

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA**

IN RE: POOL PRODUCTS DISTRIBUTION
MARKET ANTITRUST LITIGATION

MDL DOCKET NO. 2328

SECTION: R(2)

This document relates to:

CHIEF JUDGE VANCE
MAG. JUDGE WILKINSON

ALL DIRECT PURCHASER CASES

**MEMORANDUM OF LAW IN SUPPORT OF DIRECT PURCHASER
PLAINTIFFS' MOTION FOR REIMBURSEMENT OF EXPENSES**

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RULES

Federal Rule of Civil Procedure 23 1, 6, 8

Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, Counsel for Direct Purchaser Plaintiffs (“Plaintiffs”) and the Court-appointed Settlement Class Counsel (R. Docs. 483, ¶ 4 and 547, ¶ 4)—Herman, Herman & Katz, LLC; Bernstein Liebhard LLP; Kaplan Fox & Kilsheimer LLP; and Labaton Sucharow LLP (“Class Counsel”)—submit this memorandum of law in support of Class Counsel’s application for reimbursement of litigation expenses from the Hayward and Zodiac Settlement Funds.¹ This Court granted preliminary approval of Plaintiffs’ settlement with Hayward Industries, Inc. (“Hayward”) on September 26, 2014 (R. Doc. 483), and Plaintiffs’ settlement with Zodiac Pool Systems, Inc. (“Zodiac” and together with Hayward, “Settling Defendants”) on December 22, 2014 (R. Doc. 547) (collectively, the “Settlements”).

I. INTRODUCTION

Class Counsel reached Settlements with Defendants Hayward (\$6.5 million in cash) and Zodiac (\$3.45 million in cash), totaling \$9.95 million.² These Settlements were achieved in large part through Class Counsel’s investigation, hard work, skill, expertise, and persistence.

Plaintiffs and Class Counsel respectfully request reimbursement of \$3,316,667.00, or one-third of each of the Settlements, for certain litigation expenses reasonably incurred in the

¹ All capitalized terms not otherwise defined herein have the definitions set forth in the Settlement Agreement Between Direct Purchaser Plaintiffs and Defendant Hayward Industries, Inc., execution date May 13, 2014 (“Hayward Agreement”), and Settlement Agreement Between Direct Purchaser Plaintiffs and Defendant Zodiac Pool Systems, Inc. (“Zodiac Agreement”), executed on November 4, 2014. *See* Declaration of Ronald J. Aranoff in Support of Final Approval of Settlements and Application for Reimbursement of Expenses, dated March 12, 2015 (“Aranoff Declaration”) submitted along with the Motion for Final Approval of the Settlements Between Direct Purchaser Plaintiffs and Defendants Hayward Industries, Inc. and Zodiac Pool Systems, Inc. (R. Doc. 624), Exhibit 1 (Hayward Agreement) and Exhibit 2 (Zodiac Agreement).

² In addition to the monetary settlements, each Settlement Agreement also requires the Settling Defendants to provide information related to their respective transactional data and authenticate documents. Hayward Agreement ¶ 44; Zodiac Agreement ¶ 45. *See* Aranoff Declaration, Exhibit 1 (Hayward Agreement) and Exhibit 2 (Zodiac Agreement).

course of pursuing this action against Defendants.³ As detailed below, the one-third request does not cover the total expenses incurred in this case. Class Counsel have either paid or incurred the following expenses in this litigation from inception of the case through December 31, 2014:

Expenses	Amount
Shared Expenses Paid from the Litigation Fund from Inception of the Case through December 2014	\$1,588,781.35
Shared Expenses Chargeable to the Litigation Fund Incurred from the Inception of the Case through December 2014 but not yet paid	\$1,648,836.95 ⁴
Held Expenses	\$522,369.74
TOTAL	\$3,759,988.04

See Affidavit of Philip A. Garrett, C.P.A. (“Garrett Affidavit”) ¶¶ 6 and 7; Declaration of Leonard A. Davis in Support of Direct Purchaser Plaintiffs’ Motion for Reimbursement of Expenses (“Davis Declaration”) ¶ 7.

The requested litigation expenses are reasonable, as they are of the type and of the level necessary to prosecute a complex case of this nature and are the sort of expenses that are regularly reimbursed by courts. The Court, at the outset of this litigation, in PTO No. 9 (R. Doc. 119), set forth the procedure for time and expense reporting in this case. The Court enumerated categories of expenses, and the rates at which many of those expenses could be charged. See PTO No. 9. In addition the Court approved the retention of Philip A. Garrett, C.P.A. to assist and provide accounting services to Class Counsel and the Court. See PTO No. 9; Garrett Affidavit ¶ 2. Mr. Garrett provides the Court with monthly updates of the expenses incurred and

³ Plaintiffs are not seeking an award of attorneys’ fees from the Settlements.

⁴ These incurred expenses include: \$1,492,277.70 for experts, \$142,858.29 for court reporting services, and \$13,700.96 for the discovery vendor. See Davis Declaration ¶ 7.

submitted for review and approval by Class Counsel. *See* Garrett Affidavit ¶ 4. Importantly, as a result of the practices and procedures established by PTO No. 9, submitted expenses have been approved by Mr. Garrett as meeting the Court’s criteria and should be deemed reasonable. *See* Garrett Affidavit ¶¶ 3, 6, 7. With respect to expenses that have been incurred but not yet paid, these expenses fall within the categories of acceptable shared expenses listed by the Court in PTO No. 9, and should also be deemed reasonable. *See* Davis Declaration ¶ 7.

Expenses are divided into two categories: (1) shared and (2) held. Shared expenses are expenses paid out of the Plaintiffs’ Steering Committee MDL Fund account (“Litigation Fund”).⁵ PTO No. 9 at 4-5. Examples, of such costs include expert fees, electronic discovery costs (such as maintenance of the joint document depository), the services of the Court-appointed accountant, Mr. Garrett, and court reporters. *See* PTO No. 9 at 6. Held expenses are expenses paid by individual firms and are not deducted from the Litigation Fund. These expenses included travel, transportation, meals, and computer research fees, among other expenses, many of which are subject to Court-ordered rates. *Id.* at 7.

For the reasons set forth below, and in the accompanying declaration and affidavit as well as the Aranoff Declaration and Declaration of Jennifer M. Keough Regarding Notice and Settlement Administration (“Keough Declaration”), submitted along with the Motion for Final Approval of the Settlements Between Direct Purchaser Plaintiffs and Defendants Hayward Industries, Inc. and Zodiac Pool Systems, Inc. (R. Doc. 624), Class Counsel respectfully submits that the requested expenses are fair and reasonable under the applicable legal standards. Accordingly, the motion should be approved by the Court.

⁵ From the inception of the case through December 31, 2014, Plaintiffs’ counsel has contributed \$1,665,000.00 to the litigation fund. *See* Garrett Affidavit ¶ 7.

II. BACKGROUND

A. Facts and Procedural History

This litigation began in late 2011. Plaintiffs alleged a conspiracy between Pool Corporation, SCP Distributors LLC, and Superior Pool Products LLC (collectively, “PoolCorp”), and three of PoolCorp’s leading suppliers Zodiac, Hayward, and Pentair Water Pool and Spa, Inc. (the “Manufacturer Defendants” and collectively with PoolCorp, “Defendants”). As a result of the Court’s rulings on Defendants’ motions to dismiss, Plaintiffs’ Section I of the Sherman Act claim has been structured to assert three vertical conspiracies – between PoolCorp and each of the three Manufacturer Defendants – and one horizontal conspiracy comprised of the three Manufacturer Defendants and PoolCorp to raise the “free freight” minimum on product offers. Plaintiffs also assert a claim against PoolCorp under Section 2 of the Sherman Act for attempted monopolization. Plaintiffs are customers of PoolCorp and seek damages measured by the overcharges that they and other Class Members allegedly paid to PoolCorp above the prices that would have prevailed absent Defendants’ alleged illegal conduct, trebled, plus attorneys’ fees and costs, as provided by Section 4 of the Clayton Act.

B. Plaintiffs’ Counsel Have Vigorously Prosecuted This Case

Plaintiffs’ Counsel obtained the Hayward and Zodiac Settlements through diligent and thorough work. Examples of just some of their efforts during the litigation are highlighted below and discussed in the Aranoff Declaration.

1. Discovery

Plaintiffs’ Counsel devoted substantial resources to all facets of discovery. Counsel reviewed millions of pages of documents received from Defendants and third parties during the course of the litigation as well as interviewed witnesses, took and defended depositions, and

conducted expert discovery. Aranoff Declaration ¶¶ 5, 7-9. Additionally, Plaintiffs' Counsel reviewed and produced thousands of pages of documents for seven named Plaintiffs. *Id.* ¶ 6.

2. Motion Practice

The parties have engaged in substantial motion practice throughout the course of this hard-fought litigation. Starting in 2012, Plaintiffs amended their consolidated amended complaint twice, and opposed Defendants' motions to dismiss. *Id.* ¶ 10. Recently, Plaintiffs' fully briefed class certification, summary judgment oppositions, and *Daubert* motions. *Id.* ¶¶ 11-12.

3. Settlement Negotiations

The parties engaged in several mediation sessions over the course of this litigation. The first mediation session was held on July 22, 2013, before former federal judge, Layne R. Phillips. *Id.* ¶ 14. This first session was unsuccessful. *Id.* Several months later, pursuant to Pretrial Order No. 20, the parties held a second mediation session on March 20, 2014, before Judge Phillips. *Id.* ¶ 15. Shortly after the second mediation, Plaintiffs and Hayward continued to engage in settlement discussions and reached a settlement agreement. *Id.* ¶¶ 16-18, 21. Class Counsel also continued to independently discuss a settlement with Zodiac as well. *Id.* ¶ 26. On October 1, 2014, pursuant to Pretrial Order No. 23 (R. Doc. 414), the parties held a third mediation session before Judge Phillips. Aranoff Declaration ¶ 27. Shortly after this mediation Plaintiffs and Zodiac reached a settlement agreement.⁶ *Id.* ¶ 32.

⁶ On March 5, 2015, the Plaintiffs and non-settling Defendants participated in further mediation before Judge Phillips.

III. CLASS COUNSEL'S APPLICATION FOR REIMBURSEMENT OF EXPENSES IS REASONABLE AND WARRANTS APPROVAL

Class Counsel respectfully seeks \$3,316,667.00, or one third of each of the Settlements, for reimbursement of litigation expenses reasonably incurred in connection with prosecuting this action on behalf of Class Members.⁷ As discussed above, as of December 31, 2014, Plaintiffs' expenses (\$3,759,988.04) exceed the requested amount and expenses continue to be incurred in the prosecution of the litigation. *See* Garrett Affidavit ¶¶ 6-7; Davis Declaration ¶ 7.

It is well established that counsel who create a common fund are entitled to the reimbursement of expenses that they advanced on behalf of a class. *See In re Heartland Payment Sys., Inc. Customer Data Sec. Breach Litig.*, 851 F. Supp. 2d 1040, 1089 (S.D. Tex. 2012) ("class counsel in common fund cases are [] entitled to reasonable litigation expenses from that fund"); *Taft v. Ackermans*, No. 02 Civ. 7951 (PKL), 2007 WL 414493, at *11 (S.D.N.Y. Jan. 31, 2007); *see also, e.g., In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 468 (S.D.N.Y. 2004).

A. Reasonable Notice of the Requested Litigation Expenses and Opportunity to Object Has Been Given to the Class

Federal Rule of Civil Procedure 23(h) provides that "[n]otice of the motion [for an award of attorneys' fees and costs] must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner." Fed. R. Civ. P. 23(h)(1). Plaintiffs' Counsel has provided reasonable notice of this motion, and has afforded Class Members an opportunity to object to such motion.

⁷ Courts have time and again approved an award of one-third, if not more, of a common fund to attorneys. *See, e.g., In re General Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 822 (3d Cir. 1995) (in common fund cases "fee awards have ranged from nineteen percent to forty-five percent of the settlement fund"); *In re Combustion, Inc.*, 968 F. Supp. 1116, 1156 (W.D. La. 1997) (approving fee of 36% of \$127 million settlement); *In re Lease Oil Antitrust Litigation (No. II)*, 186 F.R.D. 403 (S.D. Tex. 1999) (35.1% awarded).

1. Summary of the Notice Provided

Garden City Group, LLC (“GCG”), the Court appointed claims administrator, effectuated a notice program that ensures that Settlement Class Members are apprised of their rights. Pursuant to the December 22, 2014 Order granting preliminary approval of the Zodiac Settlement, on January 16, 2015, GCG mailed Notice Packets to Settlement Class Members whose addresses GCG had compiled from PoolCorp’s transaction data. Keough Declaration ¶¶ 6-10. Notice was published in the January 23, 2015 issue of *Pool & Spa News* and the February 2015 issue of *Aqua*. *Id.* ¶ 5. Additionally, GCG established a Settlement website (www.poolproductsantitrustlitigation.com) to provide information and important deadlines to class members. *See id.* ¶ 12. This website has been operational since January 15, 2015. *Id.* Further details regarding the notice program and its effectiveness can be found in the Keough Declaration.

The Notice Packets expressly notified potential Settlement Class Members that Class Counsel would be seeking Court approval of, *inter alia*, reimbursement of litigation expenses. *See* Long Form Notice ¶ 17 (Keough Declaration Exhibit A). In the section entitled “How will the lawyers be paid?” the notice provides:

You are not personally responsible for payment of attorneys’ fees or expenses for Class Counsel. Class Counsel will ask the Court to approve from both the Hayward Settlement Fund and the Zodiac Settlement Fund an award of attorneys’ fees and reimbursement for costs and expenses incurred in the prosecution of the lawsuit in an amount not to exceed \$2,166,667 for the Hayward Settlement and \$1,150,000 for the Zodiac Settlement (one third of each Settlement).

Id. The notice also explains the process and sets deadlines for opting out or objecting to either or both of the Settlements. *See generally* Long Form Notice (Keough Declaration Exhibit A).

2. Timing of Motion for Reimbursement of Expenses and Opportunity to Object

Pursuant to Rule 23(e), the Court required Plaintiffs to file their motion for reimbursement of expenses in advance of the deadline for submitting objections. R. Doc. 547 ¶ 19 (setting forth relevant portion of schedule). Settlement Class Members will have an opportunity to review this motion and it will be available on the Settlement website. Keough Declaration ¶ 12. Objections to the Settlements, including this motion, are due no later than April 9, 2015. *See, e.g.*, Long Form Notice ¶ 18 (Keough Declaration, Exhibit A). Accordingly, Class members have approximately 30 days after the filing of this motion to lodge objections to Class Counsel's proposed reimbursement of expenses.

One month is a sufficient amount of time for Settlement Class Members to object to a motion for reimbursement of expenses. Indeed, courts have found far less time to be adequate. *See, e.g., In re: Imprelis Herbicide Marketing, Sales Practices and Prods. Liability Litig.*, 296 F.R.D. 351 (E.D. Pa. 2013) (granting fee award where class members had two weeks to review motion); *Batmanghelich v. Sirius XM Radio, Inc.*, No. CV 09-9190, 2011 U.S. Dist. LEXIS 155710, at *5 (C.D. Cal. Sept. 13, 2011) (“Plaintiff’s application for attorneys’ fees and costs and a Class Representative service payment was filed with the Court and made available for Class Members to review on the settlement website two weeks prior to the deadline for Class Members to file objections to the Settlement, giving Class Members adequate time to review the application and object to the attorneys’ fees, costs and/or service payment.”).

Thus, Class members will be provided with reasonable notice of Plaintiffs’ motion for reimbursement of expenses and will have a sufficient opportunity to object.

B. The Request for Reimbursement of Litigation Expenses is Reasonable

“[C]lass counsel in common fund cases are [] entitled to reasonable litigation expenses from that fund.” *In re Heartland*, 851 F. Supp. 2d at 1089 (citing *Radosti v. Envision EMI, LLC*, 760 F. Supp. 2d 73, 79 (2011) (quoting *Wells v. Allstate Ins. Co.*, 557 F. Supp. 2d 1, 8 (D.D.C. 2008)) (internal alteration omitted)); *Taft*, 2007 WL 414493, at *11.

Plaintiffs’ Counsel, on a monthly basis, have provided Court-appointed accountant Philip A. Garrett with records and detailed receipts of the expenses incurred in this case. *See* Garrett Affidavit ¶ 4; PTO No. 9. As noted in the attached affidavit, Mr. Garrett has reviewed and approved the paid shared and held expenses, and has provided that information to the Court for inspection on a monthly basis. *See* Garrett Affidavit ¶¶ 4, 8. Additionally, as noted above, the incurred shared expenses, fall squarely within the types of expenses contemplated by the Court in PTO No. 9, and should be deemed reasonable as well. *See* Davis Declaration ¶ 7.

At this time, Plaintiffs’ Counsel are seeking the Court’s approval of \$3,316,667.00 to be applied towards, at the discretion of Plaintiffs’ Counsel: (i) reimbursement of shared expenses paid from the Litigation Fund from the inception of the case through December 31, 2014, (ii) recovery of certain shared expenses chargeable to the Litigation Fund that were incurred from the inception of the case through December 31, 2014 but which are awaiting payment; and (iii) reimbursement of held expenses incurred by individual Plaintiffs’ counsel from inception of the case through December 31, 2014. *See* Garrett Affidavit ¶¶ 6 and 7; Davis Declaration ¶ 7.

IV. CONCLUSION

For the foregoing reasons, Class Counsel respectfully requests that the Court grant their motion for reimbursement of litigation expenses.

Dated: March 12, 2015

Respectfully submitted,

/s/ Leonard A. Davis
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Executive Committee Counsel for the Direct Purchaser Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that the above and foregoing Memorandum in Support of Direct Purchaser Plaintiffs' Motion for Reimbursement of Expenses has been served on Direct Purchaser Plaintiffs' Liaison Counsel, Russ Herman, Indirect Purchaser Plaintiffs' Liaison Counsel, Thomas H. Brill, Defendants' Liaison Counsel, William Gaudet, and Manufacturer Defendants' Liaison Counsel, Wayne Lee, by e-mail and upon all parties by electronically uploading the same to LexisNexis File & Serve in accordance with Pretrial Order No. 8, and that the foregoing was electronically filed with the Clerk of Court of the United States District Court for the Eastern District of Louisiana by using the CM/ECF System, which will send a notice of electronic filing in accordance with the procedures established in MDL 2328, on this 12th day of March, 2015.

/s/ Leonard A. Davis _____