

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

**IN RE: URETHANE ANTITRUST
LITIGATION**

**MDL 1616
Civil No. 04-md-01616-JWL**

**This Document Relates To:
The Polyether Polyol Cases**

**CLASS PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF
THEIR MOTION FOR PRELIMINARY APPROVAL OF
SETTLEMENT WITH THE DOW CHEMICAL COMPANY**

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I. INTRODUCTION

Class representatives Seegott Holdings Inc., Quabaug Corporation and Industrial Polymers, Inc. (collectively, “Class Plaintiffs”) submit this Memorandum in support of their Motion seeking preliminary approval of Class Plaintiffs’ \$835 million settlement (“Settlement”) with The Dow Chemical Company (“Dow”) and authorization to disseminate notice to Class members. A copy of the Settlement Agreement, executed February 25, 2016 (“SA”), is attached hereto as Exhibit A. *See* Fed. R. Civ. P. 23(e)(3).

This case has been an extraordinary success for the Class. The Dow settlement is one of the largest ever paid by a single defendant in an antitrust class action. Combined with prior settlements, the Dow agreement brings the total recovery to nearly one billion dollars. As the Court is aware, these results were achieved solely through the work and persistence of Class Plaintiffs, without the benefit of guilty pleas or a criminal investigation prior to the case being filed.

It has been more than eleven years since this case was filed, nearly eight years since class certification, three years since trial, and almost 18 months since the Tenth Circuit affirmed the judgment on appeal. The Dow settlement is now the final chapter in what has been, by any measure, an exceptionally long, complex, and hard-fought case that was fraught with substantial risk. Viewed in light of the history of the litigation, and the risks that remained, a cash settlement amounting to more than twice the jury verdict and almost 80% of the judgment represents an outstanding result for the Class.

Class Plaintiffs submit that the Settlement easily satisfies the standards for preliminary approval under Rule 23—namely, it is sufficiently fair and reasonable to warrant class-wide notice. Accordingly, Class Plaintiffs respectfully request that the Court grant their motion for

preliminary approval and order dissemination of class-wide notice outlining the proposed settlement, the proposed plan of distribution, and the petition for attorneys' fees, reimbursement of litigation expenses, and incentive payments to the named plaintiffs.

II. BACKGROUND

Plaintiffs filed their initial complaints in 2004 alleging that Defendants Huntsman, Bayer, BASF, Dow and Lyondell violated the Sherman Antitrust Act, 15 U.S.C. § 1, *et seq.*, by conspiring to fix, raise, maintain or stabilize the prices for Polyether Polyol Products¹ sold in the United States. First Am. Consol. Compl. ¶¶ 1-2.

Class Plaintiffs reached an initial \$55.3 million settlement with Bayer, which this Court approved on August 30, 2006. *See* Dkt. No. 425. Bayer also agreed to provide access to documents and witnesses without expensive and protracted discovery.

Nearly two years later, following class certification discovery, the Court certified a litigation class. *See* Dkt. No. 708 (July 29, 2008). Several years of merits discovery followed, involving millions of pages of document review, extensive motion practice, expert discovery and reports, and more than 100 domestic and international depositions.

In 2011, Class Plaintiffs reached settlements with BASF, Lyondell and Huntsman, which this Court also approved, along with a plan of allocation and distribution. *See* Dkt. Nos. 2078, 2079, 2139-40, 2198, 2208, 2209, 2547. All three defendants agreed to cooperate with Plaintiffs going forward. Huntsman settled for \$33 million and BASF settled for \$51 million, for a total of \$139.3 million in pre-trial settlements.

In early 2013, after defeating Dow's summary judgment and *Daubert* motions, Class Plaintiffs took the case to trial. The trial lasted four weeks, with the jury considering thousands

¹ "Polyether Polyol Products" are defined below in Section III.

of pages of exhibits plus testimony from 38 witnesses (13 live and 25 via video deposition), including several experts. The jury returned a class-wide liability verdict for Plaintiffs and awarded damages of \$400,049,039.00 for the period between November 24, 2000 and December 31, 2003. *See* Verdict Form, Dkt. No. 2799. The Court later denied Dow's post-trial motions and de-certification motion and modified the class definition to exclude 2004 purchases. After accounting for the pre-trial settlements with the other defendants, the Court entered an amended judgment against Dow in the amount of one billion, sixty million, eight hundred forty-seven thousand, one hundred seventeen dollars (\$1,060,847,117.00). Dkt. No. 2964.

Dow appealed and the Court of Appeals unanimously affirmed. *In re Urethane Antitrust Litig.*, 768 F.3d 1245 (10th Cir. 2014). The Court of Appeals subsequently denied Dow's petition for rehearing and rehearing *en banc*. *See* No. 13-3215 (10th Cir. Nov. 7, 2014).

On March 9, 2015, Dow petitioned for a Writ of *Certiorari* in the Supreme Court of the United States (No. 14-1091), arguing principally that this Court and the Tenth Circuit erred in permitting this matter to proceed as a class action. After Plaintiffs filed their opposition brief on May 15, 2015, the Supreme Court granted *certiorari* in *Tyson Foods, Inc. v. Bouaphakeo*, No. 14-1146, another class action case, on June 8, 2015. The Court has held Dow's Petition pending its decision in *Tyson Foods*.² During the briefing on the merits in *Tyson Foods*, Dow filed an *amicus* brief making arguments with respect to both *Tyson Foods* and the *Urethane* case. Class Plaintiffs also filed an *amicus* brief in *Tyson Foods* to respond to Dow's arguments concerning

² There were a number of significant class actions before the Court this Term, including *Spokeo, Inc. v. Robins*, No. 13-1339 (which has not yet been decided) and *Campbell-Ewald Company v. Gomez*, No. 14-857 (which was decided on January 20, 2016). *Tyson Foods* was decided on March 22, 2016 – four weeks after Class Plaintiffs and Dow executed the Settlement Agreement for which Class Plaintiffs seek preliminary approval. *Tyson Foods, Inc. v. Bouaphakeo*, No. 14-1146, ___ S.Ct. ___, 2016 WL 1092414 (Mar. 22, 2016).

this case.

Class Plaintiffs and Dow have been in serious and continuing settlement discussions for nearly two years. In February 2016, the parties executed a settlement agreement and jointly asked the Supreme Court to hold Dow's Petition in abeyance pending this Court's consideration of the settlement. On March 7, 2016, the Supreme Court granted that motion.

III. THE DOW SETTLEMENT AGREEMENT

The Settlement with Dow provides an extraordinary monetary payment to the Class in exchange for a class-wide release. The Settlement's key terms are discussed below.

Dow will pay a total of \$835 million in cash to the Class, to be deposited into escrow within 10 business days after the Court's preliminary approval of the Settlement. SA ¶ 27. The Settlement is binding on Dow,³ Class Plaintiffs,⁴ and the Class, which includes all persons and entities who have not timely excluded themselves from the certified litigation class and who have purchased: (1) propylene oxide-based polyether polyols; (2) monomeric or polymeric diphenylmethane diisocyanates (MMDI or PMDI – collectively, MDI); (3) toluene diisocyanates (TDI); (4) MDI-TDI blends or (5) propylene oxide-based polyether polyol systems (except those that also contain polyester polyols) (hereinafter "Polyether Polyol Products"), directly from Defendants at any time from January 1, 1999 through December 31, 2003 (the "Class Period"). SA ¶¶ 2, 6, 14. Excluded from the Class are Defendants, their respective parents, employees,

³ "Dow" means The Dow Chemical Company, and its respective past and present, direct and indirect, parents, subsidiaries, affiliates, officers, directors, employees, agents, attorneys, servants, and representatives (and the parents', subsidiaries', and affiliates' past and present officers, directors, employees, agents, attorneys, servants, and representatives), and the predecessors, successors, heirs, executors, administrators, and assigns of each of the foregoing. SA ¶ 10.

⁴ "Plaintiffs" (or "Class Representatives") are defined in the Settlement Agreement as "Seegott Holdings Inc., Quabaug Corporation and Industrial Polymers, Inc." SA ¶ 7.

subsidiaries and affiliates, and all government entities. *Id.* ¶ 2. This Class definition encompasses the same litigation Class that the Court certified, as modified in its decision denying Dow’s Motion to Decertify. *See* Dkt. No. 2879 at 6.

The Agreement provides for the following release of Dow on behalf of the Class:

from any and all claims, demands, actions, suits, and causes of action, whether class, individual, or otherwise in nature, damages whenever incurred, liabilities of any nature whatsoever, including costs, expenses, penalties, and attorneys’ fees, known or unknown, suspected or unsuspected, asserted or unasserted, in law or equity, that Releasors, or any one of them, whether directly, representatively, derivatively, or in any other capacity, ever had, now have, or hereafter can, shall, or may have against the Releasees, relating in any way to any conduct by Releasees and/or any joint and several liability arising from the conduct of any of the Defendants in the Class Actions from the beginning of time until the Effective Date concerning the pricing, purchase, selling, discounting, marketing, manufacturing, offering and/or distributing of the Products in the United States and its territories or for delivery in the United States and its territories (the “Released Claims”). The Released Claims also include, but are not limited to, all claims asserted or which could have been asserted in the Class Actions relating to or arising out of the facts, occurrences, transactions, or other matters alleged or otherwise raised during the proceedings by Plaintiffs and/or Dow in the above-captioned actions. However, nothing herein shall be construed to release any claims relative to any product defect, breach of contract, or similar claim between the parties relating to the Products.

SA ¶ 26. In essence, the Agreement releases Dow (and its current and former officers, directors, employees, agents, parents, and subsidiaries) from all claims relating in any way to any conduct prior to the Agreement’s Effective Date relating to the pricing, purchase, selling, discounting, marketing, manufacturing, or distributing of the Products in the United States. SA ¶ 26. It does not release unrelated claims, such as product liability or contract claims. *Id.* These release provisions are nearly identical to those approved in connection with prior settlements.

If the Court does not approve the Settlement, the parties have the option of rescinding the Agreement. SA ¶ 37. So as to avoid even the possibility of an inadvertent trigger of this

provision, Plaintiffs have provided the Court with two orders. One relates only to preliminary approval, while the second relates to the provision of notice to the Class.⁵

IV. THE PROPOSED SETTLEMENT SHOULD BE PRELIMINARILY APPROVED

A. The Settlement Readily Meets the Standards for Preliminary Approval

Under Rule 23(e), a class action settlement requires the Court's approval. At the preliminary approval stage, "the Court makes a preliminary evaluation of the fairness of the proposed settlement and determines whether it has any reason to not notify class members of the proposed settlement or not to hold a fairness hearing." *In re Motor Fuel Temperature Sales Practices Litig.*, No. 07-MD-1840-KHV, 2014 WL 5431133, at *4 (D. Kan. Oct. 27, 2014). "The purpose at the preliminary approval stage is not to make a final determination of the proposed settlement's fairness. Thus, 'the standard that governs the preliminary approval inquiry is less demanding than the standard that applies at the final approval stage.'" *Nakkhumpun v. Taylor*, No. 12-CV-01038-CMA-CBS, 2015 WL 6689399, at *3 (D. Colo. Nov. 3, 2015) (quoting *Newberg on Class Actions* at § 13:13 (5th ed. 2015)); accord *Motor Fuel*, 2014 WL 5431133, at *4. If the Court grants preliminary approval, it directs notice to the class and sets a final approval hearing, the second step in the process. *Id.* at *4; *Newberg on Class Actions* at § 13:10 (5th ed. 2015).

Although the Court must assess the strength of plaintiffs' claims, it should "not decide the merits of the case or resolve unsettled legal questions." *Motor Fuel*, 2014 WL 5431133, at *5. Instead, the Court need only decide whether the settlement is "within the range of possible

⁵ Of course, if the Court wishes to hear from Class Counsel on any aspect of this Motion, we are available at the Court's convenience.

approval.” *In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 205 (5th Cir. 1981); *Motor Fuel*, 2014 WL 5431133, at *4.

The Court’s analysis is informed by the “strong judicial policy in favor of settlements of class actions.” 5 *Moore’s Federal Practice* § 23.161[1] (3d ed.); see *Shaw v. Interthinx, Inc.*, No. 13-CV-01229-REB-NYW, 2015 WL 1867861, at *2 (D. Colo. April 22, 2015) (“the essence of settlement is compromise, and settlements are generally favored.”) (citation omitted); *Jones v. I.Q. Data Int’l, Inc.*, No. 14-CV-00130-PJK, 2015 WL 5704016, at *1 (D. N.M. Sept. 23, 2015); *Tuten v. United Airlines, Inc.*, 41 F. Supp. 3d 1003, 1007 (D. Colo. 2014) (quoting *Ehrheart v. Verizon Wireless*, 609 F.3d 590, 594 (3d Cir. 2010)); *Alvarado Partners, L.P. v. Mehta*, 723 F. Supp. 540, 551 (D. Colo. 1989) (noting strong policy in favor of settlements, particularly in class actions); 4 *Newberg on Class Actions* at § 13:44 (5th ed. 2015) (“The law favors settlement, particularly in class actions...”).

At the final approval stage, Rule 23(e)(2) requires a finding that the settlement is fair, reasonable and adequate, and the factors considered in this analysis can serve as a useful guide at the preliminary approval stage as well. *Pilego v. Los Arcos Mexican Restaurants, Inc.*, No. 14-cv-01686-RM-KMT, 2016 WL 471278, at *8 (D. Colo. Feb. 8, 2016) (citing *Motor Fuel*); *Rhodes v. Olson Assoc.*, 308 F.R.D. 664, 667 (D. Colo. 2015); *Lucas v. Kmart Corp.*, 234 F.R.D. 688, 693 (D. Colo. 2006). The final approval standards are well-established under Tenth Circuit law. The district court should consider: (1) whether the proposed settlement was fairly and honestly negotiated; (2) whether serious questions of law and fact exist, placing the ultimate outcome of the litigation in doubt; (3) whether the value of an immediate recovery outweighs the mere possibility of future relief after protracted and expensive litigation; and (4) the judgment of the parties that the settlement is fair and reasonable. *Tennille v. W. Union Co.*, 785 F.3d 422,

434 (10th Cir. 2015); *Rutter & Wilbanks Corp. v. Shell Oil Co.*, 314 F.3d 1180, 1188 (10th Cir. 2002); *Jones v. Nuclear Pharmacy, Inc.*, 741 F.2d 322, 324 (10th Cir. 1984).⁶ The Dow Settlement satisfies each of these factors.

1. The Settlement Was Fairly, Honestly and Extensively Negotiated

A settlement is considered to be fairly and honestly negotiated when reached after arm's-length negotiations by experienced counsel. *See Rhodes*, 308 F.R.D. at 667 (finding this factor satisfied where there was no indication “the settlement was the product of collusion” and where “the parties ‘vigorously advocated their respective positions throughout the pendency of the case.’”); *Marcus v. Kansas Dept. of Revenue*, 209 F. Supp. 2d 1179, 1182 (D. Kan. 2002) (finding this factor satisfied where the “settlement was reached after arm's-length negotiations” “by experienced counsel for the class”); *In re New Mexico Natural Gas Antitrust Litig.*, 607 F. Supp. 1491, 1506-07 (D. Colo. 1984) (finally approving settlement where court was “wholly satisfied that the negotiations took place at arms length”); *In re King Resources Co. Sec. Litig.*, 420 F. Supp. 610, 626 (D. Colo. 1976) (same).

This settlement is the result of extensive arm's-length negotiations by experienced counsel for Class Plaintiffs and Dow over almost two years. Counsel participated in numerous face-to-face meetings and many phone calls where they exchanged their respective views on the merits of Plaintiffs' case, Dow's appellate arguments, and the monetary amount for which Dow should settle. Moreover, the decade-plus history of the litigation underscores the vigor with which Class Counsel have represented the class in all respects – including for settlement purposes. Class Counsel litigated the case skillfully for years; reached favorable settlements

⁶ *See also* Dkt. Nos. 425, 2078, 2079, 2208 (orders applying these factors to prior settlements in this case).

with Dow's co-defendants; did not settle with Dow prior to summary judgment, trial, or the Tenth Circuit's decision on appeal; and ultimately those strategic judgments (and willingness to walk away from lesser offers) secured a massive recovery for the Class.

The \$835 million to be paid by Dow – one of the largest settlements paid by a single defendant in a price-fixing class action and more than double the jury's \$400 million verdict -- speaks for itself in terms of the integrity and vigor of Class Counsel's representation in the litigation and at the bargaining table. By any measure, the result is outstanding. The Dow Settlement, as well as the total settlements with defendants aggregating nearly one billion dollars, far exceeds the normal range of recovery in other antitrust cases. Typical settlements in antitrust class actions are reached prior to trial for a fraction of single damages.⁷ Comparing the result to other price-fixing cases that have gone to verdict is difficult, as few such cases ever go to trial. To our knowledge, the \$1.06 billion judgment is the largest post-verdict price-fixing judgment in a class action. Nevertheless, even when measured against the judgment of \$1.06 billion, the \$835 million settlement is extraordinary, amounting to nearly 80 percent of the judgment. This is an excellent result given the uncertainties of litigation and the specific risks to the Class described below.

In sum, the history of the parties' negotiations as well as the Settlement's terms demonstrate that the Settlement was fairly, honestly and vigorously negotiated.

2. Disputed Questions of Law and Fact Remain

The Court also considers whether "serious legal and factual questions placed the litigation's outcome in doubt." *Tennille*, 785 F.3d at 434; *King Resources*, 420 F. Supp. at 625.

⁷ See, e.g., *In re Linerboard Antitrust Litig.*, No. CIV. 98-5055, 2004 WL 1221350, at *4 (E.D. Pa. June 2, 2004) (collecting cases in which courts have approved settlements of 5.35% to 28% of potential damages).

The risks to Class Plaintiffs in the Supreme Court – and the arguments aggressively pursued by Dow on appeal – militate strongly in favor of settlement.

Here, the Class won a jury trial and the judgment was affirmed by the Tenth Circuit, yet significant risks remained. In June 2015, the Supreme Court granted *certiorari* in *Tyson Foods*, No. 14-1146 (*cert. granted*, June 8, 2015), and held Dow’s petition without action pending a decision in *Tyson Foods*. Like Dow, the petitioner in *Tyson Foods* sought clarification of the scope of *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 388 (2011), and the standards governing class certification under Rule 23. Indeed, in urging the Supreme Court to grant *certiorari*, both Dow and Tyson Foods cross-referenced each other’s petitions and claimed the presence of overlapping class certification issues warranting reversal by the Supreme Court. Dow also filed an *amicus* brief in *Tyson Foods* in an attempt to highlight for the Court alleged similarities between the two cases.

At the time the settlement was reached, the substantial risks to the Class included, *inter alia*, (i) a decision in *Tyson Foods* that established new legal standards, followed by vacatur and remand of *Urethane*; (ii) a 4-4 Supreme Court split in *Tyson Foods*, which could have resulted in *Tyson Foods* being held for re-argument until a new Justice is confirmed, meaning a further hold for *Urethane*; (iii) a decision (or *certiorari* grant) in other class action appeals pending before the Supreme Court, leading to a remand or continued hold for *Urethane*; or (iv) a *certiorari* grant in *Urethane*. The proposed settlement provides a sizeable and prompt monetary recovery, while eliminating these material risks.⁸

⁸ The appropriate time to measure the risk facing Class Plaintiffs is the time of settlement, and the relevant question is how much risk Class Plaintiffs faced when the settlement was reached. *In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d 1330, 1346 (S.D. Fla. 2011) (“A settlement fairness analysis must consider such risks at the time the settlement was reached, not

3. The \$835 Million Guaranteed Recovery Outweighs the “Mere Possibility” of Additional, Future Monetary Relief

Next, the Court should “consider the vagaries of litigation and compare the significance of immediate recovery by way of the compromise to the mere possibility of relief in the future, after protracted and expensive litigation.” *King Resources*, 420 F. Supp. at 625. For the reasons summarized above, it was far from guaranteed that the Class would prevail in the Supreme Court, and there remained a material risk that the case would require months or even years of additional hard-fought litigation. “In this respect, it has been held proper to take the bird in the hand instead of a prospective flock in the bush.” *Id.* (citations and internal quotations omitted).

Courts routinely recognize the risk, uncertainty, and expense inherent in maintaining a favorable trial court order on appeal, and approve settlements during the pendency of an appeal. *See, e.g., Nieberding v. Barrette Outdoor Living, Inc.*, No. 12-CV-2353-DDC-TJJ, 2015 WL 1645798, at *3-5 (D. Kan. Apr. 14, 2015) (not only could court approve class action settlement while appeal was pending in Tenth Circuit, pendency of appeal favored approval because “if the Tenth Circuit reversed the Court's class certification order, the class members might recover nothing”); *Seiffer v. Topsy's Int'l, Inc.*, 70 F.R.D. 622, 625, 629 (D. Kan. 1976) (approving partial settlement after Tenth Circuit affirmance of class certification and while petition for writ of *certiorari* was pending, noting that although plaintiffs had “no serious doubts” about

after settlement.”). After the settlement was reached, *Tyson Foods* was affirmed by the Supreme Court. However, risk still remains as the future application of the decision to non-Federal Labor Standards Act (“FLSA”) cases is unclear. *Tyson Foods*, 2016 WL 1092414, at *11 (“The fairness and utility of statistical methods in contexts other than those presented here will depend on facts and circumstances particular to those cases.”); *id.* at *19 (Thomas, J. dissenting) (arguing that the majority “create[d] a special, relaxed rule . . . in FLSA-based cases.”). And, for the same reason, there remained a risk that the Supreme Court would have granted *certiorari* in *Urethane* or would have vacated and remanded the Tenth Circuit’s decision for further consideration in light of *Tyson Foods*. The Class thus continued to face significant litigation risks even after the Court’s decision in *Tyson Foods*.

establishing liability, the “risk of ultimately recovering money damages dogs the heels of even able and zealous counsel,” especially in large and complex cases, and the “certainty of fixed recovery by way of agreement is often preferable to the vagaries of what might be achieved by a trial”).

Here, Class Counsel negotiated a settlement that amounted to nearly 80% of the \$1.06 billion judgment. The question is whether this guaranteed recovery of \$835 million outweighs the possibility that Plaintiffs would have prevailed throughout the appeals process and collected the entire judgment against Dow. Given the risks of maintaining a judgment through appeal, and the uncertainties at the Supreme Court level, a negotiated settlement guaranteeing nearly 80% of the judgment – and more than double the damages found by the jury – is appropriate and in the best interests of the Class.⁹

4. Class Counsel Believe That the Settlement Is Fair and Reasonable

Courts rely on the considered judgment of experienced counsel in evaluating the fairness of proposed class action settlements. *See, e.g., Lucas*, 234 F.R.D. at 695 (“Counsels’ judgment as to the fairness of the agreement is entitled to considerable weight.”) (quoting *Marcus*, 209 F. Supp. 2d at 1183); *Wilkerson*, 171 F.R.D. at 288-89 (“[T]he recommendation of a settlement by experienced plaintiffs’ counsel is entitled to great weight.”); *Alvarado*, 723 F. Supp. at 548

⁹ *See Swartz v. D-J Eng’g, Inc.*, No. 12-CV-01029-DDC-KGG, 2016 WL 633872, at *5 (D. Kan. Feb. 17, 2016) (holding that “the value of immediate recovery outweighs the mere possibility of future relief after protracted and expensive litigation.”); *Shaw*, 2015 WL 1867861, at *3 (finding settlement was “fair, adequate, and reasonable, particularly given the significant risks and costs associated with continued litigation.”); *Dep’t of Energy Stripper Well Exemption Litig.*, 653 F. Supp. 108, 117 (D. Kan. 1986) (“The risks of continued litigation are substantial for all of the parties.”); *King Resources*, 420 F. Supp. at 627 (“The Court recognizes that had these settlements not been reached, chances of the class prevailing against settling defendants would have been uncertain and disbursement of funds to the class, should it have prevailed, would undoubtedly have been delayed for some, perhaps lengthy, period of time given the high probability of an appeal or appeals in this case.”).

(“Courts have consistently refused to substitute their business judgment for that of counsel and the parties.”). Class Plaintiffs’ counsel, who are among the most experienced and respected antitrust class action lawyers in the nation, have tirelessly advanced the Class’s claims since the case’s inception, more than eleven years ago. In their judgment, the Settlement is more than fair and reasonable – it represents an outstanding result for the Class. This judgment is based not only on the calculus of risk in the appeal, but also the enormous sum of money the settlement delivers with certainty.

Relying on the judgment of counsel makes particular sense in the context of preliminary approval. Because preliminary approval is provisional, and is followed by more formal and comprehensive review and objection procedures, “[t]he Court will ordinarily grant preliminary approval where the proposed settlement ‘appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class and falls within the range of possible approval.’” *In re Motor Fuel Temperature Sales Practices Litig.*, 258 F.R.D. 671, 675 (D. Kan. 2009) (citation omitted). Those criteria are satisfied here.

In sum, because the Dow Settlement satisfies each of the Tenth Circuit’s stated criteria for approval, the Court should grant preliminary approval.

V. THE PROPOSED PLAN OF ALLOCATION AND DISTRIBUTION

Subject to this Court’s preliminary approval of the settlement and the proposed form of notice, Class Plaintiffs will notify the Class about the Plan of Allocation and Distribution for the net Dow settlement fund. The proposed allocation method and claims procedure are outlined below.

A. The Plan of Allocation

The proceeds of the Bayer, Huntsman and BASF settlement funds were distributed to Class members on a *pro rata* basis in proportion to the dollar amount of their purchases of Polyether Polyol Products during the Class Period. In accordance with the weight of authority approving settlement allocations in the pretrial setting, the Court approved that method of allocation on two occasions. See Dkt. Nos. 994 & 2209.

Now, at this stage of the litigation, Plaintiffs have the benefit of (1) the detailed analyses and trial testimony of their damages expert, Dr. James T. McClave, and (2) the jury's verdict, which determined that the Class incurred overcharges during the period November 24, 2000 through December 31, 2003. Accordingly, consistent with the Court's Order on the Plan of Allocation of Judgment Funds (Dkt. No. 2963), Class Plaintiffs will propose that the Dow Net Settlement Fund (after payment of such attorneys' fees, incentive awards and expenses, including costs of administering the distribution, as are ordered by the Court), be distributed to the members of the Class who file timely claims in proportion to the dollar amount of their estimated customer-specific damages, as determined by Dr. McClave, for the period November 24, 2000 through December 31, 2003. In accordance with accepted statistical practice, Dr. McClave will calculate each class member's damages for the period November 24, 2000 through December 31, 2003 using the customer-specific damage estimates, bounded by the Interquartile Range ("IQR") for each modeled product overcharge applicable to that customer. The IQR is a widely accepted statistical tool which measures the distance between the 25th and 75th percentile, and is used, in effect, to provide a reasonable and statistically reliable lower and upper bound for a given customer's percentage overcharge estimate – which is particularly appropriate given the numerous class members with relatively few transactions available for modeling. Distributing

the Net Settlement Fund based on customer-specific damage estimates bounded by the IQR will compensate Class Members based on their estimated damages while eliminating outlier estimates and excessive variability among class members.¹⁰

It is well established that a plan of allocation is fair, reasonable and adequate where it seeks to compensate Class members based on their estimated damages. *See, e.g., In re Crocs, Inc. Sec. Litig.*, 306 F.R.D. 672, 692 (D. Colo. 2014); *Law v. Nat'l Collegiate Athletic Ass'n*, 108 F. Supp. 2d 1193, 1196, 1200 (D. Kan. 2000); *Smith v. MCI Telcomm'cns. Corp.*, No. 87-2110-EEO, 1993 WL 142006, at *2 (D. Kan. Apr. 28, 1993) (“allocation method is reasonable and fairly compensates the members of the plaintiff class in proportion to the injury that could be substantiated at trial”).¹¹

¹⁰ Agresti, Alan and Finlay, Barbara. *Statistical Methods for the Social Sciences*, Fourth Edition, Pearson Prentice Hall, 2009, pp. 52-53 (“The difference between the upper and lower quartiles is called the interquartile range, denoted by IQR. This measure describes the spread of the middle half of the observations. An advantage of the IQR over the ordinary range or standard deviation is that it is not sensitive to outliers.”).

¹¹ Where, as here, there has been a determination that there were no damages for a certain time period of purchases, it is appropriate to exclude those purchases from the allocation. *See, e.g., Rieckborn v. Velti PLC*, No. 13-cv-03889, 2015 WL 468329, at *8-10 (N.D. Cal. Feb. 3, 2015) (approving settlement and plan of distribution under which class members would recover based on relative strength of claims, with some receiving nothing); *In re UnitedHealth Group Incorporated PSLRA Litig.*, 643 F. Supp. 2d 1094, 1101 (D. Minn. 2009) (approving allocation under which those “who sustained losses due to the conduct at issue in this litigation will be compensated; those who did not, will not.”). As a result, no recovery will be provided for purchases during the period January 1, 1999 through November 23, 2000. It should be noted, however, that Class members have received settlement payments for that period from the Bayer, BASF and Huntsman settlements.

B. The Proposed Claims Procedure

The proposed claims procedure will be modeled on the protocol used successfully to distribute the proceeds of settlements with former defendants Bayer, Huntsman and BASF, and is summarized below.¹²

1. Preparation and Mailing of Notice and Personalized Claim Forms

If final approval is granted by the Court, the Settlement Administrator will use the purchase volume data that were the basis for Plaintiffs' damages testimony presented at trial to generate a proof of claim form for each Class Member. The personalized Claim Forms will identify each Class Member's Eligible Purchase Amounts, representing the dollar value of each Class Member's purchases of Eligible Products from all Defendants during the damages period found by the jury (November 24, 2000 through December 31, 2003).

2. Submission, Processing, and Review of Claim Forms

Within 45 days of the mailing of claim forms, which will be sent after final approval, class members must properly complete and return the Claim Form. As with the previous settlement administrations, they may simply submit the personalized Claim Form pre-filled with their Eligible Purchase Amounts, as derived from Defendants' transaction databases and synthesized by Plaintiffs' experts. This is a substantial benefit to most Class Members, as it will save them the time and expense of researching and identifying their purchases over the three-

¹² Rust Consulting LLC ("Rust") served as the settlement administrator in connection with earlier settlements and notice programs in this case. Since the last notice program was implemented, the Rust employees most familiar with this litigation have left the company. Accordingly, Class Counsel propose that the Court appoint a new Settlement Administrator to administer the Dow settlement: The Garden City Group, LLC ("GCG"). Class Counsel have enjoyed an excellent working relationship with GCG in the course of administering settlements in other matters. GCG's background and experience are outlined in Exhibit B hereto.

year damages period. Alternatively, Class Members who believe the personalized Claim Forms are incorrect may gather and submit corrected purchase information.¹³

The Settlement Administrator will review and process all submitted claims, under the supervision and guidance of Class Counsel.

3. Calculation of Class Members' Shares and Distribution Amounts

As early as practicable following the Court's award of attorneys' fees, costs and incentive payments from the Dow Settlement Fund, the Settlement Administrator will calculate each Eligible Claimant's share of the Net Settlement Fund. Each Class member's share of the Net Settlement Fund will be in proportion to the aggregate amount of all Claimants' Total Recognized Losses, calculated as a fraction:

$$\% \text{ share of the Net Settlement Fund} = \frac{\text{Class member's Total Recognized Loss}}{\text{Sum of all Claimants' Total Recognized Losses}}$$

The Settlement Administrator will multiply the resulting fraction for each Class member by the dollar amount to be distributed from the Net Settlement Fund to obtain the dollar value of each Class Member's Estimated Award. Class Counsel will review the Settlement Administrator's determinations.

4. Submission of a Recommended Schedule of Distribution and Distribution Hearing

Upon completion of the claims-review process, Class Counsel will ask the Court to schedule the Distribution Hearing described below. After the Distribution Hearing has been

¹³ Unfortunately, Class Members who collected and submitted their purchase data in connection with the Bayer or Huntsman/BASF settlement fund distributions will not be able to re-use those submissions for this distribution. The earlier settlement class periods spanned 1999-2004, whereas the damages period determined by the jury is shorter, specifically, November 24, 2000 through December 31, 2003. Accordingly, Class members submitting their own purchase data to recover from the Dow Settlement Fund must confine their claim and supporting data to the damages period determined by the jury.

scheduled, the Settlement Administrator will send written notice to all claimants whose claims were reduced or deemed ineligible. The notice will state the reason(s) for claim reduction or rejection; identify the information and data the Settlement Administrator deems to be appropriate for purposes of calculating the claimant's award; explain the claimant's right to appeal the determination to the Court and the process for making such an appeal; and specify the time, date and location of the Distribution Hearing.

The Recommended Schedule of Distribution will list for each Eligible Claim the Eligible Purchase Amounts, percentage share of the Net Settlement Fund, and Estimated Award. The Estimated Awards will be the best available approximations, and not "final" amounts to be paid, because additional interest earnings, Court-ordered modifications to the Schedule, and other factors could affect the actual amounts to be paid. The Recommended Schedule of Distribution also will list the claims recommended for reduction or rejection, if any, and the reason for modification or rejection. To preserve their privacy, claimants will be identified only by claim number in the Recommended Schedule of Distribution.

At the Distribution Hearing, Plaintiffs will ask the Court to consider the Recommended Schedule of Distribution, together with any objections to individual claim determinations. At or following the hearing, the Court will enter a Final Allocation Order consistent with the Court's determinations.

5. Payments to Claimants

Once the Court enters the Final Allocation Order and the appeal period runs (or any appeal concludes), the Net Dow Settlement Fund will be transferred to a Distribution Account and checks will issue to Eligible Claimants from that account. The Settlement Administrator will follow up as appropriate to re-mail or reissue checks that are returned as undeliverable or are not negotiated in a timely manner.

VI. THE PETITION FOR ATTORNEYS' FEES, INCENTIVE AWARDS AND EXPENSES

Class Counsel intend to ask the Court to award attorneys' fees up to one-third of the Dow settlement fund, and for an award not to exceed \$2.5 million to reimburse Counsel for certain of the actual, reasonable, and necessary expenses incurred between July 1, 2011 and the present in prosecuting this litigation.¹⁴ Class Plaintiffs will seek incentive awards for the three Class Representatives not to exceed a total of \$500,000. The Petition will demonstrate that each of these requests is well supported by the facts and circumstances of this case and by precedent. *See, e.g.*, Dkt. Nos. 995 ¶ 2 & 2210 ¶¶ 2-3 (awarding attorneys' fees equal to one-third of the Bayer, Huntsman and BASF settlement funds); *In re Flonase Antitrust Litig.*, 951 F. Supp. 2d 739, 750-51 (E.D. Pa. 2013) (one-third fee and 2.99 multiplier from \$150 million fund, explaining that one to four is the standard multiplier range); *In re Vitamins Antitrust Litig.*, No. Misc. 99-197(TFH), 2001 WL 34312839, at *10, 14 (D.D.C. July 16, 2001) (34% fee from \$359 million settlement fund); *In re Air Cargo Shipping Servs. Antitrust Litig.*, No. 06-MD-1775 JG VVP, 2015 WL 5918273, at *5 (E.D.N.Y. Oct. 9, 2015) (awarding total of \$540,000 to six class representatives in antitrust class actions which resulted in 23 settlements totaling \$900 million); *King Drug Co. of Florence, Inc. v. Cephalon, Inc.*, 06-cv-01797-MSG, ECF No. 870 at ¶ 30 (E.D. Pa. Oct. 15, 2015) (awarding total of \$500,000 to six class representatives in a direct purchaser class action where settlement funds amounted to approximately \$512 million) (attached hereto as Exhibit C).

¹⁴ Previous Orders of the Court awarded reimbursement of Class Counsel's reasonable costs and expenses incurred from the inception of this matter through December 31, 2008 (Dkt. No. 995 ¶ 3) and from January 1, 2009 through June 30, 2011 (Dkt. No. 2210 ¶ 4). The Court also reimbursed some, but not all, expenses incurred between July 1, 2011 and May 31, 2013. *See* Dkt. No. 3047 ¶ 5.

VII. NOTICE SHOULD BE DISSEMINATED TO THE CLASS

Rules 23(e) and 23(h) require that court-approved notice of the Settlement and Class Counsel's fee petition be distributed to all reasonably identifiable Class members. *DeJulius v. New England Health Care Emp. Pension Fund*, 429 F.3d 935, 939 (10th Cir. 2005); 4 *Newberg on Class Actions* § 8:23 (5th ed. 2014). Rule 23(e)(1) provides that "[t]he court must direct notice in a reasonable manner to all class members who would be bound by the proposal." *See also* Fed. R. Civ. P. 23(h)(1) (notice of a fee petition must be "directed to class members in a reasonable manner").

Here, Class Plaintiffs propose to follow the same notice dissemination plan approved by the Court in connection with the previous five notice programs. *See* Dkt. No. 1990 (approving notice of Lyondell settlement); Dkt. No. 1991 (notice of Huntsman settlement); Dkt. No. 2080 (notice of BASF settlement); Dkt. No. 2962 (notice of modification of the class period); and Dkt. No. 2973 (notice of reservation of settlement funds). Specifically, Class Plaintiffs propose individual notice via first-class mail to those class members who were previously identified in connection with these prior mailings, as updated in connection with earlier notice programs or by the Settlement Administrator's use of a change-of-address database. *See Tennille*, 785 F.3d at 438-39 (rejecting challenge to notice procedures, approving use of "the post office's change-of-address database," and finding mailed notice satisfied Rule 23 and due process). The Settlement Administrator also will post the notices and related documents on the settlement website.

The proposed form of notice, attached as Exhibit D, follows the question-and-answer

format recommended by the Federal Judicial Center.¹⁵ It describes:

- the allegations and pertinent procedural history of this class action (questions 1-3);
- the Class definition (questions 4-6);
- the terms of the proposed settlement with Dow and the proposed plan of allocation and distribution, and how to submit an objection thereto (questions 7, 10);
- the anticipated process for submitting a claim (question 8);
- the scope of the release and binding effect of the settlement (question 9);
- the petition for attorneys' fees, incentive awards and reimbursement of litigation expenses, and how to submit an objection thereto (questions 10-12);
- details about the fairness hearing (questions 14-16); and
- how Class members may obtain additional information, including a copy of the settlement agreement and other pertinent documents (question 17).

The contents of the proposed Notice, and the proposed method of its dissemination, comport with Federal Rules of Civil Procedure 23(c)(2)(B), 23(e), and 23(h), as well as due process. *See generally Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 175-77 (1974) (due process is satisfied by mailed notice to all class members who reasonably can be identified).¹⁶

¹⁵ See www.fjc.gov; see also Judges' Class Action Notice and Claims Process Checklist and Plain Language Guide, at pp. 4-6 (FJC 2010) (discussing notice form and content) (available at [http://www.fjc.gov/public/pdf.nsf/lookup/NotCheck.pdf/\\$file/NotCheck.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/NotCheck.pdf/$file/NotCheck.pdf)).

¹⁶ Although Fed. R. Civ. P. 23(e)(4) *permits* courts to give class members a new opportunity to exclude themselves from the Class, there is no need for a second opt-out period here. Having had an initial opportunity to opt out of the class, Class Members "are protected by the mechanism provided in the rule: approval by the district court after notice to the class and a fairness hearing at which dissenters can voice their objections, and the availability of review on appeal." *Officers for Justice v. Civil Serv. Comm'n of San Francisco*, 688 F.2d 615, 635 (9th Cir. 1982). See also Dkt. Nos. 2078 & 2208 (approving Huntsman and BASF settlements, not requiring a second opportunity to opt out). As it did with the Huntsman and BASF settlements, this Court should approve this Settlement without providing Class members a second opportunity to opt out.

Accordingly, Class Plaintiffs respectfully request that the Court approve the form and plan of dissemination of notice.

VIII. CONCLUSION

For the reasons stated herein, Class Plaintiffs respectfully request that the Court grant the motion for preliminary approval of the settlement with Dow and order dissemination of the Notice, in the form and manner described above, to the Class Members. Proposed orders are being submitted herewith.

Dated: March 24, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of March, 2016, I caused the foregoing Class Plaintiffs' Memorandum of Law in Support of Their Motion for Preliminary Approval of Settlement with The Dow Chemical Company to be filed electronically with the Clerk of the Court by using the CM/ECF system which will send notice of electronic filing to all counsel who have registered for receipt of documents filed in this matter.

/s/ Robert W. Coykendall

Robert W. Coykendall