IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

In re Polyurethane Foam Antitrust Litigation	Case No. 1:10 MD 2196
This document relates to: ALL CASES	PRELIMINARY COMMENTS BY COURT PRIOR TO CLASS CERTIFICATION HEARING JUDGE JACK ZOUHARY

Unsettled State of Class Certification Jurisprudence

This Court notes generally that lower court application of *Wal-mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), *Amgen Inc. v. Connect. Retirement Plans and Trust Funds*, 133 S. Ct. 1184 (2013), and *Comcast Corp. v. Behrend*, 133 S. Ct. 1432 (2013), has not been uniform in what exactly "rigorous analysis" requires under Federal Civil Rule 23.

Some circuits describe the *Dukes* line of cases as requiring a relatively more thorough review of a plaintiff's Rule 23 burden. *See, e.g.*, *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244 (D.C. Cir. 2013). Other circuits have reviewed class certification decisions in the aftermath of the *Dukes* line of cases in such a way as to suggest "rigorous analysis" means what it has always meant, despite the Supreme Court's recent activity on this subject. *See, e.*g., *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796 (7th Cir. 2013).

The Sixth Circuit appears to now be in the latter camp. In *In re Whirlpool Corp. Front-Loading Washer Prod. Liab. Litig.*, 722 F.3d 838 (6th Cir. 2013), the Sixth Circuit described *Comcast* and *Amgen* as simply reaffirmations of settled Rule 23 jurisprudence. In the panel's view, *Comcast* was a "straightforward application of class certification principles" which broke "no new ground on

the standard for certifying a class." *Id.* at 860. And *Amgen*, in the context of predominance analysis, instructs district courts to consider only whether common questions predominate. *Id.* at 858.

This Court looks forward to hearing from counsel on this point: In the context of this case, what does "rigorous analysis" mean in light of the *Dukes* line of cases and *In re Whirlpool Corp*.?

Motion to Strike Sur-Rebuttal Reports

This Court has reviewed Direct Purchasers' Motion to Strike Defendants' Sur-Rebuttal Reports (Doc. 894), and Defendants' Opposition (Doc. 905). This Court will deny the Motion.

As Defendants correctly point out in reply, this Court gave Defendants leave to file a written submission or argue orally at the hearing relative to new matters raised in the Plaintiff expert reply reports (Doc. 905-1 at 5). However, in granting leave for a limited filing, this Court did not envision Defendants filing another 240 pages of materials (and nearly simultaneously with this Court's questions, the filing of which was delayed by one day owing to a massive winter storm that shuttered the Toledo, Ohio federal courthouse for three days).

In denying the Motion, this Court expects that during the hearing counsel for Defendants will *not* repeat arguments contained in the sur-rebuttal materials. Instead, if the sur-rebuttal materials are responsive to an aspect of the discussion, Defendants may refer this Court to the relevant pages of those materials. This Court intends to strictly enforce time limits so that we can all move through the agenda.

Defendants' *Daubert* Position Brief

This Court has also reviewed Defendants' position on timing for resolving the pending *Daubert* Motions (Doc. 889). This Court intends to rule on *Daubert* motions that impact resolving the class certification motions.

Defendants have filed four Motions to Strike. As NEWBERG observes, the question of whether and how *Daubert* applies at class certification is unsettled. NEWBERG ON CLASS ACTIONS § 7.24. For example, prior to *Dukes*, a district court in this Circuit held that *Daubert* does not apply *at all* at class certification. Other circuits find application of *Daubert* appropriate, but describe Rule 702's application at class certification according to substantially varying standards. *Compare Ellis v. Costco Wholesale Corp*., 657 F.3d 970 (9th Cir. 2011), *with In re Zurn Pex Plumbing Products Liab. Litig*., 644 F.3d 604 (8th Cir. 2011).

At present, this Court is persuaded by the Seventh Circuit's opinion in *Messner v. Northshore Univ. Health System*, 669 F.3d 802 (7th Cir. 2012), that it is prudent to rule on *Daubert* motions, according to normal *Daubert* standards, with respect to those aspects of expert testimony that are "critical" to a plaintiff meeting its Rule 23 burden. In a case of this magnitude, it makes little sense to grant class certification if the "critical" expert testimony supporting that decision is so flawed or unreliable as to be inadmissible at trial. Therefore, this Court will rule on those *Daubert* motions necessary to a ruling on the pending Motion for Class Certification.

IT IS SO ORDERED.

s/ *Jack Zouhary*
JACK ZOUHARY
U. S. DISTRICT JUDGE

January 14, 2014