IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

IN RE URETHANE ANTITRUST LITIGATION	)	
THIS DOCUMENT RELATES TO: POLYETHER POLYOL CASES	)	Case No. 04-md-1616-JWL-JPO

THE DOW CHEMICAL COMPANY'S RESPONSE
TO CLASS PLAINTIFFS' SUR-REPLY MEMORANDUM
ADDRESSING *COMCAST CORP. V BEHREND*

While Plaintiffs characterize *Comcast* as "complex," the thrust of the Supreme Court's decision is simple: antitrust class actions must adhere to the same disciplined application of Rule 23's requirements that the Supreme Court has repeatedly mandated in other class litigation. *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432, 1433 (2013) (citing *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997), *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011)). In *Comcast*, the Supreme Court focused its predominance analysis on the element of causation, more particularly causation of damages. The test of damage causation is uncontroversial. It requires that "a model purporting to serve as evidence of damages in [a] class action must measure *only those damages attributable to that theory*" of antitrust impact accepted for class action treatment, differentiating the specific impact of the illegal conduct at issue from the price impact "caused by factors unrelated to an accepted theory of antitrust harm." *Id.* at 1433, 1435 (emphasis supplied). The Supreme Court found there was "no question" that McClave's model in *Comcast* failed this test and decertified the class.

Plaintiffs portray *Comcast* as a narrow ruling, applicable only to initial class certifications in monopolization cases where the modeling methods are not "well established." There is no support for this in the Supreme Court's opinion. Plaintiffs' arguments, in fact, highlight the precision and clarity with which *Comcast* applies to the present case.

Nor can the implications of *Comcast* for the specific motions here be finessed. A key and still undisputed predicate of Dow's post-trial motions is the jury's rejection of the very same causal linkage that was lacking in *Comcast.* The legally and logically prior issue is class certification. Because the record now establishes that Rule 23 requirements are not met, the case should be decertified.

For this and the additional reasons set out in Section II, Plaintiffs' request that this Court

give deference to the jury's verdict in ruling on the decertification motion mistakenly assumes that the verdict alters the Court's role in deciding certification, and ignores that Plaintiffs have the burden to prove the predicates for certification. The burden to establish those predicates always rests with the movant, and the Court alone (deciding a procedural issue, not acting as the trier of fact) makes all findings required by Rule 23. Far from being constrained by the verdict, the Rule 23 analysis determines whether the verdict may be given any effect at all.

Consideration of the jury's verdict ***does*** become relevant in connection with the Rule 50 motions, but, as discussed in Section III, *Comcast* underscores how that verdict compels entry of judgment for Dow. The jury's verdict zeros in on the core relationship analyzed in *Comcast*, *i.e.* the certified theory of antitrust liability and its causal connection to damages. Plaintiffs still have no answer at all to the jury's crucial rejection of McClave's claim that modeled variance equates to illegally caused overcharges. For this same reason, what the jury concluded for the period through at least November 23, 2000 would, if considered on the class issue, require decertification under *Comcast*.

I. ***COMCAST* CANNOT BE DISTINGUISHED**

A. *Comcast*'s Requirement That Damage Causation Be Proven As A Common Issue Cannot Be Marginalized As The Mere Product of Stipulation Or A Non-Mandatory Option

Plaintiffs assert that "both parties" in *Comcast* "conceded" that damages had to be proven "on a classwide basis" through the use of "common methodology," suggesting that the requirement of classwide damages proof was simply stipulated. Plaintiffs' Sur-Reply ("PSR") at 16-17. Plaintiffs stress that they have made no such concession here. But nowhere in its opinion does the Supreme Court even hint that proof of damage causation need not be common after all. The very core of the opinion is exactly the opposite – that causation of damages **must** be proven on a common basis in Rule 23(b)(3) antitrust class actions. 133 S. Ct. at 1431 n.4, 1433.

Relatedly, Plaintiffs urge that their damage proofs are protected by *Story Parchment*[1] and other cases that allow inference and estimation to play a role in the proof of antitrust damages. PSR at 6. Plaintiffs suggest that they do not depend upon McClave's model to prove "the causal nexus that was lacking in *Comcast*" and that there was other "extensive," "independent" proof. *Id.* at 12-13. This argument is flawed.

First, the issue framed and decided in *Comcast* was not whether inference and estimation are permissible in quantifying antitrust damages. Rather, the Court asked whether *causation* of damages had been proven in a *class* case using *classwide* evidence. The McClave Model was critical in *Comcast* because it was Plaintiffs' "sol[e] vehicle" for quantifying causally linked damages for the class as a whole and thus the only classwide proof of causal damages.[2] Precisely the same is true in this case, particularly given the fact that urethane prices were negotiated individually. *See Blades v. Monsanto*, 400 F.3d 562, 571 (8th Cir. 2005) (certification denied in part because there was no uniform market price).

Second, if *Story Parchment* could be read to limit Rule 23's requirements, substantive law would override procedural rules authorized by Congress. But just as the Rules Enabling Act prevents procedural rules from altering substantive rights, 28 U.S.C. § 2072, the converse is true – antitrust opinions regarding proof of damage cannot dilute rule requirements unless and until Congress adopts them into law. *See In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 326 (3d Cir. 2008) (presuming classwide impact from price-fixing would "appear to conflict with the 2003 amendments to Rule 23"). The *Comcast* Court saw no conflict with *Story Parchment*, and

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[1] *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 562 (1931) (cited in *Comcast*).

[2] *Id.* at 1431. It bears noting that in *Comcast* too, other experts testified to antitrust impact. *Behrend v. Comcast*, 264 F.R.D. 150, 166-74 (E.D. Pa. 2010). None purported to quantify causally linked damages for the class as a whole.

plaintiffs' inability in *Comcast* to proceed under Rule 23 abridged no substantive right. Plaintiffs' reliance upon *Story Parchment* here is, at bottom, an objection to *Comcast* itself, not a basis for distinguishing it.

Third, *Story Parchment* does not conflict with *Comcast* because the latitude *Story Parchment* allowed in proving the amount of antitrust damages does not extend to the element of causation. The requirement that injury and damages flow causally from proven liability is imposed by Section 4 of the Clayton Act, which enables recovery for injury to business or property "by reason of" violations of the antitrust laws. *See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488-89 (1977). The *Story Parchment* Court itself was careful to limit the scope of "uncertain[ty]" permitted in damage proofs to "those damages which are *definitely attributable to the wrong* and only uncertain in respect of their *amount*." 282 U.S. at 562 (emphasis supplied). This critical distinction was later discussed extensively and deployed in the Seventh Circuit's widely-cited decision in *MCI Commc'ns Corp. v. Am. Tel. & Tel. Co.*, 708 F.2d 1081, 1161 (7th Cir. 1983), which was followed in turn by *Image Tech. Servs., Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1224 (9th Cir. 1997), which was, in turn, cited by the *Comcast* Court itself. 133 S. Ct. at 1433.[3]

Finally, Plaintiffs' various attempts to refocus this case on the evidence summarized by Dr. Solow merely highlight again Dr. Solow's testimony that (a) the standard antitrust analysis requires proof of impact on market "performance," and (b) he depended upon McClave's

[3] *See also Coleman Motor Co. v. Chrysler Corp.*, 525 F.2d 1338, 1353 (3d Cir. 1975) (explaining that the jury could not have made a "just and reasonable inference" because the evidence showed the damage figures were due in part to lawful action). In continuing to press the argument that damage causation can still be based on a "reasonable inference," PSR at 7-8, Plaintiffs also cite a treatise provision that merely discusses *how* to perform a multiple regression analysis, not whether such an analysis suffices to prove classwide causation of damages. IIA Phillip E. Areeda *et al.*, ANTITRUST LAW ¶¶ 394-95, at 386 (3d ed. 2007).

modeling work to satisfy this requirement. Trial Tr. 2184:6-17. Thus, Dr. Solow's testimony only magnifies the significance of McClave's failure to satisfy *Comcast*'s requirements.[4]

B. *Comcast* Applies To Horizontal Price-Fixing Cases

The *Comcast* opinion refers to monopolization only in describing the history of the case. 133 S. Ct. at 1430, 1438. There is nothing in the decision limiting its application to monopolization claims; indeed, the Court made clear that the case "turns on the straightforward application of class certification principles." *Id.* at 1433.

Plaintiffs' suggestion that *Comcast* is "inapposite" to horizontal price-fixing claims is flatly at odds with the Clayton Act. The causation requirement for all antitrust damage actions flows from Section 4 of the Act, which grants the right to bring **all** such actions. 15 U.S.C. § 15 ("[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue . . . ."). No court has ever limited this language to monopolization claims. The specific test of damages causation adopted in *Comcast* also flowed from the same source – Section 4 of the Clayton Act. *See Image Tech.*, 125 F.3d at 1224 ("A failure to [segregate damages attributable to lawful competition from damages attributable to . . . monopolizing conduct] *contravenes the command of the Clayton Act*") (emphasis supplied). The lineage of this test, then, is the same as that traced in Section A above: Section 4 to *MCI*, to *Image Tech.*, to *Comcast*. *See* § I.A, *supra*. Again, it is the broadly applicable causation requirement of Section 4 that constrains antitrust plaintiffs to "disaggregate" losses and present solely those losses that are specifically attributable to the anticompetitive conduct at issue.

[4] Perhaps this is why Plaintiffs appear to reverse course toward the end of their brief and seek to resurrect McClave's model as common proof. PSR at 18.

C. Plaintiffs' Theory of Antitrust Injury Does Not Distinguish *Comcast*

Plaintiffs' contention that their own theory of antitrust injury is "obvious," PSR at 1, provides no basis for distinguishing *Comcast*. The issue in *Comcast* was not the clarity of the theory of injury, but rather the viability of a model design which did not differentiate the impact of the theory of injury at issue from that of other causal factors. 133 S. Ct. at 1435.

Plaintiffs' related contention that "[h]ere there is only one simple theory of injury," PSR at 9, misses the mark for the same reason. There was only one theory of injury certified in *Comcast* as well. The problem was that McClave's *Comcast* model was not tailored to that one theory. This lack of specificity was demonstrated by the fact that the model was not modified to isolate the impact alleged under that theory. The same is true in this case. McClave developed his model to accommodate Plaintiffs' initial allegations of both price-fixing and customer/market allocation. He never re-specified it following Plaintiffs' decision to drop the latter claim. *See also Image Tech.*, 125 F.3d at 1224 ("When a § 2 monopolization claim has been dismissed or adjudicated against plaintiff, damages attributable to that claim must be disaggregated."). The issue, again, is not whether other theories of liability were pursued or are now substantiated, but rather whether the model matched the theory presented at trial.

Dow's Reply further explored other causal factors not eliminated McClave's Model. Plaintiffs call this "analogizing" and a "sleight of hand" that is designed to repeat "unrelated merits criticisms" of the McClave Model. PSR at 10. Far from being "unrelated," the other causal factors are directly on point under *Comcast*. The causal relationship test in *Comcast* requires exclusion of any losses attributable to "factors unrelated to an accepted theory of antitrust harm," not just those attributable to uncertified claims. *See MCI*, 708 F.2d at 1162 (plaintiffs' attribution of "**all** losses to a defendant's illegal acts, despite the presence of

significant **other factors,**" was improper) (emphasis supplied). The burden is on the plaintiffs to satisfy this basic element of their claim by showing that their model design is right: that it excludes any losses attributable to "significant other factors" and focuses solely on the impact of the claim certified. In the present case, not only were other factors not excluded, but affirmative evidence of such factors was presented, thereby undercutting McClave's assumption that all modeled variance equated to illegal overcharges. It is not up to the jury to resolve this problem, *see* § II.A, *supra*, although the jurors ultimately concluded that McClave's equation of modeled variance with illegal overcharges was wrong when they found no illegal overcharges for the period extending at least through November 23 2000.[5]

D. *Comcast* Created No Exception for Frequently Used Damages Models

Whether an expert's model is "well-established" or even "reliable" enough for admission into evidence under *Daubert* is irrelevant to the *Comcast* analysis, which focuses on whether the model does what it needs to do under Rule 23. Use of a regression model (including McClave's regressions models in *Comcast* and here), or any other model, does not guarantee certification. *See, e.g., Piggly Wiggly Clarksville, Inc. v. Interstate Brands Corp.*, 100 F. App'x 296, 299 (5th Cir. 2004) (affirming denial of class certification despite plaintiffs' expert's testimony, noting that "[m]ultiple regression analysis is not a magic formula").

II. *COMCAST* SUPPORTS DECERTIFICATION OF THIS CASE

There are some areas where the present case differs from *Comcast*. But these differences enhance rather than diminish the impact of that decision on Dow's decertification motion.

[5] At one point, Plaintiffs say that the model specified in this case "isolates the result of 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." PSR at 9. While isolation is the key, the comparison made by McClave here did nothing to isolate the impact attributable to the "harmful event" at issue. *Comcast*, 133 S. Ct. at 1435. As McClave admitted in this case with even greater specificity than he did in *Comcast*, "cartel events" were not part of his model in this case. Trial Tr. at 3147:6-11.

A. The Post-Trial Status Of This Case Bolsters The Need For Decertification

Plaintiffs misapprehend the requirements of post-trial class action practice. They repeatedly insist that the jury's verdict diminishes Dow's Rule 23 motion. PSR at 5-6. Specifically, they argue that the standards for sufficiency challenges govern certification and chastise Dow for failing to produce evidence against certification, effectively shifting the burden of certification to Dow. *Id.* Importantly, in 2003, Rule 23(c) was amended to permit a court to alter its class certification order at any time before a "final judgment." This change was made to ensure that courts "consider carefully all relevant evidence and make a definitive determination that the requirements of Rule 23 have been met before certifying a class," *Hydrogen Peroxide*, 552 F.3d at 320, while reflecting the practical fact that "[d]ecertification may be warranted after further proceedings," Fed. R. Civ. P. 23, Advisory Committee Note to 2003 Amendments. Notably, there was **no** other change to the Rule 23 standards or practice now applicable post-trial. And post-trial decertifications reflect no such change.[6] More fundamentally, the issue under Rule 23 is the threshold issue of whether plaintiffs can meet their burden of showing their claims should be adjudicated on a classwide basis to begin with. Nothing the jury does can alter that burden.[7]

The proceedings here also confirm the wisdom of allowing a court flexibility to decertify a class after a trial on the merits. While the class in *Comcast* was decertified at an earlier stage, Plaintiffs here have received greater latitude – and still have failed. Moreover, the conduct of this trial demonstrates the need for decertification. The jury was presented with a problem

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[6] *See, e.g.*, *Wang v. Chinese Daily News, Inc.*, 709 F.3d 829 (9th Cir. 2013); *Taylor v. The Hous. Auth. of New Haven*, 267 F.R.D. 36 (D. Conn. 2010).

[7] *See In re S.E. Milk Antitrust Litig.*, No. 08-MD-1000, 2011 WL 3205798, at *3 n.4 (E.D. Tenn. July 28, 2011) (decertifying a class by rejecting the contention that a jury could resolve any conflict between class members because the court must ensure it was "placing the burden where it actually belongs—with the class representatives").

(evidence showing the McClave Model did not differentiate overcharges attributable to the conduct at issue) that should have precluded prosecution of the case as a class action. Indeed, the jury's answer to Verdict Question 3 underscores McClave's admission of his model's limitations and confirms the need for decertification under *Comcast*. While the jury's verdict highlights the problem, the propriety of class certification must now be decided by the Court.

B. *Comcast* Underscores The Importance of The Variability of Damages Evidence In This Case

In the present case, not only does the model fail to establish the required connection with Plaintiffs' theory of liability, it fails to prove individual injury and damages classwide. The same causal relationship is implicated – the relationship of liability to injury and damages. In this case, McClave's model here has failed at both ends, both in its connection to liability conduct and in its connection to all class members.

Plaintiffs' latest brief adds nothing but repetition to their prior, inadequate efforts to justify the use of extrapolation. *Comcast* makes clear that (as stated by the minority in the Third Circuit and as acknowledged by plaintiffs' counsel in his argument before the Supreme Court) the model must prove causation of individual injury using common, classwide proof. *Behrend v. Comcast*, 655 F.3d 182, 221 n.28 (3d Cir. 2011) (Jordan, J., concurring in part and dissenting in part) (plaintiffs must "proffer[] a model that shows how damages can be calculated on a class-wide basis" to satisfy predominance); Sup. Ct. Oral Arg. Tr. At 44-45 (*available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/11-864.pdf). By contrast, extrapolation merely **substitutes** a single number for thousands of individual transactions with different prices**,** thereby **disconnecting** the model from causation of individual injury.[8]

[8] In this respect, the facts of this case justify the *Comcast* Court's additional concerns over variability. 133 S. Ct. at 1435 n.6.

III. COMCAST CONFIRMS THE LEGAL BASIS FOR DOW'S RULE 50 MOTIONS

All of the foregoing also bears on Dow's other motions for entry of judgment under Rule 50 and for a new trial. Two additional points regarding Rule 50 are confirmed by *Comcast*.[9]

First, while *Comcast* did not address Rule 50, the principle of antitrust law applied in its Rule 23 analysis is precisely that which underpins the Rule 50 motions. That principle requires the certified theory of liability be causally linked to injury and damages through a properly designed model. Here, the jury rejected both the Plaintiffs' theory of conspiracy and the modeled linkage to that theory. As *Comcast* confirmed, the jury's decision means that the Clayton Act's causation requirements have not been met. Judgment should be entered for Dow.

Second, Plaintiffs simply repeat their past efforts to offer another evidentiary basis to support the jury's damage award. PSR at 13, 18. Of course, they assume the validity of the model, despite the fact that *Comcast* has confirmed its invalidity. Plaintiffs also continue to misuse McClave's testimony about "20%,"[10] which has no causal tie to any event, much less a tie that meets the requirements of *Comcast*.

[9] Plaintiffs in a footnote accuse Dow of raising for the first time on reply parallel pricing; plus factors; and the lack of evidence to support a conspiracy on every product, involving Lyondell, and starting on November 24, 2000. Dow discussed parallel conduct and plus factors in its opening brief, Dow's Opening Brief at 41-42 (behavior of prices following price announcements); 39-41 (plus factors), and Plaintiffs discussed the issues in their opposition, Plaintiffs' Opp. Brief at 16 ("Lockstep pricing"); 40-41 (parallel pricing); 45-47 (plus factors). Dow's opening brief also explained that Plaintiffs' evidence did not support a conspiracy, Dow's Opening Brief at 31-44, and the discussion of the lack of evidence in Dow's reply responds to plaintiffs' argument that the evidence was "overwhelming," Plaintiffs' Opp. Brief at 35-44.

[10] *See* Dow's Reply at 21.

Respectfully submitted,

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Certificate of Service

On April 29, 2013, I caused a copy of this document to be 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.

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