances. In fact, the ultimate goal in class actions is to determine the aggregate sum, which fairly represents the collective value of claims of individual class members. The evidentiary standard for proof of monetary relief on a classwide basis is simple—the proof submitted must be sufficiently reliable to permit a just determination of the defendant's liability within recognized standards of admissible and probative evidence.") (footnote omitted).

unidentified and unknowable, requiring the distribution of any future class recovery to others with similar interests. That is not this case. *See Scrap Metal*, 527 F.3d at 534 (defendant "confuses the concept of fluid recovery with aggregate damages"). Fluid recovery is not an issue where, as here, all class members are identifiable (indeed are known); individual overcharge estimates are known (indeed are the basis for the post-judgment Plan of Allocation); and sufficient evidence supports an actual jury finding of injury on the merits for all or nearly all of these identified members of the Class. On these facts, fluid recovery is not an issue. *See* Post-Trial Opinion, at 20 n.4 (rejecting Dow's "fluid recovery" argument); 3 Newberg on Class Actions § 10:7 (4th ed. 2002) ("[D]amages in antitrust class actions may be determined on a classwide, or aggregate basis, without resorting to fluid recovery where the computerized records of the particular industry, supplemented by claim forms, provide a means to distribute damages to injured class members in the amount of their respective damages."); Dkt. No. 2816, at 51-52 (briefing "fluid recovery" issue at greater length).

Finally, Dow's assertion of constitutional and Rules Enabling Act objections to the Court's final judgment reads as if the Class damage estimate were somehow inflated artificially above and beyond the *actual* injury Dow caused to individual class members. *See* Dow Br. at 4. But that is not the case. As Dr. McClave testified at trial, his aggregate damage estimates were simply the arithmetic sum of customer-specific estimates for each Class member, nearly all of whom were injured according to his analysis. Trial Tr. at 2894:21-2897:5, and 2832:18-21.

Dow has yet to explain how its substantive rights were violated in these circumstances, where the jury's verdict rests not just on extensive expert and non-expert proof of injury for all or nearly all class members, but on an aggregate damage estimate calculated from the arithmetic sum of customer-specific damage estimates described by Plaintiffs' expert at trial. On these

facts—where Plaintiffs' presentation of aggregated Class damage totals added not a penny to Dow's estimated liability to individual members of the Class—there is no plausible basis for Dow's suggestion of constitutional or Rules Enabling Act issues.[4]

To the contrary, the judgment fully "conform[s] to and follow[s] the verdict." *Bennett v. Butterworth*, 52 U.S. 669, 675 (1850). And this is precisely the type of case Rule 23(b)(3) is designed to resolve. *See, e.g., In re Urethane Antitrust Litig.*, 237 F.R.D. 440, 453 (D. Kan. 2006) ("The hundreds, and perhaps thousands, of class members are dispersed across the country, each with relatively similar claims. Certainly, the most feasible way for these plaintiffs to pursue their claims is by way of a class action.").

C. Class Damages Must Be Trebled

Nor is Dow correct that the Clayton Act somehow bars the trebling of aggregate class action damage awards. On Dow's strained reading of the statute, for which it cites no authority, treble damages are available only to individual antitrust plaintiffs, but not to direct purchasers who establish their price-fixing claims as part of a certified class. If anything is inconsistent with the Rules Enabling Act, it is Dow's novel theory that plaintiffs somehow lose their entitlement to the full measure of statutory damages by proceeding under Rule 23.

Dow's reading of the Clayton Act cannot possibly be sustained. The Clayton Act mandates treble damages for any person injured by antitrust violations. 15 U.S.C. § 15. There is no indication whatsoever that trebling is unavailable in class actions, and absent class members do not lose their "personhood" by virtue of membership in a certified class. Rather, the most

[4] *See, e.g.*, 3 Newberg on Class Actions § 10:5 (4th ed. 2002) ("Aggregate computation of class monetary relief is lawful and proper . . . . Challenges that such aggregate proof affects substantive law and otherwise violates the defendant's due process or jury trial rights to contest each member's claim individually, will not withstand analysis."); *Pharmaceutical Indus.*, 582 F.3d at 197 (same).

natural reading of the statute is the opposite of Dow's—that Congress intended to impose liability broadly on antitrust violators by awarding treble damages to "any person" injured by price-fixing, irrespective of which Rules of Civil Procedure are followed in establishing liability.

At bottom, Dow's position is a broadside attack on antitrust class actions. This attack cannot be reconciled with the statutory framework under which price-fixing has long been considered both the "supreme evil of antitrust," *Verizon Communications Inc. v. Law Office of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004), and the paradigmatic case for class resolution. *See* Dkt. No. 708, at 14; *see generally Standard Oil Co. of Cal.*, 405 U.S. at 262-66 (explaining purpose of Clayton Act damage remedy and emphasizing that "class actions . . . are definitely preferable in the antitrust area"). Consistent with the plain meaning and recognized interpretation of the statute, the Court should treble the Class damage award pursuant to 15 U.S.C. § 15.[5]

II. DOW'S CHALLENGE TO THE PLAN OF ALLOCATION IS MERITLESS

A. The Plan of Allocation Is Ministerial

As detailed above, the verdict establishes all aspects of Dow's liability under the Sherman Act, resulting, after statutory trebling and offset for prior settlements, in a $1,060,847,117 judgment for the Class. What remains is for the Court to amend the final judgment to include a Plan of Allocation for distributing the common judgment fund after the parties exhaust any appeals. *See* Dkt. No. 2885. As Plaintiffs have explained, the proposed Plan of Allocation establishes a ministerial administrative process for distributing the common fund to

[5] Courts in other antitrust price-fixing class actions have consistently trebled the jury's damages award when entering a judgment in favor of the plaintiff class or its representatives on behalf of the class. *See In re Vitamin C Antitrust Litig.*, Dkt. No. 676 (E.D.N.Y. Mar. 14, 2013) (Exhibit C); *In re Scrap Metal Antitrust Litig.*, Dkt. No. 640 (N.D. Ohio Feb. 10, 2006) (Exhibit D); *In re Vitamins Antitrust Litig.*, Dkt. No. 4801 (D.D.C. June 29, 2005) (Exhibit E).

Class members, with the distribution based formulaically on Dr. McClave's customer-specific damage calculations for the period November 24, 2000-December 31, 2003. *Id.*[6]

Contrary to Dow's suggestion, the Plan does not implicate any merits issues. Again, the predicate of Dow's objection is its view that Plaintiffs were required as a matter of law to introduce individualized class member-by-class member damage estimates at trial. For the reasons explained, that premise is incorrect; Plaintiffs established Dow's liability on the merits using common proof of injury and damages for all or nearly all Class members, providing sufficient evidence to support the jury's resolution of all substantive elements of the case relating to Dow and its liability. The fact that administrative distribution of the common judgment fund will be deferred until after any appeals does not preclude the Court's entry of final judgment or afford Dow any basis for objecting to the Plan of Allocation.

For example, in *Boeing Co. v. Van Gemert*, 444 U.S. 472 (1980), the Supreme Court rejected the argument that final judgment must wait "until absentee class members have presented their individual claims" through an administrative distribution process. *Id.* at 475-76 & n.5. Instead, judgment for the class as a whole "terminated the litigation between Boeing and the class concerning the extent of Boeing's liability." *Id.* Similarly, in *Cook v. Rockwell International Corp.*, 618 F.3d 1127 (10th Cir. 2010), the Tenth Circuit held that a plan of allocation providing for "the application of mathematical principles to a formula involving identifiable property records and the jury's verdict" was sufficient to support final judgment. *Id.* at 1138. "While it is true that certain class members may wish to challenge the ultimate

[6] As noted, these customer-specific damage calculations were the foundation of Dr. McClave's opinions expressed at trial, including his testimony that nearly all individual class members were injured in the aggregate amounts presented to the jury. *See* page 8, *supra*. Accordingly, the Plan of Allocation is consistent with the proof supporting the verdict.

allocation of damages to them, the guidelines provided by the Plan of Allocation are straightforward and mechanical" and, moreover, "any such challenges would not affect the total damages owed by Defendants, which are clearly identified in the judgment." *Id.*

Here, as in *Boeing* and *Cook*, the Court has entered judgment against Dow for a sum certain, terminating the litigation concerning the extent of Dow's liability. As in *Boeing* and *Cook*, the proposed amended judgment establishes a formula for allocating the damages to class members, although further administration of the common fund will be necessary to implement that allocation. As in *Boeing* and *Cook*, the judgment is accordingly final and appealable. *See also Parks v. Pavkovic*, 753 F.2d 1397, 1402 (7th Cir. 1985) (judgment was final where "nothing remains pending in the district court except calculating the actual amount owed each class member, which . . . is not the resolution of a separate claim but merely the disbursement stage following what we have determined to have been the final judgment on damages.").[7]

B. Dow Has No Legal Interest in the Plan of Allocation

Dow's substantive liability was fixed by the verdict and is not implicated by the Plan of Allocation at all. Because Dow has no legal interest in the judgment fund, it has no basis for objecting to the proposed Plan on any of the various grounds it has raised. As explained by the leading treatise on class actions:

> When aggregate damages for the class are awarded, the litigation is ended from the defendant's standpoint except for payment of the judgment or appeal

[7] The cases cited by Dow on the Plan of Allocation issue are readily distinguishable. *See* Dow Br. at 10-11. In *Albright v. UNUM Life Ins. Co. of Am.*, 59 F.3d 1089, 1092-1093 (10th Cir. 1995), which was not even a class action, the Tenth Circuit held that the judgment was not final because the district court entered a "judgment" that did not include any determination of damages whatsoever. In *Strey v. Hunt International Resources Corp.*, 696 F.2d 87, 88 (10th Cir. 1982), the Tenth Circuit held that the judgment was not final because the district court had not established "the formula that will determine the division of damages among class members[.]" Here, in contrast, the proposed Plan of Allocation satisfies the requirements of *Strey* in the manner approved by the Tenth Circuit's subsequent decision in *Cook*.

> therefrom. A third stage of litigation remains to determine the distribution of the classwide damage award. This stage is a nonadversary proceeding.

3 Newberg on Class Actions § 10:17 (4th ed. 2002).

As the Supreme Court has recognized, the benefits flowing from the judgment belong solely to the members of the Class. *See Boeing*, 444 U.S. at 482 (class members are "the equitable owners of their respective shares in the recovery"). Because Dow has no legal interest in the judgment fund, it is well established that it "has no interest in how the class members apportion and distribute a damage fund among themselves." *Allapattah Servs., Inc. v. Exxon Corp.*, 333 F.3d 1248, 1258 (11th Cir. 2003) (citing *Boeing*, 444 U.S. at 481 n.7), *aff'd sub nom.*, *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546 (2005).[8]

Dow has cited no authority suggesting it has any valid interest in the allocation of the judgment fund. Nor has it articulated any basis for departing from the settled rule holding that a

[8] *See also Boeing*, 444 U.S. at 481 n.7 ("The judgment on the merits stripped Boeing of any present interest in the fund."); *Six (6) Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1307 (9th Cir. 1990) ("Where the only question is how to distribute the damages, the interests affected are not the defendant's but rather those of the silent class members."); *Florin v. Nationsbank of Georgia, N.A.*, 34 F.3d 560, 562 n. 1 (7th Cir.1994) ("Defendants have satisfied their obligation to pay into the settlement fund, and thus have no interest in the amount of fees class counsel want to extract from the fund"); *Copeland v. Marshall*, 641 F.2d 880, 905 n.57 (D.C. Cir. 1980) (en banc) ("In 'common fund' cases, the losing party no longer continues to have an interest in the fund[.]") (internal citation omitted); *In re Antibiotic Antitrust Actions*, 333 F. Supp. 278, 287 (S.D.N.Y. 1971) ("The most misleading of [the defendants'] arguments characterizes a class-wide recovery as a 'pot of gold' which the plaintiffs and their counsel are somehow not entitled to receive. If we assume that a price-fixing conspiracy is proven at trial, however, the defendants will certainly have no right to the 'pot of gold' created by their illegal activities."), *amended*, 333 F. Supp. 291 (S.D.N.Y. 1971) and *amended*, 333 F. Supp. 299 (S.D.N.Y. 1971); *Peterson v. BASF Corp.*, A04-1553, 2005 WL 949195, at *2 (Minn. Ct. App. Apr. 26, 2005) ("BASF fully participated in the trial on the merits at which aggregate damages were decided by the jury, according it the process that was due. Its claim that it has a due process right to participation in the distribution stage after judgment has been entered has no merit."), *review denied* (Minn. App. July 19, 2005); 3 Newberg on Class Actions § 10:24 (4th ed. 2002) (a defendant who has paid a judgment into an escrow account is "not the rightful owner" of the money).

defendant has no right to participate in that process.[9] Furthermore, because the substance of Dow's objection to the Plan of Allocation is merely a duplicative attack on the sufficiency of the evidence supporting the verdict on the elements of injury and damages, Dow's objections should be overruled for all the reasons explained above.

C. Dow's Due Process Arguments Are Baseless

Despite its lack of legal interest in the allocation of the judgment fund, Dow insists the Plan of Allocation is "defective because it fails to disclose to the Court or to Dow the backup or output" for Dr. McClave's calculations, a "failure" Dow says goes to its Due Process rights and "right to a jury trial" on damages for specific class members. Dow Br. at 6 and 10.

Dow's argument is flawed. First, the factual premise—that Plaintiffs never disclosed Dr. McClave's backup for customer damage calculations—is simply wrong. In fact, Dow received all relevant data and backup years ago in connection with Dr. McClave's reports. *See, e.g.*, Dkt. No. 2707, at 9 (Dow's pre-trial motion to decertify the class, recognizing that Dr. McClave's "data and analysis" included all information required to calculate individual overcharge estimates). Accordingly, Dow had every opportunity to address any relevant "individual damage" issues during the trial. Had Dow actually wanted to address these issues—for example

[9] Dow lacks even a contingent interest in the judgment proceeds in the event there are unclaimed funds remaining after distribution to the Class. Reversion of unclaimed funds to an adjudicated wrongdoer such as Dow "has been rejected by courts because reversion would defeat the important deterrence objectives of the underlying statute[.]" 3 Newberg on Class Actions § 10:17 (4th ed. 2002) (citing *In re Lupron Mktg. & Sales Practices Litig.*, 677 F.3d 21, 32-33 (1st Cir. 2012), *cert. denied*, 133 S. Ct. 338 (U.S. 2012) ("Courts have generally agreed with the ALI principles," which "explain that returning unclaimed funds to the defendant 'would undermine the deterrence function of class actions and the underlying substantive-law basis of the recovery by rewarding the alleged wrongdoer simply because distribution to the class would not be viable.'") (quoting ALI Principles, § 3.07 cmt. b) (internal citation omitted)); *see also In re Baby Products Antitrust Litig.*, 708 F.3d 163, 172 (3d Cir. 2013) ("Reversion to the defendant risks undermining the deterrent effect of class actions by rewarding defendants for the failure of class members to collect their share of the settlement.").

by cross examining Dr. McClave on whether individual Class members were in fact overcharged—Dow was free to do so. That Dow did not avail itself of that opportunity reflects its own tactical decisions, and provides no basis for manufacturing yet another constitutional and "fundamental right" issue for appeal.[10]

More fundamentally, Dow has no "clear right to a jury trial" on the amount of damages for every individual class member as distinct from the damages Dow caused the Class as a whole. As already explained, there is no authority requiring individual customer-by-customer proof of injury and damages. In fact, the entire history of price-fixing class actions is to the contrary—and the use of aggregate damage calculations is well-established. Because the jury found Dow's liability on the merits using common proof of injury and damages for all or nearly all class members, and the Plan administrator will merely execute the formulaic act of allocating the judgment funds, there is no due process issue relating to Dow and the Plan of Allocation.

Finally, Dow contends "it would violate Dow's Due Process rights to award damages to specific class members based on calculations generated using a model that the jury did not accept[.]" Dow Br. at 10. Dow, of course, has made this argument before, speculating improperly that the jury may have rejected Dr. McClave's testimony in part and that other factors explained the "variance" estimated by Dr. McClave's model. The Court has correctly rejected this assertion, finding "sufficient evidence, including Dr. McClave's model and testimony, that the post-2000 variance shown by the model was linked to the alleged price-fixing." Post-Trial Opinion, at 14; *see also id.* ("The fact that the jury found that plaintiffs failed to sustain their burden of proof with respect to one period of time does not necessarily mean that the evidence

[10] Dow knew full well what Dr. McClave's answer would be had it raised these issues at trial: his analysis showed overcharge for nearly all individual class members, *accounting for 99.8% of all class purchases*. *See* Dkt No. 2752, at 8.

was not sufficient to support the jury's finding of liability with respect to another period. It cannot be said as a matter of law that the jury rejected Dr. McClave's entire model; indeed, the verdict suggests that the jury accepted that model in finding liability and awarding damages for the later period."); *see generally Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 114 n.9 (1969) (antitrust plaintiffs "need not exhaust all possible alernative sources of injury in fulfilling [their] burden of proving compensable injury").

In short, there is no due process issue where the proof introduced at trial—expert and otherwise—is legally sufficient to support the Class verdict on the elements of injury and damages. *See, e.g., Pharmaceutical Indus.*, 582 F.3d at 197 (rejecting due process challenge where aggregate class proof was sufficient to support the judgment); *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.").

D. Dow's Seventh Amendment Arguments Are Also Baseless

Dow's Seventh Amendment arguments also rest on the erroneous notion that the jury's verdict fails to establish Dow's liability and damages on the merits under the Sherman Act, and that only individual jury adjudications of customer-by-customer proof of damages comport with the Constitution. But for the same reason the judgment is final notwithstanding the need for future common fund administration under the Plan of Allocation, the Seventh Amendment is not implicated in a case in which the jury *did* resolve the defendant's liability and damages. Dow invokes a sampling of generic Seventh Amendment cases, but they are wholly inapposite. *E.g.*, *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 353 (1998) (Seventh Amendment violated when judge, not jury, decides the amount of statutory damages awarded to copyright owner).

Here, the jury's verdict fixed both Dow's liability on the merits and, by crediting the overcharge methodology of Plaintiffs' expert, Dow's aggregate damages. As courts have made clear, "[c]hallenges that such aggregate proof affects substantive law and otherwise violates the defendant's due process or jury trial rights to contest each member's claim individually, will not withstand analysis." *Pharmaceutical Indus.*, 582 F.3d at 197 (quoting 3 Newberg on Class Actions § 10:5 (4th ed. 2002)).

The proposed Plan of Allocation, moreover, does not subject those jury determinations to "reexamination" by another finder of fact. Dow. Br. at 9. The administrator's job is ministerial—essentially doing paperwork, administering the common fund established by the judgment, and sending checks in the post-judgment phase of the case. That process has no bearing whatsoever on Dow's scope of liability, which has been fixed definitively by the jury.

E. The Plan of Allocation Is Consistent with the Verdict

Dow claims the Plan of Allocation is inconsistent with the verdict because, in Dow's view, the jury may not have credited Plaintiffs' proof that all or nearly all class members were injured between November 24, 2000 and December 31, 2003 in the individual amounts estimated by Dr. McClave for that time period. *See* Dow Br. at 11.

But the Plan of Allocation is consistent with both the proof presented at trial and a straightforward interpretation of the verdict, *i.e.*, that the jury found (1) Dow participated in a price-fixing conspiracy; (2) all or nearly all direct purchaser customers were injured during the period November 2000-December 2003 (as the evidence clearly supports, *see* Post Trial Opinion, at 13-15); and (3) Dr. McClave's analysis, considered in context with the proof as a whole including various technical criticisms raised by Dow and its experts, supported a just and reasonable jury determination of $400,049,039 damages for the Class covering all or nearly all who purchased during the period after November 24, 2000. *See* Dkt. No. 2816, at 28-33

(addressing sufficiency of the evidence supporting the jury's damage award).

In particular, as Plaintiffs have explained, a reasonable interpretation of the verdict is that the jury found that all class members were injured during the period November 24, 2000-December 31, 2003 and that the jury accepted some but not all of Dow's technical expert criticisms in reducing Dr. McClave's damage estimate of $496,680,486 to the final award of $400,049,039. Dkt. No. 2816, at 31-32 (summarizing Dr. McClave's testimony that, even accepting certain Dow criticisms, damages would be reduced by approximately 0-25%, but would remain statistically and economically significant). For example, if the jury accepted Dow's "monthly data" criticism, it could have determined damages in the amount that it did. *Id.*; *cf. Johnson v. ABLT Trucking Co., Inc.*, 412 F.3d 1138, 1144 (10th Cir. 2005) ("If there is any plausible theory that supports the verdict, the reviewing court must affirm the judgment.").

Because the Plan of Allocation is consistent with both the evidence and the verdict, there is no basis for Dow's speculation that the Plan awards damages to uninjured Class members. Neither the verdict, nor the final judgment, nor the Plan of Allocation should be upset by Dow's guesswork as to the nature of the jury's deliberations. *See, e.g., North Am. Specialty Ins. Co. v. Britt Paulk Ins. Agency, Inc.*, 579 F.3d 1106, 1113 (10th Cir. 2009) (where "the total damage award was within the range of evidence, the jury's verdict should not be upset based on speculation"); *United Phosphorus, Ltd. v. Midland Fumigant, Inc.*, 205 F.3d 1219, 1228 (10th Cir. 2000) (refusing to "speculate as to the jury's deliberations and calculations" where "the jury's [lower] award was well within the range of proof"); *Questar Pipeline Co. v. Grynberg*, 201 F.3d 1277, 1287-89 (10th Cir. 2000) (to upset damage verdict "within a range of the evidence" would "be to impermissibly speculate as to the manner by which jurors arrived at the

verdict").[11]

For all of these reasons, Dow (which in any event lacks standing to object) has not and cannot show that the Plan of Allocation is somehow unreasonable—which is the flexible standard governing such common fund distributions. *See, e.g., In re Universal Serv. Fund Tel. Billing Practices Litig.*, No. 02-MD-1468-JWL, 2011 WL 1808038, at *2 (D. Kan. May 12, 2011) (*pro rata* plan of allocation of aggregate damage award was "reasonable and appropriate, and represents the best and most practical plan of distribution of the judgment fund").

F. Plaintiffs' Proposal for Unclaimed Funds Is Appropriate and Has No Bearing on Dow's Substantive Rights

Under Class Plaintiffs' proposed Plan of Allocation, if any unclaimed funds remain after the initial distribution, they are allocated to the participating members of the Class. *See* Exhibit A at Part D. As noted above, Dow has no legal interest in the judgment fund or the Plan of Allocation. Nonetheless, without citing any relevant authority, Dow argues that the Plan's disposition of unclaimed funds is unauthorized by law and would violate Dow's rights. Dkt. No. 2898 at 12.

"Federal courts have broad discretionary powers in shaping equitable decrees for distributing unclaimed funds." *Six (6) Mexican Workers*, 904 F.2d at 1307 (citation omitted). Courts have recognized that individual class members may be appropriate recipients of unclaimed funds. *See id.* at 1307 n.4*; see also Powell v. Georgia-Pacific Corp.*, 119 F.3d 703, 706 (8th Cir. 1997). Such a distribution is appropriate here because it serves the twin objectives of compensating injured class members and deterring unlawful conduct proscribed by the federal antitrust laws. Plaintiffs' experience with settlement fund distributions in this case suggests that

[11] Consistent with both the verdict and the Plan of Allocation, Plaintiffs' proposed amended final judgment includes language clarifying that judgment is being entered in favor of the Class "for purchases between November 24, 2000 and December 31, 2003." *See* Exhibit A.

any pool of unclaimed funds is likely to be relatively small, and so distribution of such funds to already-compensated Class members should not result in a significant windfall. *Cf. In re Universal Serv. Fund Tel. Billing Practices Litig.*, No. 02-MD-1468-JWL, 2013 WL 2476587, at *2 (D. Kan. June 7, 2013) (declining to distribute unclaimed funds to participating class members, who already had received 200 times their estimated damages, where the additional distribution would have provided an additional 28 times their estimated damages).

Alternatively, the Court may approve a Plan that allocates unclaimed funds for a *cy pres* distribution. This, too, is a well-accepted method of distributing unclaimed funds. *See, e.g., Six (6) Mexican Workers*, 904 F.2d at 1307; *Universal Serv. Fund*, 2013 WL 2476587, at *3-6.

Courts typically rule on the details of how to distribute unclaimed funds after the claims period has expired and the amount of the unclaimed funds, if any, is known. *See e.g., Six (6) Mexican Workers*, 904 F.2d at 1309; *Universal Serv. Fund*, 2013 WL 2476587. At that time, the Court will be in a better position to make an informed decision that is "guided by the objectives of the underlying statute and the interests of the silent class members." *Six (6) Mexican Workers*, 904 F.2d at 1307. Plaintiffs' proposed Plan of Allocation, as amended by Exhibit A, reflects this reasonable and appropriate practice. *See* Exhibit A (proposed amended final judgment and Plan of Allocation).

CONCLUSION

For all the reasons stated, Plaintiffs respectfully submit that the Court should enter the proposed amended final judgment and approve the Plan of Allocation.

Dated: June 20, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that on this 20th day of June, 2013, I caused the foregoing Class Plaintiffs' Reply Memorandum in Support of Class Plaintiffs' Motion to Amend the Judgment and Opposing the Dow Chemical Company's Motion to Amend the Judgment 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*
Gerard A. Dever