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:	JUDGE VANCE MAG. JUDGE WILKINSON
ALL DIRECT PURCHASER CASES	

MEMORANDUM OF LAW IN SUPPORT OF DIRECT PURCHASER PLAINTIFFS' MOTION FOR FINAL APPROVAL OF THE SETTLEMENT BETWEEN PLAINTIFFS AND DEFENDANT PENTAIR WATER POOL AND SPA, INC.

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Direct Purchaser Plaintiffs ("Plaintiffs") respectfully submit this memorandum of law in support of their motion for final approval of the settlement between Plaintiffs and Defendant Pentair Water Pool and Spa, Inc. ("Pentair" or the "Settling Defendant").[1]

I. INTRODUCTION

The proposed Settlement with Pentair falls well within the criteria for final approval by the Court. The Settlement is the product of hard-fought litigation, as well as extensive settlement negotiations, which included several formal mediation sessions presided over by a former federal judge, Layn R. Phillips, and Magistrate Judge Wilkinson. The proposed Pentair Agreement provides the Settlement Class with $6,000,000 in cash, plus interest. In addition to the monetary settlements, the Pentair Agreement also requires Pentair to provide information related to its transactional data and to authenticate documents. *See* Pentair Agreement ¶ 45.

Notably, as of October 30, 2015, no Class Member has objected to the proposed Settlement or Settlement Class. The objections deadline is December 11, 2015.

In light of the uncertainty, complexity, and expenses inherent in litigation, the proposed Settlement is fair, reasonable, and adequate and should be given final approval by the Court.

II. BACKGROUND

A. The Litigation

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: Pentair, Zodiac Pool Systems, Inc. ("Zodiac"), and Hayward Industries, Inc. ("Hayward") (collectively with PoolCorp, "Defendants"). As a result of

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[1] All capitalized terms not otherwise defined herein have the definitions set forth in the Settlement Agreement Between Direct Purchaser Plaintiffs and Defendant Pentair Water Pool and Spa, Inc. ("Pentair Agreement"), executed on July 20, 2015. *See* Declaration of Jay L. Himes in Support of Motion for Final Approval of Settlement Between Plaintiffs Pentair Water Pool and Spa, Inc. dated November 2, 2015 ("Himes Decl."), Exhibit 1 (Pentair Agreement).

the Court's rulings on Defendants' motions to dismiss (R. Doc. 221; R. Doc 346), Plaintiffs' Section 1 claim alleges three vertical conspiracies—between PoolCorp and each of the three Manufacturer Defendants—and one horizontal conspiracy among the three Manufacturer Defendants and PoolCorp to raise the "free freight" minimum on product orders.[2] Plaintiffs assert claims against Defendants under Section 1 of the Sherman Act for conspiracy to restrain trade; and 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. Pentair denied all the allegations of wrongdoing in this action.

B. The Settlement Negotiations

The Settlement Agreement with Pentair arose from extensive arm's-length and good faith negotiations. Himes Decl. ¶¶ 4, 13. The scope and details of the negotiations are described in the Himes Declaration. Class Counsel and Pentair's counsel, all highly experienced and capable, vigorously advocated their respective clients' positions in settlement negotiations. Himes Decl. ¶ 16.

The parties participated in four formal mediation sessions before Hon. Layn R. Phillips (U.S. District Judge retired), a respected mediator of disputes of this nature. *Id.* ¶¶ 4, 14. These sessions did not result in a resolution. *Id.* ¶ 14.

On April 1, 2015, the parties attended a status conference before the Court, during which the Court requested that the parties' counsel meet with Magistrate Judge Wilkinson to determine if a renewed effort at settlement would be worth pursuing. *Id.* ¶ 15. Thereafter, the parties met

[2] For simplicity, we include Hayward and Zodiac as "Defendants" and "Manufacturer Defendants" although each was dismissed from the case pursuant to the Court's final approval of their settlements. R. Doc. 658.

with the Magistrate Judge on April 1, 2015 and on June 22, 2015; reached an agreement in principle on June 22, 2015; and negotiated the final terms of the agreement in the subsequent weeks. *Id.* The parties have not entered into any side agreements. *Id.* ¶ 17.

III. PROVISIONS OF THE SETTLEMENT AGREEMENT

A. The Settlement Class

The Settlement Agreement defines the Settlement Class as follows:

> All persons and entities located in the United States that purchased Pool Products in the United States directly from PoolCorp, during the Class Period from November 22, 2007 to November 21, 2011. Excluded from the Settlement Class are Defendants and their subsidiaries, parents, or affiliates, whether or not named as a Defendant in the Second Consolidated Amended Class Action Complaint, and government entities.

See Pentair Agreement ¶ 23. Also excluded from the Settlement Class are any Class Members who timely elect to opt out of either or both of the Settlement Class.

B. The Terms of the Settlement Agreement

The Settlement Agreement includes the following relevant provisions:

***Settlement Amounts*:** Pentair has agreed to pay a settlement amount of $6,000,000 in cash. *See id.* at ¶¶ 21, 35. Additionally, the Settlement Agreement provides that the costs of class notice and settlement administration will be borne by the Settlement Fund and that Class Counsel may, at a time approved by the Court, seek from the Settlement Amount an award of attorneys' fees and expenses. *Id.* at ¶¶ 35, 37.

***Cooperation*:** Pentair has agreed to answer questions about its transactional data, if necessary, and authenticate documents. *See id*. at ¶ 45.

Releases: In exchange for the consideration described above, Plaintiffs have agreed to release Pentair from any and all claims arising out of or resulting from Defendants' alleged unlawful conspiracy. *See id.* at ¶¶ 30-32.

IV. PRELIMINARY APPROVAL ORDER AND CERTIFICATION OF SETTLEMENT CLASS

On August 13, 2015, the Court preliminarily approved the Pentair Settlement. R. Doc. 668. The Court certified the class for settlement purposes and authorized Class Counsel to disseminate Notice and Claim forms by direct mail and publication. *Id*. Further, the Court determined that the Settlement Class satisfied the Rule 23(a) requirements of numerosity, commonality, typicality, and adequacy. *Id.* at ¶ 2. The Court also found that the Settlement Class satisfied the Rule 23(b)(3) requirements of predominance and superiority. *Id*. The Court also issued a notice and final approval schedule. *See* R. Doc. 668.

V. THE NOTICE PLAN MEETS THE REQUIREMENTS OF RULE 23(e) OF THE FEDERAL RULES OF CIVIL PROCEDURE AND DUE PROCESS

The Settlement Class Members are entitled to notice of the proposed Settlement and an opportunity to be heard. *See* Fed. R. Civ. P. 23(e); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985). Notice of the Settlement and proposed Settlement Class was provided per the Court's August 13, 2015 Order. *See* R. Doc. 668. The Notice was designed to provide members of the proposed Settlement Class with (among other things): (1) a clear and detailed description of the terms of the Settlements; (2) the date of this Court's hearing on final approval of the Settlements; (3) the deadlines for opting out of the proposed Settlement Class or notifying the Court of an objection to the Settlements; (4) phone and internet contact information for the Settlements administrator to permit members of the proposed Settlement Class to obtain answers to questions or other information; and (5) notice that, in the event the Court finally approves the Settlement, Class Counsel may seek from the Court an Order for the reimbursement of fees, costs, and expenses, the amount not to exceed one-third of the Settlement. The Notice was accompanied by a Claim Form, the format of which was agreed between Plaintiffs and Pentair, and approved by the Court. R. Doc. 668 at ¶ 8.

A. The Notice

On August 31, 2015, Garden City Group, LLC ("GCG"), the Settlements Claims Administrator retained by Class Counsel and approved by the Court, mailed the Notice and Claim Forms (the "Notice Packet") to approximately 74,855 Class Members identified using the transactional data produced by PoolCorp. *See* Declaration of Jennifer M. Keough Regarding Notice and Settlement Administration, ("Keough Decl.") at ¶¶ 8-10. As of October 30, 2015, GCG received 676 Notice Packets returned by the U.S. Postal Service with forwarding address information that were promptly re-mailed to the updated address provided. *Id.* ¶ 11. In addition, 10,861 Notice Packets were returned by the U.S. Postal Service without forwarding address information. *Id.* In total 63,994 Class Members were sent Notice Packets that were not subsequently returned to GCG. *Id.* ¶ 12. As of October 30, 2015, Plaintiffs are not aware of any objections to the Pentair Settlement; objections are due by December 11, 2015. *Id.* ¶ 18. GCG received only 6 requests for exclusion from the Pentair Settlement. *Id.* ¶ 17; *see id.* Exhibit C (identifying opt-outs). Requests for exclusion also are due by December 11, 2015. R. Doc. 668. As of October 30, 2015, GCG has received a cumulative total of 2,468 Claim Forms, which represent claims under the Pentair Settlement, as well as the Hayward and Zodiac settlements that the Court previously approved. *Id.* ¶ 16. Plaintiffs anticipate receipt of additional Claim Forms since the claims submission deadline is December 11, 2015.

B. Summary Notice, Website, and Toll-Free Telephone Number

As per the approved Notice plan, Plaintiffs also supplemented direct mail distribution with publication of a Summary Notice in industry publications, and maintain a website and toll-free telephone number. Summary Notice was published in the following industry publications: *Pool & Spa News* (October 9, 2015 issue) and *Aqua* (October 2015 issue). Keough Decl. at ¶ 13; *see id.* Exhibit B (tearsheets from *Pool & Spa News* and *Aqua*). Plaintiffs also maintain a

website, [3] administered by GCG, dedicated to the Pentair Settlement, as well as to the prior Hayward and Zodiac Settlements. *Id.* ¶ 14. The website has been operational since January 15, 2015, and is accessible twenty-four hours a day, seven days a week. The website provides information, including important deadlines and answers to frequently asked questions. Website visitors can also download a Notice Packet, the Court's preliminary approval order, the Settlement Agreement, and other relevant documents for the Pentair Settlement. As of October 30, 2015, the website had received 1,584 visits. *Id.*

In addition to the website, GCG maintains an automated toll-free telephone number (1-844-322-8225) with an Interactive Voice Response ("IVR") system that potential Settlement Class Members can call for information about the Pentair Settlement. *Id.* at ¶ 15. The number is operational twenty-four hours a day, seven days per week. Callers have the ability to listen to important information about the Settlements and to request a copy of the Notice Packet, the Settlement Agreement, and the preliminary approval order. If callers have additional questions, they also have the ability to speak to a customer representative Monday through Friday from 8:00 a.m. to 5:00 p.m. Eastern Time.[4] GCG has maintained and updated and will continue to maintain and update the IVR throughout the administration of all three Settlements.

C. The Notice Plan and Claim Procedures Meet the Requirements of Due Process

The Court's preliminary approval order directed that notice of the Pentair settlement be given by individual mailing and publication. R. Doc 668 ¶¶ 9-11. This notice plan, which Plaintiffs have since implemented, fulfills the requirements of Due Process and Rule 23. *See In re Train Derailment Near Amite La.*, MDL No. 1531, 2006 WL 1561470, at *19 (E.D. La. May

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[3] http://www.poolproductsantitrustlitigation.com

[4] The website and toll-free number similarly are available to service the Hayward and Zodiac settlements.

24, 2006) (Court held that the mailing of notice of class certification, claim submission, and opt-out procedures to all known plaintiffs and the publication of the notice in local newspapers was "reasonably calculated, under all of the circumstances, to apprise the interested parties of the pendency of the action" and to afford them the opportunity to opt out if they so desired); *In re Prudential–Bache Energy Income P'ships Sec. Litig.*, MDL No. 0888, 1995 WL 20613, at *2 (E.D. La. Jan. 6, 1995) (first class mail and publishing notice complied with fundamental due process rights as notice reasonably calculated, under all circumstances, to apprise interested parties).[5]

D. Pentair Has Satisfied CAFA's Additional Notice Requirement

The Class Action Fairness Act ("CAFA") mandates that "[a]n order giving final approval of a proposed settlement may not be issued earlier than 90 days after the later of the dates on which the appropriate Federal official and the appropriate State official are served with the notice required under subsection (b)." 28 U.S.C. § 1715(d). The responsibility for providing CAFA Notice belongs to Settling Defendant. 28 U.S.C. § 1715(b). Subsection 1715(b) provides: "Not later than 10 days after a proposed settlement of a class action is filed in court, each defendant that is participating in the proposed settlement shall serve upon the appropriate State official of each State in which a class member resides and the appropriate Federal official, a notice of the proposed settlement . . . ."

Pentair has satisfied the CAFA notice requirement by mailing notice to the appropriate state and federal officials on August 28, 2015 (with the exception of the notice to the Attorney

[5] *See also Zimmer Paper Prods. Inc. v. Berger & Montague*, P.C., 758 F.2d 86, 90 (3d Cir. 1985) ("It is well settled that in the usual situation first-class mail and publication in the press fully satisfy the notice requirements of both Fed. R. Civ. P. 23 and the due process clause.").

General of Montana, which was mailed on September 2, 2015).[6] Although Pentair's notice was served more than ten days after notice of the settlement was filed with the Court, the Court should hold this of no moment because Pentair will have served notice more than 90 days before the final fairness hearing, which is scheduled for January 8, 2016. Pentair has thus provided federal and state officials sufficient notice and an opportunity to be heard concerning the settlement.[7]

VI. THE PENTAIR SETTLEMENT SHOULD BE GIVEN FINAL APPROVAL BECAUSE IT IS FAIR, REASONABLE, AND ADEQUATE

A. Standard for Granting Final Approval of the Settlements

It has long been settled that compromises of disputed claims are favored by the courts. *See Williams v. First Nat'l Bank of Pauls Valley*, 216 U.S. 582, 595 (1910). This is particularly true in the context of class actions. *See, e.g.*, *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977). Class action settlements minimize the litigation expenses of the parties and reduce the strain that litigation imposes upon already scarce judicial resources. The Fifth Circuit has repeatedly held that, as a result of their highly-favored status, settlements "will be upheld whenever possible because they are a means of amicably resolving doubts and preventing lawsuits." *Miller v. Republic Nat'l Life Ins. Co.*, 559 F.2d 426, 428 (5th Cir. 1977) (internal quotations omitted). *See also Turner v. Murphy Oil USA, Inc.*, 472 F. Supp. 2d 830, 843 (E.D.

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[6] *See* Declaration of Samantha P. Griffin Regarding Pentair Water Pool & Spa, Inc.'s Compliance with 28 U.S.C. § 1715. R. Doc. 681.

[7] *See In re Processed Egg Prods. Antitrust Litig.*, 284 F.R.D. 249, 258 n.12 (E.D. Pa. 2012) ("Over ninety days have elapsed since [defendant] served the appropriate state or federal officials with the CAFA notice, and there have been no requests for hearings or objections to the settlement made. It follows that, although the notice requirements under CAFA have not been fully met on a technical basis, the substance of the requirements have been satisfied insofar as giving federal and state officials sufficient notice and opportunity to be heard concerning the [s]ettlement."); *Kay Co. v. Equitable Prod. Co.*, No. 2:06-CV-00612, 2010 WL 1734869, at *4 (S.D. W. Va. Apr. 28, 2010) ("Although [defendant] sent notice packets to the appropriate State and Federal officials, it did not provide such notice promptly after the Agreement was filed, as required by CAFA . . . . Since more than 100 days have passed since service was perfected and since there have been no adverse comments from any of the aforesaid State or Federal officials, the Court FINDS that compliance with CAFA is satisfactory.") (capitalization in original).

La. 2007) ("[T]here is a 'strong judicial policy favoring the resolution of disputes through settlement'. . . . The public interest favoring settlement is especially apparent in the class action context where claims are complex and may involve a large number of parties, which otherwise could lead to years of protracted litigation and sky-rocketing expenses.") (quoting *Smith v. Crystian*, 91 F. App'x 952, 955 (5th Cir. 2004)).

Before the Court grants Rule 23(e) approval to a proposed class action settlement, the court must find that it is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2); *Newby v. Enron Corp.*, 394 F.3d 296, 301 (5th Cir. 2004); *In re OCA, Inc. Sec. & Deriv. Litig.*, No. 05-2165, 2009 WL 512081, at *9 (E.D. La. Mar. 2, 2009) (Vance, J.). Six factors—known as the "Reed factors"—should be considered in assessing whether a settlement is fair, reasonable and adequate: (1) the existence of fraud or collusion behind the settlement; (2) the complexity, expense, and likely duration of the litigation; (3) the stage of the proceedings and the amount of discovery completed; (4) the probability of plaintiff's success on the merits; (5) the range of possible recovery; and (6) the opinions of the class counsel, class representatives, and absent class members. *Reed v. Gen. Motors Corp.*, 703 F.2d 170, 172 (5th Cir. 1983). In considering these factors, there is a strong presumption in favor of finding the settlement fair. *See Cotton*, 559 F.2d at 1331 ("Particularly in class action suits, there is an overriding public interest in favor of settlement."). As discussed below, Plaintiffs and Class Counsel respectfully submit that the Pentair Settlement satisfies the criteria for final approval.

B. The Pentair Settlement Meets the Standards for Final Approval

1. The Pentair Settlement Was Achieved Without Fraud or Collusion

"The fact that a class action settlement is reached after arms' length negotiations by experienced counsel generally gives rise to a presumption that the settlement is fair, reasonable, and adequate." *In re Train Derailment*, 2006 WL 1561470, at *19; *see Faircloth v. Certified Fin.*

Inc., No. 99-3097, 2001 WL 527489, at *4 (E.D. La. May 16, 2001); Herbert B. Newberg & A. Conte, *Newberg on Class Actions* § 11:41 (4th ed. 2002). Moreover, if the terms of the proposed settlement are fair, courts generally will assume the negotiations were proper. *See In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 212 (5th Cir. 1981).

The proposed Settlement is the product of hard-fought, arm's-length negotiations by experienced counsel with the assistance of a mediator and the Magistrate Judge. *See In re Currency Conversion Fee Antitrust Litig.*, 263 F.R.D. 110, 122 (S.D.N.Y. 2009), *aff'd sub nom Priceline.com, Inc. v. Silberman*, 405 F. App'x 532 (2d Cir. 2010) (settlement reached after mediation is entitled to a presumption of arms-length dealings and fairness); *Billitteri v. Secs. Am., Inc.*, No. 3:09-cv-01568-F, 2011 WL 3586217, at *10 (N.D. Tex. Aug. 4, 2011) ("[T]here is no evidence that the settlement was obtained by fraud or collusion. On the contrary, this settlement was diligently negotiated after a long and hard-fought process that culminated in ultimately successful mediation . . . . ").

Settlement negotiations with Pentair spanned nearly two years and included formal mediation sessions, teleconferences, and email exchanges. Himes Decl. ¶¶ 13-16. The best interests of the Settlement Class were of paramount importance to Class Counsel throughout the negotiation process.

Moreover, Class Counsel conducted its own extensive and in-depth investigation of the facts of this case, and concluded that the Pentair Settlement was in the best interest of the class. By the time the settlement was reached, both Class Certification and Summary Judgment motions had been fully briefed and fact discovery had closed; Class Counsel had reviewed over 4 million pages of documents produced by Defendants, and had deposed numerous fact witnesses. *See* Himes Decl. ¶¶ 5-9. Accordingly, Plaintiffs had significant knowledge of Defendants'

alleged antitrust conspiracy and the strengths and weaknesses of the parties' claims and defenses when the Pentair Settlement was reached.

Furthermore, the parties have been represented by seasoned class action litigators. Class Counsel are experienced in similar antitrust class actions, and unreservedly recommended the Settlement. Counsel for Pentair, Foley & Lardner LLP and Stone Pigman Walther Wittmann L.L.C., are similarly experienced. "[W]here the parties have conducted an extensive investigation, engaged in significant fact-finding and Lead Counsel is experienced in class-action litigation, courts typically 'defer to the judgment of experienced trial counsel who has evaluated the strength of his case.'" *Schwartz v. TXU Corp.*, No. 3:02-CV-2243-K, 2005 WL 3148350, at *21 (N.D. Tex. Nov. 8, 2005) (citation omitted).

2. The Complexity, Expense, and Likely Duration of the Litigation

Courts recognize that antitrust class actions are "long, complex and expensive" to prosecute. *In re Lease Oil Antitrust Litig. (No. II)*, 186 F.R.D. 403, 432 (S.D. Tex. 1999); *see also*, *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 118 (2d Cir. 2005) ("Federal antitrust cases are complicated, lengthy, and bitterly fought."); *In re Linerboard Antitrust Litig.*, 296 F. Supp. 2d 568, 577 (E.D. Pa. 2003) ("An antitrust class action is arguably the most complex action to prosecute . . . . The legal and factual issues involved are always numerous and uncertain in outcome.") (citation and internal quotations omitted). It is well-established that antitrust class action litigation has "undeniable inherent risks, such as whether the class will be certified and upheld on appeal, whether the conspiracy as alleged in the Complaint can be established, whether Plaintiffs will be able to demonstrate class wide antitrust impact and ultimately whether Plaintiffs will be able to prove damages." *In re Packaged Ice Antitrust Litig.*, No. 08-MD-1952, 2011 WL 717519, at *10 (E.D. Mich. Feb. 22, 2011). Continuing this litigation against Pentair would entail a lengthy and complex battle.

Pentair vigorously defended against Plaintiffs' claims and was fully prepared to continue litigating this case through trial. Had the case continued, Pentair would have continued to pursue its various defenses, and a jury trial might well have turned on questions of proof, making the outcome inherently uncertain for the parties. *In re Linerboard Antitrust Litig.*, 292 F. Supp. 2d 631, 639 (E.D. Pa. 2003); *In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 475–76 (S.D.N.Y. 1998) ("Antitrust litigation in general, and class action litigation in particular, is unpredictable. . . . [T]he history of antitrust litigation is replete with cases in which antitrust plaintiffs succeeded at trial on liability, but recovered no damages, or only negligible damages, at trial, or on appeal."). As this Court noted in its final approval of the Hayward and Zodiac settlements, "[a] trial in this matter would be lengthy and would require numerous attorneys, paralegals, and witnesses. This case also requires expert testimony to establish market definition, causation, and damages. After trial, the parties could still expect years of appeals." R. Doc. 653 at 24.

The degree of uncertainty attendant with further litigation supports final approval of the proposed settlements.

3. The Stage of the Proceedings and Amount of Discovery Completed

Plaintiffs have engaged in substantial case investigation, discovery, and motion practice, all of which leads Class Counsel to believe that the Pentair Settlement is beneficial to and reasonable for the Class. Here, in light of the amount of pre-trial briefing and discovery that has been completed, the Court can be assured that "the parties have obtained sufficient information about the strengths and weaknesses of their respective cases to make a reasoned judgment about the desirability of settling the case on the terms proposed. . . ." *In re Educ. Testing Serv. Praxis Principles of Learning and Teaching: Grades 7-12 Litig.*, 447 F. Supp. 2d 612, 620-21 (E.D. La. 2006) (Vance J.).

Fact discovery closed well before the Settlements were reached. Defendants collectively produced over 4 million pages of documents, which were reviewed by Class Counsel. In addition, 84 depositions of parties and non-parties have taken place, including the proposed Class Representatives. Moreover, the parties have engaged in extensive motion practice, from the initial Rule 12(b)(6) motions to class certification, summary judgment, and *Daubert* motions. In this process, Defendants revealed their likely trial and factual arguments, which provided Plaintiffs with accurate insight into the challenges they face as they prepare this case for a jury. The information amassed has allowed all parties to assess their respective positions in detail and make a reasonable decision on settlement.

4. The Probability of Plaintiffs' Success on the Merits

To assess the reasonableness of a proposed settlement seeking monetary relief, an inquiry "should contrast settlement rewards with likely rewards if case goes to trial." *In re Chicken Antitrust Litig. Am. Poultry*, 669 F.2d 228, 239 (5th Cir. 1982); *see also Reed*, 703 F.2d at 172. The Court, however, "must not try the case in the settlement hearings because the very purpose of the compromise is to avoid the delay and expense of such a trial." *Id.* at 172 (citation and internal quotations omitted).

Neither side could confidently expect a complete victory at trial that would not be subject to the potential risk and delay of appeal.[8] Although Class Counsel are confident that the Plaintiffs' claims are meritorious, there is always a risk of recovering little or nothing at trial given the inherent uncertainties in this type of litigation. *In re Packaged Ice*, 2011 WL 717519, at *7 ("Experience proves that, no matter how confident trial counsel may be, they cannot predict

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[8] Because Plaintiffs are continuing to prosecute this case against the remaining Defendant, PoolCorp, Class Counsel do not wish to highlight potential weaknesses (if any) or emphasize particularly vulnerable points in their case. To do so could prejudice the prosecution of this action. *See Manual for Complex Litigation* (Fourth) § 21.651 (2004) ("Given that the litigation might continue against other defendants, the parties may be reluctant to disclose fully and candidly their assessment of the proposed settlement's strengths and weaknesses that led them to settle separately.").

with 100% accuracy a jury's favorable verdict, particularly in complex antitrust litigation.") (citation and internal quotations omitted). Under the proposed Settlement, the Settlement Class secures the Settlement Amount without the risk of trial or delays by appeal. Moreover, even assuming a favorable verdict and that damages were awarded at trial, any resulting recovery likely would not be seen for years, and would be greatly diminished by the continued costs of litigation. In light of these considerations, Plaintiffs and Class Counsel respectfully submit that certain recovery through settlement is the preferred result.

5. The Range of Possible Recovery

The range of possible recovery must be juxtaposed against the likelihood of recovery. In evaluating the reasonableness of a proposed settlement, "the present value of the damages plaintiffs would likely recover if successful, appropriately discounted for the risk of not prevailing, should be compared with the amount of the proposed settlement." *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 322 (3d Cir. 1998) (citation and internal quotations omitted).[9] Moreover, the determination of reasonable settlement is not susceptible to a mathematical equation yielding a particularized sum. *See In re Relafen Antitrust Litig.*, 231 F.R.D. 52, 73 (D. Mass. 2005) ("A fine-tuned equation by which to determine the reasonableness of the size of a settlement fund does not exist."); *In re Combustion, Inc.*, 968 F. Supp. 1116, 1129 (W.D. La. 1997) ("The proposed settlement need only reflect a fair, reasonable, and adequate estimation of the value of the case in view of what might happen at trial.").

[9] *See also Wal-Mart*, 396 F.3d at 119 ("[T]here is a range of reasonableness with respect to a settlement—a range which recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion—and the judge will not be reversed if the appellate court concludes that the settlement lies within that range.") (citation and internal quotations omitted).

Here, the Pentair Settlement, totaling $6 million in cash, is within the range of possible recovery. The Settlement represents approximately 2.25% of Plaintiffs' estimated class-wide damages ($266.8 million). R. Doc. 473-1 at 9-10; *see In re Prudential Sec. Inc. Ltd. P'ships Litig.*, MDL No. 1005, 1995 WL 798907 (S.D.N.Y. Nov. 20, 1995) (approving settlement of between 1.6% and 5% of claimed damages). As the Court stated in *Parker v. Anderson,* 667 F.2d 1204 (5th Cir. 1982):

> The fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved . . . . In fact there is no reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of the potential recovery.

Id. at 1210 n.6 (citation and internal quotations omitted). Although at first glance it appears that the settlement figure is small in comparison to potential damages; the estimated class-wide damages do not reflect the substantial risks of non-recovery or diminished recovery faced by plaintiffs by continued litigation. Thus, the value of the Pentair Settlements is fair and reasonable in light of the risks of continued litigation, as well as the time and expense that would be incurred to prosecute the action through a trial.

The class also receives a non-monetary benefit as part of the settlement. Pentair has agreed to cooperate with DPPs to answer questions about its transactional data and to assist with authenticating records. This cooperation will assist DPPs as they proceed against the non-settling Defendant, PoolCorp.

6. The Opinion of Class Counsel, Class Representatives, and Absent Class Members

"Counsel are the Court's main source of information about the settlement . . . and therefore the Court will give weight to class counsel's opinion regarding the fairness of settlement." *Turner*, 472 F. Supp. 2d at 852 (citation and internal quotations omitted). "[W]here

the parties have conducted an extensive investigation, engaged in significant fact finding and Lead Counsel is experienced in class-action litigation, courts typically 'defer to the judgment of experienced trial counsel who has evaluated the strength of his case.'" *Schwartz v. TXU Corp.*, 2005 WL 3148350, at *21 (citation omitted). Here, Class Counsel, who have considerable experience in complex class action litigation and antitrust law, have agreed to the terms of the Pentair Settlement.

Further, as of October 30, 2015, Class Counsel have not received any objections, and only six exclusion requests. Keough Decl. ¶¶ 17-18. The objections deadline is December 11, 2015. To the extent any timely objections are received after the filing of this brief, Class Counsel will address those objections in any reply filings as provided for in the Court's August 13, 2015 Order. R. Doc. 668 at ¶ 20. The attitude of absent class members, expressed either directly or indirectly by their failure to object after notice or high level of participation in the proposed settlement program, is an additional factor on which district courts generally place heavy emphasis. *See In re Oil Spill by the Oil Rig "Deepwater Horizon"*, 295 F.R.D. 112, 150 (E.D. La. 2013) ("one indication of the fairness of a settlement is the lack of or small number of objections") (citation and internal quotations omitted); *Quintanilla v. A & R Demolition Inc.*, No. H-04-1965, 2008 WL 9410399, at *5 (S.D. Tex. May 7, 2008) ("'If only a small number of objections are received, that fact can be viewed as indicative of the adequacy of the settlement'") (quoting *Wal-Mart*, 396 F.3d at 118).

In light of the foregoing analysis, Plaintiffs respectfully submit that the Settlement is fair, reasonable and adequate, and warrants this Court's final approval.

VII. THE PLAN OF ALLOCATION AND CLAIMS PROCESS ARE FAIR AND REASONABLE

The plan allocating the proceeds of a class action settlement also must be fair, reasonable, and adequate. *See In re Chicken*, 669 F.2d at 238. District courts enjoy "broad supervisory powers over the administration of class-action settlements to allocate the proceeds among the claiming class members . . . equitably." *Beecher v. Able*, 575 F.2d 1010, 1016 (2d Cir. 1978); *accord In re Chicken*, 669 F.2d at 238.

The Plan of Allocation as set forth in the Notice describes in detail how the Settlement Fund will be allocated. Under the Plan of Allocation, up to one-third of the Pentair Settlement Fund ($2 million) may be used to pay Class Counsel's fees or expenses upon Court approval. Additionally, the parties have agreed to deduct notice costs arising from the Pentair Settlement out of the Settlement Fund. The remaining amounts (the "Net Pentair Settlement Fund") will be distributed to class members that submit valid and timely claims.

The Net Pentair Settlement Fund will be distributed on a pro rata basis among all class members who submit valid and timely Claim Forms. In other words, each Settlement Class member shall be paid a percentage of the Net Pentair Settlement Fund that each class member's recognized claim bears to the total of all recognized claims submitted by all class members who file a claim.

This basic approach commonly is used in antitrust settlements and has been approved as fair and reasonable. *See*, *e.g.*, *In re Air Cargo Shipping Servs. Antitrust Litig.*, No. 06-MD-1775, 2012 WL 3138596, at *3 (E.D.N.Y. Aug. 2, 2012) (approving an allocation plan that "distributed to class members that submit valid claim forms in proportion to their relevant purchases from defendants of 'Airfreight Shipping Services'"); *In re Cardizem CD Antitrust Litig.*, 218 F.R.D.

508, 531 (E.D. Mich. 2003), *appeal dismissed*, 391 F.3d 812 (6th Cir. 2004) (approving an allocation plan based on "each Class members' *pro rata* share of the Net Settlement Fund").

In connection with the preliminary approval of the Pentair Settlement, Class Counsel addressed in its briefing why the proposed Plan of Allocation is fair and reasonable. In its August 13, 2015 Order and Reasons granting Preliminary Approval, this Court took note of the proposed Plan of Allocation and, after a review of Plaintiffs' submission held, "the allocation plan to be fair and unbiased." R. Doc. 667 at 30. No facts have changed since the Court made its finding at Preliminary Approval. In sum, the Plan of Allocation in this case is based on recognized principles and falls within the mainstream of distribution plans routinely approved.

VIII. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully submit that the proposed Pentair Settlement is fair, reasonable, and adequate, and should be given final approval by the Court.

Dated: November 2, 2015

Respectfully submitted,

/s/ *Russ M. Herman*
Russ M. Herman (Bar No. 6819)
Leonard A. Davis (Bar No. 14190)
HERMAN, HERMAN & KATZ, L.L.C.
820 O'Keefe Avenue
New Orleans, LA 70113
Tel: 504-581-4892

Direct Purchaser Plaintiffs' Liaison Counsel

Robert N. Kaplan
Gregory K. Arenson
Elana Katcher
KAPLAN FOX & KILSHEIMER LLP
850 Third Avenue
New York, NY 10022
Tel: 212-687-1980

Ronald J. Aranoff
Dana Statsky Smith
BERNSTEIN LIEBHARD LLP
10 East 40th Street
New York, NY 10016
Tel: 212-779-1414

Jay L. Himes
Robin A. van der Meulen
LABATON SUCHAROW LLP
140 Broadway
New York, NY 10005
Tel: 212-907-0700

Executive Committee Counsel for the Direct Purchaser Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that the above and foregoing Memorandum of Law in Support of Direct Purchaser Plaintiffs' Motion for Final Approval of the Settlement Between Plaintiffs and Defendant Pentair Water Pool and Spa, Inc. 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 2nd day of November, 2015.

/s/ *Leonard A. Davis*