

**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 REIMBURSEMENT OF EXPENSES**

TABLE OF CONTENTS

	Page(s)
TABLE OF AUTHORITIES	ii
I. INTRODUCTION	1
II. BACKGROUND	5
A. Facts and Procedural History	5
B. Plaintiffs’ Counsel Have Vigorously Prosecuted This Case.....	6
1. Discovery	6
2. Motion Practice.....	6
3. Settlement Negotiations	6
III. CLASS COUNSEL’S APPLICATION FOR REIMBURSEMENT OF EXPENSES IS REASONABLE AND WARRANTS APPROVAL	7
A. Reasonable Notice of the Requested Application and Opportunity to Object Has Been Given to the Class.....	8
1. Summary of the Notice Provided.....	8
2. Timing of Motion for Reimbursement of Expenses and Opportunity to Object	9
B. The Request for Reimbursement of Litigation Expenses is Reasonable	10
IV. CONCLUSION.....	11

TABLE OF AUTHORITIES

	Page(s)
<u>Cases</u>	
<i>Batmanghelich v. Sirius XM Radio, Inc.</i> , No. CV 09-9190 VBF (JCX), 2011 U.S. Dist. LEXIS 155710, at *5 (C.D. Cal. Sept. 13, 2011)	9
<i>City of Omaha Police & Fire Ret. Sys. v. LHC Grp.</i> , Civ. No. 6:12 -1609, 2015 WL 965696 (W.D. La. Mar. 2, 2015).....	7, 10
<i>In re Combustion, Inc.</i> , 968 F. Supp. 1116 (W.D. La. 1997)	7
<i>In re Enron Corp. Sec., Derivative & “Erisa” Litig.</i> , No. H-01-3624, 2003 WL 22962792 (S.D. Tex. Nov. 5, 2003).....	3
<i>In re General Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig.</i> , 55 F.3d 768 (3d Cir. 1995)	7
<i>In re Global Crossing Sec. & ERISA Litig.</i> , 225 F.R.D. 436 (S.D.N.Y. 2004).....	7
<i>In re Heartland Payment Sys., Inc. Customer Data Sec. Breach Litig.</i> , 851 F. Supp. 2d 1040 (S.D. Tex. 2012).....	7, 10
<i>In re Lease Oil Antitrust Litig.(No. II)</i> , 186 F.R.D. 403 (S.D. Tex. 1999).....	7
<i>In re Transpacific Passenger Air Transp. Antitrust Litig.</i> , No. C 07-05634 CRB, 2015 WL 3396829 (N.D. Cal. May 26, 2015).....	3
<i>In re: Imprelis Herbicide Mktg., Sales Practices and Prods. Liab. Litig.</i> , 296 F.R.D. 351 (E.D. Pa. 2013).....	9
<i>Johnson v. Ga. Highway Express, Inc.</i> , 488 F.2d 714 (5th Cir. 1974)	3
<i>Radosti v. Envision EMI, LLC</i> , 760 F. Supp. 2d 73 (D.D.C. 2011).....	10
<i>Taft v. Ackermans</i> , No. 02 Civ. 7951 (PKL), 2007 WL 414493 (S.D.N.Y. Jan. 31, 2007)	7, 10
<i>Wells v. Allstate Ins. Co.</i> , 557 F. Supp. 2d 1 (D.D.C. 2008).....	10

Rules

Fed. R. Civ. Rule 23(c) 1

Fed. R. Civ. Rule 23(e) 1, 9

Fed. R. Civ. Rule 23(h) 7

Fed. R. Civ. Rule 23(h)(1) 7

Other Authorities

1 Alba Conte, *Attorney Fee Awards* § 2:20 (3d ed. 2004)..... 3

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 Pentair Settlement Fund.¹ This Court granted preliminary approval of Plaintiffs’ settlement with Pentair Water Pool and Spa, Inc. (“Pentair”) on August 13, 2015 (R. Doc. 667) (the “Settlement”).

I. INTRODUCTION

Class Counsel reached the Settlement with Pentair, which provides the Settlement Class with \$6.0 million in cash, plus interest.² The Settlement was achieved in large part through Class Counsel’s investigation, hard work, skill, expertise, and persistence.

Plaintiffs and Class Counsel respectfully request reimbursement of \$2 million, or one-third of the Settlement, for certain litigation expenses reasonably incurred in the course of pursuing this action. Previously, following the Court’s preliminary approval of Plaintiffs’ settlement with Hayward Industries, Inc. (“Hayward”) on September 26, 2014, R. Doc. 483, and

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 Direct Purchaser Plaintiffs’ Motion for Final Approval of Settlement Between Direct Purchaser Plaintiffs and Defendant Pentair Water Pool and Spa, Inc., dated November 2, 2015 (“Himes Declaration”), submitted along with the Motion for Final Approval of the Settlement Between Direct Purchaser Plaintiffs and Defendant Pentair Water Pool and Spa, Inc., Exhibit 1.

² In addition to the monetary settlement, the Settlement Agreement also requires Pentair to provide information related to its transactional data and to authenticate documents. Pentair Agreement ¶ 45. *See* Himes Declaration, Exhibit 1.

Plaintiffs’ settlement with Zodiac Pool Systems, Inc. (“Zodiac”) on December 22, 2014, R. Doc. 547, Plaintiffs’ filed a Motion for Reimbursement of Expenses on March 12, 2015, requesting reimbursement of litigation expenses in the amount of \$3,316,667. R. Doc. 625. The Court approved Plaintiffs’ Counsel’s request on June 2, 2015. R. Doc. 653. Class Counsel have either paid or incurred the following expenses in this litigation from inception of the case through October 30, 2015:

Expenses	Amount
Shared Cost Paid from the Litigation Fund from Inception of the Case through September 30, 2015	\$1,799,779.25
Shared Costs Paid from the Litigation Fund from October 1 through October 29, 2015	\$1,220,022.66
PTO39 Cost Assessment	\$871,772.07
Shared Costs Incurred but not paid as of October 30, 2015	\$142,858.29
Held Costs	\$649,022.51 ³
TOTAL	\$4,683,454.78

See Affidavit of Philip A. Garrett, C.P.A., sworn to on October 31, 2015 (“Garrett Affidavit”) ¶¶ 6, 7; Declaration of Leonard A. Davis in Support of Direct Purchaser Plaintiffs’ Motion for Reimbursement of Expenses dated November 2, 2015 (“Davis Declaration”) ¶ 6. While the total amount of litigation expenses already awarded (\$3,316,667) plus the amount now requested (\$2,000,000) exceeds the amount of expenses thus far incurred, the excess sum will be used to

³ This is the total amount of Held Expenses as of August 31, 2015.

fund future litigation expenses incurred through trial.⁴ Numerous courts have approved the formation of litigation expense funds from partial settlements to pay future litigation expenses. See 1 Alba Conte, *Attorney Fee Awards* § 2:20 (3d ed. 2004) (courts have “permitted class plaintiffs who have settled with fewer than all defendants to expend class-settlement monies, or a portion thereof, for litigation expenses to prosecute the action against remaining, non-settling defendants”) (collecting cases); *In re Enron Corp. Sec., Derivative & “Erisa” Litig.*, No. H-01-3624, 2003 WL 22962792, at *1, *10 (S.D. Tex. Nov. 5, 2003) (citing additional cases) (\$15 million of \$40 million settlement fund (37.5% of the settlement fund) allocated to an expense fund to be used for past and future litigation expenses. Plaintiffs’ counsel also reserved the right to seek attorneys’ fees at a later date); see also *In re Transpacific Passenger Air Transp. Antitrust Litig.*, No. C 07-05634 CRB, 2015 WL 3396829, at *1-2 (N.D. Cal. May 26, 2015) (approving approximately \$13 million in attorneys’ fees, \$3 million in expenses, and \$3 million “for future expenses to be used in ongoing litigation against the non-Settling Defendants” from an approximately \$39.5 million settlement fund).

Class Counsel believe that the additional litigation expenses going forward will greatly exceed the excess amount. In the event that any excess amount remains after all incurred and to-be-incurred Shared Expenses and Held Expenses have been reimbursed, Class Counsel respectfully reserve the right to request that the Court award the excess sum as attorneys’ fees.⁵ Plaintiffs’ Counsel have expended over 70,000 hours in attorney and staff time in the prosecution

⁴ In its recent decision approving Indirect Purchaser Plaintiffs’ Counsel’s request for attorneys’ fees and costs, this court approved \$346,666.67 in fees and \$320,000 for a litigation expenses reserve which included \$43,283.30 to be set aside for future litigation expenses (totaling one-third of the settlement). R. Doc. 663.

⁵ As noted below, The Notice sent to the Settlement Class members states that Plaintiffs’ Counsel would seek up to \$2 million as “an award of attorneys’ fees and reimbursement of expenses.”

of this Litigation and the resulting lodestar is many times the current excess sum. Any such future application for attorneys' fees would be extremely fair to Plaintiffs when cross-checked with the Fifth Circuit's lodestar methodology in order to confirm the reasonableness of counsel fees.⁶ *See* Garrett Affidavit ¶ 5.

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 type of expenses that are regularly reimbursed by courts. The Court, at the outset of this litigation, in PTO No. 9, 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 (R. Doc. 119). 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 submitted for review and approval by Class Counsel. *See* Garrett Affidavit ¶¶ 4, 9. 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 not yet been incurred, these expenses will fall within the categories of acceptable shared expenses listed by the Court in PTO No. 9, and will be submitted to Philip A. Garrett for his review and approval.

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").

⁶ Class Counsel will further address the relevant legal standards, including the factors enumerated by the Fifth Circuit in *Johnson v. Ga. Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974), in any later application for attorneys' fees, if necessary.

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 include travel, transportation, meals, and computer research fees, among other expenses, many of which are subject to Court-ordered rates. PTO No. 9 at 7.

For the reasons set forth below, and in the accompanying Garrett Affidavit and Davis Declaration, as well as the Himes Declaration and Declaration of Jennifer M. Keough Regarding Notice and Settlement Administration (“Keough Declaration”), submitted along with the Motion for Final Approval of the Settlement Between Direct Purchaser Plaintiffs and Defendant Pentair Water Pool and Spa, Inc., Class Counsel respectfully submit that the requested expenses are fair and reasonable under the applicable legal standards.

II. BACKGROUND

A. Facts and Procedural History

This litigation began in late 2011. Plaintiffs have 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, and Hayward (collectively with PoolCorp, “Defendants”).⁷ As a result of the Court’s rulings on Defendants’ motions to dismiss, Plaintiffs’ Sherman Act Section I 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

⁷ 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.

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 Pentair Settlement through diligent and thorough work. Examples of just some of their efforts during the litigation are highlighted below and discussed in the Himes 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. Himes 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 participated in four 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

resulted in a resolution with Hayward and Zodiac, but not with Pentair. *Id.* ¶ 14. On April 1, 2015, the parties attended a status conference before the Court, during which the Court requested that 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 with the Magistrate Judge on April 1, 2015 and June 22, 2015. At the June 22 meeting, Plaintiffs and Pentair reached an agreement in principle, 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. CLASS COUNSEL'S APPLICATION FOR REIMBURSEMENT OF EXPENSES IS REASONABLE AND WARRANTS APPROVAL

Class Counsel respectfully seeks \$2 million, or one third of the Settlement, for reimbursement of litigation expenses reasonably incurred in connection with prosecuting this action on behalf of Class Members.⁸

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”); *City of Omaha Police & Fire Ret. Sys. v. LHC Grp.*, Civ. No. 6:12-1609, 2015 WL 965696, at *11 (W.D. La. Mar. 2, 2015) (unpublished); *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*

⁸ 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: Pool Products Distribution Market Antitrust Litigation*, Order and Reasons, at 30-36 (E.D. La. June 2, 2015) (R. Doc. 653) (approving award of one-third of Hayward and Zodiac Settlements); *see also 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 Litig. (No. II)*, 186 F.R.D. 403 (S.D. Tex. 1999) (35.1% awarded).

Crossing Sec. & ERISA Litig., 225 F.R.D. 436, 468 (S.D.N.Y. 2004).

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

Federal Rule of Civil Procedure 23(h)(1) 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.” Class Counsel has provided reasonable notice of this motion, and has afforded Class Members an opportunity to object to such motion.

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 August 13, 2015 Order granting preliminary approval of the Pentair Settlement, on August 31, 2015, GCG mailed Notice Packets to Settlement Class Members whose addresses GCG had compiled from PoolCorp’s transaction data. Keough Declaration ¶¶ 6-12. Notice was published in the October 9, 2015 issue of *Pool & Spa News* and the October 2015 issue of *Aqua*. *Id.* ¶ 13. Additionally, GCG has established a Settlement website (www.poolproductsantitrustlitigation.com) to provide information and important deadlines to Settlement Class members.⁹ *See id.* ¶ 14. 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.

⁹ This website was first created for the Hayward and Zodiac Settlements. Keough Declaration ¶ 14. The website was updated and supplemented for the Pentair Settlement. *Id.*

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 the Pentair 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 \$2,000,000 (one third of the Pentair Settlement).

Id. The notice also explains the process and sets deadlines for opting out or objecting to the Settlement. 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 directed Plaintiffs to file their motion for reimbursement of expenses in advance of the deadline for submitting objections. R. Doc. 668 ¶ 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 ¶ 14. Objections to the Settlement, including this motion, are due no later than December 11, 2015. See, e.g., Long Form Notice ¶ 18 (Keough Declaration, Exhibit A). Accordingly, Class members have approximately 40 days after the filing of this motion to lodge objections to Class Counsel’s application for reimbursement of expenses.

This 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 Mktg., Sales Practices and Prods. Liab. 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 VBF (JCX), 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 have 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 (D.D.C. 2011) (quoting *Wells v. Allstate Ins. Co.*, 557 F. Supp. 2d 1, 8 (D.D.C. 2008)) (internal alteration omitted)); *City of Omaha Police & Fire Ret. Sys.*, 2015 WL 965696, at *11; *Taft*, 2007 WL 414493, at *11.

Plaintiffs' Counsel have provided on a monthly basis 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 his 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, 9. These incurred shared expenses fall squarely within the types of expenses contemplated by the Court in PTO No. 9, and should be deemed reasonable.

The requested expenses have also been necessary. They are of the type and of the level required to prosecute a complex case of this nature and are the sort of expenses that are regularly reimbursed by courts. In its decision approving Plaintiffs' Counsel's first request for reimbursement of litigation expenses, the Court found that the expenses incurred by Class Counsel thus far have been both necessary and reasonable, and noted that:

DPPs reached a settlement ... only after fact discovery, including the depositions of over eighty fact witnesses, and the review of over four million documents, was complete. This sort of work requires not only attorney hours but also money—for discovery vendors, travel, copying, and so on. The expenses sought by Class Counsel also include approximately \$2 million in expert fees. As the Court has explained above, DPPs’ case requires expert testimony.

R. Doc. 653 at 35-36.

At this time, Plaintiffs’ Counsel seek the Court’s approval of \$2 million to be applied, at the discretion of Plaintiffs’ Counsel, and approved by Philip Garrett, towards: (i) reimbursement of shared expenses paid from the Litigation Fund from the inception of the case through October 21, 2015; (ii) reimbursement of held expenses incurred by individual Plaintiffs’ counsel from inception of the case through August 31, 2015; and (iii) future litigation expenses incurred going forward. To the extent that any excess remains after all Shared Expenses and Held Expenses have been reimbursed, Plaintiffs’ Counsel respectfully reserve the right to request that the Court award the excess sum as attorneys’ fees.

IV. CONCLUSION

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

Dated: November 2, 2015

Respectfully submitted,

/s/ Russ M. Herman

Russ M. Herman (Bar No. 6819)

Leonard A. Davis (Bar No. 14190)

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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 2nd day of November, 2015.

/s/ Leonard A. Davis
