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) CHIEF JUDGE VANCE MAG. JUDGE WILKINSON
This document relates to: ALL DIRECT PURCHASER CASES	

MEMORANDUM OF LAW IN SUPPORT OF DIRECT PURCHASER PLAINTIFFS' MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT BETWEEN PLAINTIFFS AND DEFENDANT HAYWARD INDUSTRIES, INC.

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Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, Direct Purchaser Plaintiffs ("Plaintiffs") respectfully submit this memorandum in support of their motion for: (1) preliminary approval of a settlement between Plaintiffs and Hayward Industries, Inc. ("Hayward") as set forth in the Settlement Agreement Between Direct Purchaser Plaintiffs and Defendant Hayward Industries, Inc. (also referred to as the "Agreement" or "Settlement"), attached as Exhibit 1 to the Declaration of Ronald J. Aranoff, sworn to June 6, 2014 ("Aranoff Decl."); (2) certification of a Settlement Class, and authorization of Plaintiffs to represent the Settlement Class; (3) appointment of Class Counsel[1] for purposes of Settlement; (4) submission of proposed notices by July 11, 2014 for approval by the Court of the form and notice plan; and (5) approval of The Garden City Group, Inc. ("Garden City") as administrator of the Settlement and Citibank N. A. ("Citibank") as escrow agent.

I. INTRODUCTION

The proposed Settlement now before the Court for preliminary approval will enable the Class (as defined below) to recover $6,500,000 in cash, plus interest earned thereon ("Settlement Amount"), in exchange for the release of all claims against Hayward. The Settlement also requires Hayward to authenticate documents and provide, if necessary, information related to transactional data. The Settlement is the product of over two years of hard-fought litigation as well as extensive settlement negotiations, including two formal mediation sessions presided over by a former federal judge Layn R. Phillips. Class Counsel and Plaintiffs believe that the Settlement is in the best interests of the Class in view of the variety of factors described herein, as well as the complexity, risks and likely expense of litigating claims against Hayward through

[1] Capitalized terms used but not defined in this Memorandum of Law shall have the meanings given to them in the Settlement Agreement.

trial. Based on their evaluation of the facts and governing law, Plaintiffs and Class Counsel submit that the proposed Settlement is fair, reasonable, and adequate.

At this time, in considering whether to grant preliminary approval of a proposed settlement, the Court need determine only whether the settlement is sufficiently fair, reasonable, and adequate to allow notice of the proposed settlement to be disseminated to the Settlement Class. A final determination of the Settlement's fairness will be made at or after the Fairness Hearing, after Class Members have received notice of the Settlement and have been given an opportunity to object to it or opt-out of the class. As set forth below, Plaintiffs submit that the Settlement amply satisfies the required standards for preliminary approval, the only issue at this time.

II. BACKGROUND

A. The Litigation

This litigation began in late 2011. Plaintiffs allege a conspiracy between Pool Corporation, SCP Distributors LLC, and Superior Pool Products LLC (collectively, "PoolCorp"), and three of PoolCorp's leading suppliers Hayward, Pentair Water Pool and Spa, Inc., and Zodiac Pool Systems, Inc. (together with PoolCorp, "Defendants"). 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. Fact discovery has closed and expert discovery is underway.

B. The Settlement Negotiations

Class Counsel and Hayward's Counsel engaged in extensive arm's length negotiations for nearly one year to reach the current settlement. Aranoff Decl. ¶ 4. The scope and details of the negotiations are described in the Aranoff Declaration attached hereto. Class Counsel and Hayward's Counsel, both highly experienced and capable, vigorously advocated their respective clients' positions in the settlement negotiations. Aranoff Decl. ¶ 12

The parties mediated this action before the Hon. Layn R. Phillips, a respected mediator of disputes of this nature. *Id*. at ¶ 4. The first mediation session, held on July 22, 2013, was unsuccessful. *Id.* at ¶ 6. However, Counsel for Plaintiffs and Hayward continued to engage in settlement discussions. *Id.* These discussions were both one-on-one teleconference calls and teleconference calls facilitated by Judge Phillips. *Id.* Pursuant to Pretrial Order 20 (Dkt No. 334), the parties held a second mediation session on March 20, 2014. *Id.* at ¶ 7. At that session, Plaintiffs and Hayward made some progress, but still did not reach a settlement. *Id.* Following the mediation, Counsel for Plaintiffs and Hayward, facilitated by Judge Phillips, continued to engage in settlement discussions. *Id.* at ¶ 8. On March 28, 2014, Judge Phillips issued a mediator's proposal to both sides which was accepted by Plaintiffs and Hayward on April 1, 2014. *Id.* at ¶ 9. Over the next few weeks, the parties negotiated the settlement agreement and signed the Settlement Agreement with an execution date of May 13, 2014. *Id.* at ¶ 12.

III. PROVISIONS OF THE SETTLEMENT AGREEMENT

A. The Settlement Class

The Settlement defines the proposed 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 Aranoff Decl., Exhibit 1 ¶ 22.

B. Cash Consideration

The Settlement Agreement provides that, within 10 days after Hayward receives an Order from the Court granting Preliminary Approval of the Settlement, Hayward will pay the Settlement Amount. *See Id.* at ¶ 35. These funds shall be maintained in an escrow account controlled by the Parties pending final approval of the Settlement by the Court**.** Hayward and Plaintiffs each have the right and option to rescind the Settlement Agreement for the reasons described in ¶ 32 of the Agreement, including in the event that the Court refuses to approve the Agreement or any part thereof, or if such approval is modified or set aside on appeal. Additionally, the Settlement Agreement provides that the costs of class notice and settlement administration may 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, expenses, and incentive awards for Class Representatives. *Id.* at ¶ 34.

C. The Cooperation Provision

In addition to the Settlement Amount, the Agreement requires that Hayward: (1) clarify transactional data produced by Hayward, if necessary; and (2) authenticate and certify business records of documents produced by Hayward. *Id*. at ¶ 44.

D. Release Provisions

In exchange for the consideration described above, Plaintiffs have agreed to release Hayward from any and all claims arising out of or resulting from Defendants' alleged unlawful conspiracy. The full text of the proposed release is set forth in ¶¶ 29-31 of the Settlement Agreement.

IV. THE PROPOSED SETTLEMENT IS SUFFICIENTLY FAIR, REASONABLE AND ADEQUATE

A. Standard for Granting Preliminary Approval of the Settlement

Federal Rule of Civil Procedure 23(e) requires judicial approval for any compromise of claims brought on a class basis. *See In re OCA, Inc. Sec.& Deriv. Litig.*, No. 05-2165, 2008 WL 4681369, at *11 (E.D. La. Oct. 17, 2008) (J. Vance). Approval of a proposed settlement is a matter within the sound discretion of the district court. *See Ayers v. Thompson*, 358 F.3d 356, 368 (5th Cir. 2004). This discretion should be exercised in the context of a public policy which strongly favors the pretrial settlement of lawsuits. *See Miller v. Republic Nat'l Life Ins. Co.*, 559 F.2d 426, 428 (5th Cir. 1977) ("[settlements] will be upheld whenever possible because they are a means of amicably resolving doubts and preventing lawsuits") (internal quotation omitted). Moreover, in the case of class actions, the Fifth Circuit has held that "there is an overriding public interest in favor of settlement," because such suits "have a well deserved reputation as being most complex." *Cotton v. Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977).

The approval of class action settlements involves a two-step process: (1) preliminary approval; and (2) a fairness hearing, after notice to the class, to determine final approval of the proposed settlement. *McNamara v. Bre-X Minerals Ltd.*, 214 F.R.D. 424, 426 (E.D. Tex. 2002); *see* Manual for Complex Litigation (Fourth) § 21.63 (2004). At the preliminary approval stage, the Court's review is less stringent than at the final fairness hearing. *See, e.g., In re OCA*, 2008 WL 4681369, at *11.

Before a court finally approves a settlement, the court must find that the proposed settlement is "fair, reasonable, and adequate." Fed. R. Civ. 23(e)(1)(c); *In re OCA, Inc. Sec.& Deriv. Litig.*, No. 05-2165, 2009 WL 512081, at *9 (E.D. La. Mar. 2, 2009) (J. Vance); *In re Educ. Testing Serv. Praxis Principles of Learning and Teaching: Grades 7-12 Litig.*, 447 F.

Supp. 2d 612, 619 (E.D. La. 2006) (J. Vance). However, in determining whether preliminary approval of a proposed settlement is warranted, the sole issue before the Court is whether the settlement is within the range of what may be found to be fair, reasonable and adequate, so that notice can be given to the proposed class and a hearing scheduled to consider final approval of the settlement. *McNamara*, 214 F.R.D. at 430 ("If the preliminary evaluation of the proposed settlement does not disclose grounds to doubt its fairness or other obvious deficiencies ... and appears to fall within the range of possible approval, the court should direct that notice under Rule 23(e) be given to the class members of a formal fairness hearing.") (internal citation omitted); see *also* Newberg on Class Actions, §11.25 (4th Ed. 2002) (the examination conducted at the preliminary approval stage is done in order to identify defects in the settlement that would risk making "notice to the class, with its attendant expenses, and a hearing...futile gestures").

Furthermore, the Court is not required to make a final determination as to the merits of the proposed settlement at this time. *McNamara*, 214 F.R.D. at 427 ("the purpose of the preliminary approval is to detect any obvious defects that will preclude final approval of the settlement"); *see also In re Chinese-Manufactured Drywall Prods Liab. Litig.*, No. 2:09-CV-07628, 2012 WL 92498, at *7 (E.D. La. Jan. 10, 2012) ("At the stage of preliminary approval, the questions are simpler, and the court is not expected to, and probably should not, engage in analysis as rigorous as is appropriate for final approval.").

As discussed below, Plaintiffs and Class Counsel respectfully submit that the proposed Settlement satisfies the criteria for preliminary approval.

B. The Proposed Settlement Meets the Standards for Preliminary Approval

Although the Court's inquiry on final approval of a class action settlement will generally be more rigorous, the factors then considered also inform the inquiry on a motion for preliminary approval. For final approval, six factors are typically analyzed:

> (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 plaintiffs' 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). At this stage, the Court need only conduct a preliminary review of these factors in order to consider whether the proposed Settlement falls within the range of what may be found to be fair, reasonable and adequate. *McNamara*, 214 F.R.D. at 430. Accordingly, Class Counsel will provide a more detailed analysis of these six factors in their briefing submitted prior to the final settlement hearing.

1. The Proposed Settlement is Absent Fraud and Collusion

"[T]here is typically an initial presumption that a proposed settlement is fair and reasonable when it is the result of arms-length negotiations." *Faircloth v. Certified Fin. Inc.*, No. Civ. A. 99-3097, 2001 WL 527489, at *4 (E.D. La. May 16, 2001); *In re Train Derailment Near Amite La.*, No. Civ. A. MDL No. 1531, 2006 WL 1561470, at *19 (E.D. La. May 24, 2006) ("The fact that a class action settlement is reached after arm's length negotiations by experienced counsel generally gives rise to a presumption that the settlement is fair, reasonable, and adequate ..."). 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).

Class Counsel and Hayward's Counsel engaged in extensive arm's length negotiations for nearly one year to reach the current Settlement. Class Counsel and Hayward's Counsel, both

highly experienced and capable, vigorously advocated their respective clients' positions in the settlement negotiations. Giving further support, this Settlement was reached only after a lengthy process that involved two formal mediation sessions with Judge Phillips, an experienced mediator, and the settlement was the result of a mediator's proposal issued to the parties after the second mediation session. *See In re Currency Conversion Fee Antitrust Litig.*, 263 F.R.D. 110, 122 (S.D.N.Y. 2009) (settlement reached after mediation is entitled to a presumption of arms-length dealings and fairness), *aff'd sub nom Priceline.com, Inc. v. Silberman*, 405 F. App'x 532 (2d Cir. 2010).

Viewing the circumstances of this Settlement, the Court should find that the Settlement is the product of good faith, arm's-length negotiation between the Parties and is devoid of fraud and collusion.

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

Another reason for counsel to recommend, and the courts to approve, a proposed settlement is the complexity, expense, duration, and risks of further litigation. *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 434 (1968) (court must consider, *inter alia*, "the complexity, expense, and likely duration of the litigation"). After weighing these considerations against the benefit of prompt recovery for the Class, Class Counsel strongly believes the Settlement is favorable to and in the best interests of Plaintiffs and the Class.

The Settlement with Hayward is reasonable given pretrial and trial risks in any class action. *Turner v. Murphy Oil USA, Inc.*, 472 F. Supp. 2d 830, 843 (E.D. La. 2007) ("The public interest favoring settlement is especially apparent in the class action context where claims are complex and . . . could lead to years of protracted litigation and sky-rocketing expenses.").

Continuing this litigation against Hayward would entail a lengthy and expensive legal battle, which has already consumed over two years.

Additionally, Hayward has asserted various defenses, and a jury trial might well turn on questions of proof, making the outcome inherently uncertain for both 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.").

The degree of uncertainty supports preliminary approval of the proposed Settlement Agreement.

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

Here, in light of the amount of discovery that has been completed, the Court may presume that the settlement represents an informed, educated, and fair resolution of this dispute. Fact discovery closed well in advance of the Settlement Agreement. 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 10 current and former Hayward employees and the proposed Class Representatives. As a result of these efforts, both sides were clearly informed of the strengths and weaknesses of Plaintiffs' claims, both factually and legally, and were able to use this knowledge to engage in hard-fought negotiations. *In re Educ. Testing Servs.*, 447 F. Supp. 2d at 620-21 (internal quotations omitted) ("the question is not whether the parties have completed a particular amount of discovery, but whether 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 ....”). Moreover, the information amassed leaves all parties in a position 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. American Poultry*, 669 F.2d 228, 239 (5th Cir. 1982); *see also Reed*, 703 F.2d at 172. Thus, “the court must compare the terms of the compromise with the likely rewards of litigation.” *In re Initial Pub. Offering Sec. Litig.*, 243 F.R.D. 79, 83 (S.D.N.Y. 2007) (internal quotation omitted). 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.” *Reed*, 703 F.2d at 172 (quotation omitted).

There can be little doubt that neither side could expect a complete victory at trial that would not be subject to the potential risk and delay of appeal. Under the proposed Settlement, the Class will receive the Settlement Amount now without that risk. Moreover, because liability under the Sherman Act is joint and several, and PoolCorp’s sales of Hayward’s products remain in the case, this Settlement in no way prejudices the Class’s ability to recover its full treble damages caused by the alleged conspiracy. Furthermore, even assuming a favorable verdict and damages were awarded at trial, any resulting recovery would likely not be seen until years from now, 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

Consistent with the fact that there is litigation risk to both sides, the Agreement provides for compensation somewhere between the best-case scenarios envisioned by either side. “[T]he

essence of a settlement is compromise. A just result is often no more than an arbitrary point between competing notions of reasonableness." *In re Corrugated Container Antitrust Litig.*, 659 F.2d 1322, 1325 (5th Cir. 1981). Thus, the "trial court should not make a proponent of a proposed settlement justify each term of settlement against a hypothetical or speculative measure of what concessions might have been gained; inherent in compromise is a yielding of absolutes and an abandoning of highest hopes." *Cotton v. Hinton*, 559 F.2d at 1330 (internal quotation omitted). The "fact that the plaintiff might have received more if the case had been fully litigated is no reason not to approve the settlement." *Priddy v. Edelman*, 883 F.2d 438, 447 (6th Cir. 1989); s*ee also 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.").

The proposed Settlement here is valued at $6,500,000. The value of the proposed Settlement is fair and reasonable in light of the risks of continued litigation as well as the time and expense which would be incurred to prosecute the action through a trial.

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 (internal citations 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.*, No. 3:02-CV-2243-K, 2005 WL 3148350, at *21 (N.D. Tex. Nov. 8, 2005) (internal citation omitted). Here, Plaintiffs' Counsel have considerable experience in complex class action litigation and antitrust law and

have agreed to settle this Action. Plaintiffs have also agreed to the terms of the proposed Settlement.[2]

In light of the foregoing analysis, Plaintiffs respectfully submit that the Settlement falls within the range of what could be found to be fair, reasonable and adequate and warrants this Court's preliminary approval.

V. CERTIFICATION OF THE PROPOSED SETTLEMENT CLASS IS WARRANTED

One of this Court's functions in reviewing a proposed settlement of a class action is to determine whether a settlement class maybe certified under Rule 23 of the Federal Rules of Civil Procedure. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997); *see also, e.g., In re Enron Corp. Sec. & ERISA Litig.*, No. H-01-3624, 2003 WL 22494413, at *2 (S.D. Tex. July 24, 2003) (preliminarily approving settlement and conditionally certifying class for settlement purposes). Rule 23(a) sets forth four prerequisites to class certification: (i) numerosity, (ii) commonality, (iii) typicality, and (iv) adequacy of representation. In addition, the class must meet one of the three requirements of Rule 23(b). *See* Fed. R. Civ. P. 23.

The Supreme Court has long recognized that the class action device is particularly suitable for antitrust claims. *See, e.g., Amchem*, 521 U.S. at 624 (Rule 23 (b)(3)'s predominance requirement is "readily met in certain cases alleging . . . violations of antitrust laws"). *See e.g., In re High-Tech Employee Antitrust Litig.*, 289 F.R.D. 555, 563 (N.D. Cal. 2013) ("The Supreme Court has long recognized that class actions serve a valuable role in the enforcement of antitrust laws."). The treble damages remedy under federal antitrust law is designed to encourage potential litigants to effectively serve as "private attorney general" in promoting enforcement of

[2] Class Members have not yet had the opportunity to review the terms of the Settlement. Therefore, Class Counsel will advise the Court of the Class Members' reaction to the Settlement following completion of the notice process, as part of the analysis presented in support of final approval of the Settlement.

the antitrust laws. *See Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251, 262 (1972). Rule 23 class actions "enhanc[e] the efficacy of private actions by permitting citizens to combine their limited resources to achieve a more powerful litigation posture." *Id.* at 266.

The claims at issue in this Action are no exception. As detailed below, Plaintiffs respectfully submit that the proposed Settlement Class satisfies each of the four requirements of Rule 23(a) and the factors enumerated in Rule 23(b)(3).[3]

A. The Proposed Settlement Class Meets the Requirements of Rule 23(a)

1. The Settlement Class is Sufficiently Numerous

First, Rule 23(a)(1) requires that the class be so numerous that joinder of all class members is impracticable. *See Watson v. Shell Oil Co.*, 979 F.2d 1014, 1022 (5th Cir. 1992) (Rule 23(a)(1) "imposes no mechanical rules, turning instead on the practicability of joining all class members individually"). To meet this requirement, a plaintiff is not required to show the exact number of class members at the time of class certification. *Henry v. Cash Today, Inc.*, 199 F.R.D. 566, 569 (S.D. Tex. 2000). In addition, the court may also consider whether members of the proposed class are geographically dispersed. *See Barrie v. Intervoice-Brite, Inc.*, No. 3:01-CV-1071-K, 2006 WL 2792199, at *13 (N.D. Tex. Sept. 26, 2006).

Here, the proposed Settlement Class consists of persons and entities that purchased Pool Products in the United States directly from PoolCorp, during the period from November 22, 2007 to November 21, 2011. The proposed Class is estimated at thousands of direct purchasers from PoolCorp. SCAC ¶ 36. *See Street v. Diamond Offshore Drilling,* No. Civ.A. 00-1317, 2001 WL 568111, at *4 (E.D. La. May 25, 2001) ("Although the number of members in a proposed class is not determinative of whether joinder is impracticable, it has been noted that any class consisting

[3] The Parties have stipulated to settlement class certification subject to the Court's approval. Aranoff Decl. Exhibit 1 ¶ 22.

of more than forty members should raise a presumption that joinder is impracticable."); *Rubenstein v. Collins*, 162 F.R.D. 534, 537 (S.D. Tex. 1995) (where "number of class members could extend into the thousands," numerosity is satisfied). Further, Class members are geographically dispersed throughout the United States, making joinder of all Class Members impractical. Here, the numerosity requirement is easily satisfied because of the large number of putative Class Members and their geographical distribution throughout the United States make joinder highly impractical.

2. There are Common Questions of Law and Fact

Second, Rule 23(a) requires the existence of questions of law or fact common to the class. Fed. R. Civ. P. 23(a)(2). Questions are common to the class if class members' claims "depend upon a common contention" that is "of such a nature that it is capable of class wide resolution – which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011). The Supreme Court has confirmed: "We quite agree that for purposes of Rule 23(a)(2), [e]ven a single [common] question 'will do' …" *Id.* at 2556 (brackets in original).

"Courts interpreting the commonality requirement in the antitrust area have held that allegations concerning the existence, scope and efficacy of an alleged conspiracy present questions adequately common to class members to satisfy the commonality requirement." *In re Blood Reagents Antitrust Litig.*, 283 F.R.D. 222, 233 (E.D. Pa. 2012) (quoting *In re Linerboard Antitrust Litig.*, 203 F.R.D 197, 205 (E.D. Pa. 2001); *see also In re Mercedes-Benz Antitrust Litig.*, 213 F.R.D. 180, 185-87 (D.N.J. 2003) (allegation of conspiracy in class action context raises "a central issue that will establish common questions of both law and fact"); *Weisfeld v. Sun Chem. Corp.*, 210 F.R.D 136, 141 (D.N.J. 2002) (holding that conspiracy to restrain trade

subject to common proof); Newberg on Class Actions, §3.10 (4th Ed. 2002) (existence of and alleged conspiracy in an antitrust class action brought on behalf of direct purchasers is a common issue that will satisfy the Rule 23(2)(2) prerequisite).

Significantly, in this case, the Judicial Panel on Multidistrict Litigation has already found that there are numerous common questions of both law and fact, and it is for this reason that this action was centralized in this District. *Cf. In re Oil Spill by Oil Rig Deepwater Horizon*, 295 F.R.D. 112, 134 (E.D. La. 2013) quoting *In re Chinese–Manufactured*, 2012 WL 92498, at *9 ("Movants argue that commonality is also easily satisfied because the Judicial Panel on Multidistrict Litigation ordered the subject cases to be consolidated in the MDL based upon commonality of facts, and the factual and legal issues arising from KPT Chinese drywall are common to all claimants. The Court agrees....").

Here, Plaintiffs' allegations raise questions of law and fact common to the proposed Class, including, for example: (i) whether the antitrust laws were violated by Defendants' conduct alleged in the Second Consolidated Amended Complaint ("SCAC"), as upheld by the Court's ruling on Defendants' motion to dismiss directed to that pleading; (ii) whether, and to what extent, Defendants' conduct caused Plaintiffs and Class members to pay supra-competitive prices for Pool Products; and (iii) to what extent the members of the Class have sustained damages and the proper measure of damages. Any one of these issues standing alone establish the requisite, commonality under Rule 23(a)(2).

3. The Representative Plaintiffs' Claims Are Typical of Those of the Settlement Class

Third, the typicality requirement of Rule 23(a)(3) is satisfied when the claims or defenses of the party or parties representing the class are typical of the claims or defenses of the other class members. Fed R. Civ. P. 23(a)(3). The test for typicality is not demanding. *See In re*

OCA, 2008 WL 4681369, at *11. The typicality requirement "focuses on the general similarity of the legal and remedial theories behind plaintiff's claims." *Id*. at *8 (citing *Lightbourn v. County of El Paso*, 118 F.3d 421 426 (5th Cir. 1997)).

Here, Plaintiffs have alleged that the Defendants artificially raised the prices of Pool Products through collusive acts. Such claims of the representative Plaintiffs, like those of the other members of the Class, arise out of the same alleged illegal anticompetitive conduct by the same Defendants and are based on the same legal theories. Thus, typicality is easily satisfied, because the representative parties are stating the same claims, concerning the same conduct and seeking the same relief as all members of the proposed class.

4. Representative Plaintiffs and Settlement Counsel Will Fairly and Adequately Protect the Interests of the Class

Fourth, Rule 23(a)(4) requires that the class representatives fairly and adequately protect the interests of the class they seek to represent. There are two prongs to this requirement: (i) the representatives must have interests that are not antagonistic to the interest of other members of the class; and (ii) the representatives must have retained attorneys who are qualified, experienced and able to conduct the litigation. *In re Lease Oil Antitrust Litig. (No. II)*, 186 F.R.D. 403, 421-22 (S.D. Tex. 1999).

Here, Plaintiffs and members of the Class have common interests and no conflicts. Plaintiffs and members of the Class allegedly paid artificially inflated and supracompetitive prices for Pool Products – prices higher than they would have paid absent Defendants' unlawful conspiracy – they have the same interest in establishing liability, and they all seek damages for the ensuing overcharge.

Further, Plaintiffs are represented by the law firms of Herman, Herman & Katz, LLC, Bernstein Liebhard LLP, Kaplan Fox & Kilsheimer LLP, and Labaton Sucharow LLP, firms

highly experienced in class action litigation and which have successfully prosecuted many antitrust and other complex class actions in courts throughout the United States. Thus, Plaintiffs are adequate representatives of the Class, and their counsel are qualified, experienced and capable of prosecuting this Action, in satisfaction of Rule 23(a)(4).

Plaintiffs' counsel were previously appointed by the Court to the Plaintiffs' Executive Committee to manage this litigation. *See* PTO 4 (Dkt No. 79). Plaintiffs' Counsel now respectfully request that the Court appoint for purposes of this settlement Herman, Herman & Katz, LLC, Bernstein Liebhard LLP, Kaplan Fox & Kilsheimer LLP, and Labaton Sucharow LLP as Class Counsel, pursuant to Rule 23(g).

B. Plaintiffs' Claims Satisfy the Prerequisites of Rule 23(b)(3)

Once the four prerequisites of Rule 23(a) are met, as in this case, Plaintiffs must also show that the proposed Settlement Class satisfies one of the requirements of Rule 23(b), in this case 23(b)(3). Here, the Settlement Class qualifies under Rule 23(b)(3), which authorizes class certification if "the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3).[4]

Rule 23(b)(3) is "designed to secure judgments binding all class members, save those who affirmatively elect[] to be excluded," where a class action will "achieve economies of time, effort, and expense, and promote . . . uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." *Amchem*,

[4] Since this is a settlement class, the Court need not examine the manageability of the Class at trial. *Amchem*, 521 U.S. at 620.

521 U.S. at 614-15. Certification of the proposed Settlement Class under Rule 23(b)(3) will serve these purposes.

1. Common Questions of Law and Fact Predominate

The Rule 23(b)(3) predominance requirement "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem*, 521 U.S. at 614-15; *Bell Atlantic Corp. v. AT&T Corp.*, 339 F.3d 294, 301 (5th Cir. 2003). The mere existence or possibility of some individual issues does not defeat class certification. *See In re Mercedes-Benz*, 213 F.R.D. at 186. To determine whether the class claims meet the predominance requirement, the court must examine the underlying cause of action. *In re OCA*, 2008 WL 4681369, at *9.

A plaintiff seeking certification of an antitrust class action must show that common or class-wide proof will predominate with respect to: "(1) a violation of the antitrust laws…, (2) individual injury resulting from that violation, and (3) measurable damages." *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 311 (3d Cir. 2008). The Supreme Court has recognized that the Rule 23(b)(3) predominance test can be "readily met" in antitrust cases. *Amchem*, 521 U.S. at 624-25; *see also In re Scrap Metal Antitrust Litig.*, 527 F.3d 517, 535 (6th Cir. 2008) (predominance is readily met because "proof of the conspiracy is a common question thought to predominate"); Newberg on Class Actions, §18.26, 86-89 (4th Ed.2002) ("In antitrust suits, the issues of conspiracy, monopolization, and conspiracy to monopolize have been viewed as central issues which satisfy the predominance requirement.").

In addition, in antitrust cases, the predominance standard is also met by a showing that the existence of individual injury resulting from the alleged antitrust violation is capable of proof at trial through evidence that is common to the class rather than individual to its members. *See Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1430 (2013). In addition, the plaintiffs' damages

model must be tied to and consistent with the plaintiffs' particular theory of antitrust impact. *Id*. at 1433.

Here, Plaintiffs and members of the Settlement Class allegedly paid artificially inflated and supracompetitive prices for Pool Products – prices higher than they would have paid absent Defendants' alleged unlawful conduct. Plaintiffs and members of the Settlement Class have the same interest in establishing liability, and they all seek damages for the ensuing overcharge and will rely on the same evidence. Thus, Plaintiffs have articulated a single theory of liability – namely, Defendants conspired to raise the prices of Pool Products and thus artificially inflated Pool Product prices - which will be capable of measurement on a class-wide basis since all class members purchased Pool Products.

2. A Class Action is Superior to Other Methods of Adjudication

"The superiority requirement asks the court to balance, in terms of fairness and efficiency, the merits of a class action against those of alternate available methods of adjudication." *In re Lease Oil*, 186 F.R.D. at 428.

Here, a class action is superior to other available methods for the fair and efficient adjudication of class claims, "because litigating all of these claims in one action is far more desirable than numerous separate actions litigating the same issues." *In re Ins. Brokerage Antitrust Litig.*, 579 F.3d 241, 259 (3d Cir. 2009) (internal quotations omitted). Absent class action certification, the Court may be faced with dozens of individual lawsuits, all of which would arise out of the same set of operative facts. By proceeding as a class action, resolution of common issues alleged in one action will be a more efficient use of judicial resources and bring about a single outcome that is binding on all class members. Also, as in most antitrust lawsuits, potential plaintiffs are likely to be geographically dispersed, as are the Class Representatives. As such, the realistic alternative to a class action is many scattered lawsuits with possibly

contradictory results for some plaintiffs and Defendants. These very issues led the Supreme Court to acknowledge that the unique qualities of antitrust litigation often mean that a class action is superior to individual lawsuits. *Amchem*, 521 U.S. at 617.

VI. REQUEST TO APPOINT GARDEN CITY AS CLAIMS ADMINISTRATOR AND CITIBANK AS ESCROW AGENT

Class Counsel, after rigorous evaluation, has selected and nominate for approval Garden City as the Claims Administrator for the proposed Settlement. Garden City would handle all aspects of providing notice to the Class and claims administration including mailing and publishing the notice, managing a call center and website to handle all questions regarding completion and submission of the claim forms, physically processing the claims and inputting the data on computers, reviewing claims, informing class members whether or not their claims are deficient or complete, and ultimately, distributing the Settlement Fund subject to Court approval.

Garden City is one of the country's largest and most experienced settlement administration firms, and has personnel well-versed in antitrust matters. Since its inception nearly 30 years ago, Garden City has administered over 1,700 settlements, processed over 52 million claims, disbursed over $35 billion in recoveries, issued more than 30 million checks and wires, disseminated approximately 300 million notices, sent hundreds of millions of emails, handled millions of calls, and designed and launched hundreds of settlement websites.

Class Counsel has also selected and nominate for approval Citibank as escrow agent for the proposed Settlement.

For the foregoing reasons, Class Counsel respectfully requests that the Court approve Garden City as the Claims Administrator in this case to disseminate Notice and process the

claims of potential class members. In addition, Class Counsel respectfully requests that the Court approve Citibank as escrow agent.

VII. NOTICE TO THE CLASS

Plaintiffs propose to move the Court, by July 11, 2014, for approval of a proposed form of, and means for disseminating, notice of the Settlement to the members of the Settlement Class. Hayward will have the opportunity to review the proposed form and means of notice before Plaintiffs' filing with the Court. *Id*. ¶ 39. The proposed form of notice will include all of the information required by Rule 23 and due process. The Settlement Fund includes the costs of class notice and settlement administration. Subject to court approval, in the event that settlement with another Defendant is obtained before notice is approved and disseminated, Plaintiffs respectfully request that notice of this Settlement with Hayward and any subsequent settlements be combined. This would minimize costs incurred by the Class.

VIII. CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that the Court: (1) preliminarily approve the Settlement; (2) certify the Settlement Class, and authorize Plaintiffs to represent the Settlement Class; (3) appoint Class Counsel for purposes of Settlement; (4) order Class Counsel to submit a proposed notice form and notice plan for approval by the Court by July 11, 2014; and (5) approve Garden City as administrator of the Settlement and Citibank as escrow agent.

Dated: June 6, 2014

Respectfully submitted,
/s/ *Russ M. Herman*
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CERTIFICATE OF SERVICE

I hereby certify that the above and foregoing Memorandum of Law in Support of Direct Purchaser Plaintiffs' Motion for Preliminary Approval of Settlement Between Direct Purchaser Plaintiffs and Defendant, Hayward Industries, 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 6th day of June, 2014.

/s/ Adam H. Weintraub
ADAM H. WEINTRAUB