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 ZODIAC POOL SYSTEMS, INC.

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Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure ("FRCP"), Direct Purchaser Plaintiffs ("Plaintiffs") respectfully submit this memorandum of law in support of their motion for: (1) preliminary approval of a settlement between Plaintiffs and Zodiac Pool Systems, Inc. ("Zodiac"), as set forth in the Settlement Agreement between Direct Purchaser Plaintiffs and Defendant Zodiac Pool Systems, Inc. (also referred to as the "Settlement Agreement", "Agreement" or "Settlement"), attached as Exhibit 1 to the Declaration of Ronald J. Aranoff, sworn to on November 24, 2014 ("Aranoff Decl."); (2) certification of a Settlement Class, and authorization of Plaintiffs to represent the Settlement Class; (3) appointment of Class Counsel for purposes of Settlement; (4) preliminary approval of the proposed Plan of Allocation; (5) approval of a notice plan for the proposed Settlement; and (5) approval of The Garden City Group, Inc. ("GCG") as administrator of the Settlement and Citibank, N. A. ("Citibank") as Escrow Agent.[1]

I. INTRODUCTION

The proposed Settlement now before the Court for preliminary approval will enable the Class (as defined below) to recover $3,450,000 in cash, plus interest earned thereon ("Settlement Amount"), in exchange for the release of all claims against Zodiac. The Settlement also requires Zodiac to provide, if necessary, information related to transactional data and to authenticate and certify documents. The Settlement is the product of nearly three years of hard-fought litigation as well as extensive settlement negotiations, including three formal mediation sessions presided over by a former federal judge, Layn R. Phillips. Plaintiffs and Class Counsel 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 Zodiac through

[1] Unless otherwise defined herein, all capitalized terms have the meaning ascribed 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 a 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 satisfies the required standards for preliminary approval.[2]

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 Zodiac, Hayward Industries, Inc. ("Hayward"), and Pentair Water Pool and Spa, Inc. (collectively 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. Zodiac denies all the allegations of wrongdoing in this action.

The Court recently preliminarily approved a settlement between Plaintiffs and Hayward

[2] Pursuant to PTO 32, the information the Court requested in PTO 27 is contained herein. Plaintiffs respectfully refer the Court to Exhibit 5 of the Aranoff Declaration, which indexes the corresponding pages for Plaintiffs' response to each request in PTO 27.

(the "Hayward Settlement").

B. The Settlement Negotiations

Class Counsel and Zodiac's Counsel engaged in extensive arm's length negotiations for over a year to reach the current settlement. Aranoff Decl. ¶ 4. The scope and details of the negotiations are described in the Aranoff Declaration attached hereto. *Id.* ¶¶ 4-12. Class Counsel and Zodiac's Counsel, both highly experienced and capable, vigorously advocated their respective clients' positions in the settlement negotiations. *Id.* The parties mediated this action before the Honorable Layn R. Phillips, a respected mediator of disputes of this nature. *Id.* ¶ 5.

Class Counsel and Zodiac's Counsel participated in three formal mediation sessions. The first mediation session, held on July 22, 2013, was unsuccessful. *Id.* ¶ 6. The parties held a second mediation session on March 20, 2014. *Id.* ¶ 7. The second mediation session was also unsuccessful. However, Class Counsel and Zodiac's Counsel continued to engage in sporadic settlement discussions, which included an in-person settlement discussion on July 23, 2014. *Id.* The parties held a third mediation session on October 1, 2014, during which Class Counsel and Zodiac's Counsel made some progress, but nonetheless failed to reach a settlement. *Id.* ¶ 8. Following the third mediation session, Class Counsel and Zodiac's Counsel, facilitated by Judge Phillips, continued to engage in settlement discussions. *Id.* On October 2, 2014, Judge Phillips issued a mediator's settlement proposal to both sides using a "double-blind" procedure in which neither side would know if the other had accepted the proposal unless both sides accepted. *Id.* ¶ 9. The mediator's proposal also included a term that, if both sides accepted, any disputes regarding the scope of the proposal would be submitted to Judge Phillips for binding determination. *Id.* Plaintiffs and Zodiac each accepted the mediator's proposal on October 6, 2014. *Id.* ¶ 10. The parties then negotiated the form of the written Settlement Agreement over the ensuing weeks and submitted a dispute concerning its terms to Judge Phillips. *Id.* ¶ 11.

Finally the parties signed the Settlement Agreement, with an execution date of November 4, 2014. *Id.* ¶ 12. The parties have not entered into any side agreements. *Id.*

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. Ex. 1 ¶ 22. This is the same defined Settlement Class that the Court approved in connection with the Hayward Settlement.

B. Cash Consideration

The Settlement Agreement provides that, within 10 days after Zodiac receives an Order from the Court granting Preliminary Approval of the Settlement, Zodiac will pay the Settlement Amount. *See id.* ¶ 34. The Settlement Fund shall be maintained in an Escrow Account controlled by the Parties pending final Court approval of the Settlement. *Id*. Plaintiffs and Zodiac 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 (*id.* ¶ 40) 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.* ¶ 36.

C. The Cooperation Provision

In addition to the Settlement Amount, the Agreement requires that Zodiac: (1) clarify transactional data produced by Zodiac, if necessary; and (2) authenticate documents and certify

business records produced by Zodiac. *Id.* ¶ 45.

D. Release Provisions

In exchange for the consideration described above, Plaintiffs have agreed to release Zodiac 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

FRCP 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) (Vance, J.). 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 that strongly favors the pretrial settlement of lawsuits. *See Miller v. Republic Nat'l Life Ins. Co.*, 559 F.2d 426, 428 (5th Cir. 1977). 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. P. 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) (Vance, J.). 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; 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. *See In re Chinese-Manufactured Drywall Prods. Liab. Litig.*, No. 2:09-CV-07628, 2012 WL 92498, at *7 (E.D. La. Jan. 10, 2012).

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 approval hearing.

1. The Proposed Settlement Was Achieved Without Fraud or 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); *see also In re Train Derailment Near Amite La.*, No. Civ.A. MDL No. 1531, 2006 WL 1561470, at *19 (E.D. La. May 24, 2006). 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 between Class Counsel and Zodiac's Counsel. Class Counsel and Zodiac'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 three formal mediation sessions with former Judge Phillips, an experienced mediator, and was the result of a mediator's proposal issued to the parties after the third mediation session. *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).

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

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

Another reason for counsel to recommend, and 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). After weighing these considerations against the benefit of a sure and prompt recovery for the Settlement Class, Class Counsel strongly believe the Settlement is favorable to and in the best interests of Plaintiffs and the Settlement Class.

The Settlement with Zodiac 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 Zodiac would entail a lengthy and expensive legal battle, which has already consumed approximately three years.

Additionally, Zodiac 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 attendant with further litigation 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 can be assured

that the Settlement represents an informed, educated, and fair resolution of this dispute. Fact discovery closed well before the Settlement was 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 15 current and former Zodiac 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 Serv. Praxis Principles of Learning and Teaching: Grades 7-12 Litig.*, 447 F. Supp. 2d 612, 620-21 (E.D. La. 2006) (Vance J.) ("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") (internal quotations omitted). 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. American 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 (quotation omitted).

Neither side could confidently expect a complete victory at trial that would not be subject to the potential risk and delay of appeal. Under the proposed Settlement, the Settlement Class would secure the Settlement Amount without the risk of trial or delays by appeal. Moreover,

because liability under the Sherman Act is joint and several, and PoolCorp's sales of Zodiac's products remain in the case, this Settlement in no way prejudices the Settlement 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 likely would 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 scenario envisioned by each 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). *See 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 value of the proposed Settlement 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.

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). Here, Class 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.[3]

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 that the Settlement warrants this Court's preliminary approval.

V. CERTIFICATION OF THE PROPOSED SETTLEMENT CLASS IS WARRANTED

A function of this Court in reviewing a proposed settlement of a class action is to determine whether a settlement class may be certified under Rule 23. *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). 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. This Court has already held that a similarly defined settlement class satisfied the prerequisites of Rule 23(a) and Rule 23(b) in its September 26, 2014 Orders granting

[3] 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.

preliminary approval of the Hayward Settlement (Dkt Nos. 482-83).

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"). 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).[4]

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). 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 Class Period. The proposed Class is currently estimated at approximately 70,000 direct purchasers from PoolCorp (Dkt No. 447 at 6. *See Street v. Diamond Offshore Drilling,* No. Civ.A. 00-1317, 2001 WL 568111, at *4 (E.D. La. May 25, 2001) ("it has been noted that any class consisting of more than forty members should raise a presumption that joinder is impracticable.") (internal quotations

[4] The Parties have stipulated to settlement class certification subject to the Court's approval. *See* Aranoff Decl. Ex. 1 ¶ 22.

omitted); *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.

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

Here, Plaintiffs' allegations raise questions of law and fact common to the proposed

Settlement Class, including, for example: (i) whether the antitrust laws were violated by Defendants' conduct alleged in the Second Consolidated Amended Complaint ("SCAC"), to the extent those allegations were not dismissed by the Court's ruling on Defendants' motion to dismiss directed to that pleading; (ii) whether, and to what extent, Defendants' alleged conduct caused Plaintiffs and Settlement Class Members to pay supra-competitive prices for Pool Products; and (iii) to what extent the members of the Settlement Class have sustained damages and the proper measure of damages. Any one of these issues, standing alone, establishes 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, Texas*, 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 Settlement 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 interests 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 Settlement Class have common interests and no conflicts. 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 the alleged unlawful conspiracy among Defendants—they have the same interest in establishing liability, and they all seek damages for the ensuing overcharge.

Further, as discussed *infra*, Plaintiffs have retained qualified counsel with extensive experience in class action litigation that have vigorously prosecuted this action. Thus, Plaintiffs are adequate representatives of the Settlement Class, and their counsel are qualified, experienced and capable of prosecuting this action, in satisfaction of Rule 23(a)(4).

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 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).[5]

Rule 23(b)(3) is "designed to secure judgments binding all class members, save those who

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

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*, 521 U.S. at 614-15. Certification of the proposed Settlement Class under Rule 23(b)(3) will serve these purposes. This Court has already found that the Hayward Settlement class satisfies Rule 23(b)(3)'s requirements (Dkt Nos. 482-83).

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 623; *Bell Atl. 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.

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 (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 that Defendants conspired to raise the prices of Pool Products and thus artificially inflated Pool Product prices.

Plaintiffs' expert, Dr. Gordon Rausser, summarized his economic findings applicable to all proposed Settlement Class Members in his Expert Report of Gordon Rausser, Ph.D. in Support of Class Certification for Settlement, dated August 28, 2014 ("Summary Report") (Dkt No. 473-1), based on common evidence (Defendants' transaction data, Defendants' contemporaneous documents, deposition testimony, industry studies, and the economics literature). Dr. Rausser found a product market (Pool Products distribution services) and a geographic market (the United States) in which PoolCorp exercised market power over its customers and over its suppliers, including the Manufacturer Defendants. Summary Report, Dkt No. 473-1 at 3-5. Dr. Rausser then evaluated what he considered to be evidence of anti-competitive behavior in that market by PoolCorp with the help of the Manufacturer Defendants, including, among others, the foreclosure of rivals to PoolCorp, the PoolCorp Preferred Vendor Program, most-favored-pricing clauses, and increasing the threshold for free freight. *Id*. at 5-6. This behavior, according to Dr. Rausser, allowed PoolCorp to establish what economists call a credible threat, which, together with PoolCorp's pricing system, meant that PoolCorp elevated and maintained its prices above

the levels they would otherwise have been. *Id.* at 7. The common impact was confirmed by Dr. Rausser's Common Factors regression, which demonstrated that a common set of factors accounted for 99% of the variation in prices to PoolCorp's customers. *Id.* at 7-8. Dr. Rausser quantified that common impact and established a common methodology for calculating damages through an overcharge multiple regression analysis. *Id.* at 9. He found an estimated percentage overcharge of 4.97%, which the Manufacturer Defendants' economists Dr. Vandy Howell and Dr. Michael C. Keeley confirmed did not change after correcting Dr. Rausser's error in dividing rather than multiplying the quantity of product shipped by the unit size for certain transactions (Expert Report of Vandy Howell, Ph.D., The Direct and Indirect Purchaser Cases, October 14, 2014, at 21 n. 62, Exs. V.2.A, V.2.B; Supplemental Rebuttal Expert Report of Michael C. Keeley, Ph.D. Pertaining to Class Certification for the Direct Purchaser Cases, dated October 14, 2014, at 6 n. 13) and PoolCorp's economist Dr. John H. Johnson, IV found decreased by only 0.36% due to Dr. Rausser's error in assigning incorrect units of measure for certain transactions (Dr. John H. Johnson, IV's Written Critique of the Supplemental Report of Dr. Gordon Rausser, dated October 14, 2014 ("Johnson Critique"), at 26 n. 93).[6] The percentage overcharge of 4.97% translates to estimated class-wide damages of $266.8 million. Summary Report, Dkt No. 473-1 at 9. In addition, Dr. Rausser showed that damages may be calculated for each individual Settlement Class Member by multiplying the overcharge percentage by each member's purchases. *Id.* Thus, Plaintiffs have demonstrated that they have a plausible method for proving

[6] Dr. Johnson also found that Dr. Rausser, when calculating damages, erroneously applied an inflation factor a second time. Johnson Critique Ex. 1 ¶ 9. That error does not affect the regression calculating the percentage overcharge. Dr. Johnson also criticized Dr. Rausser for not using the same reference base period for all components of Dr. Rausser's cost explanatory variable, but Dr. Johnson did not disclose the effect of doing so. Johnson Critique ¶¶ 24-25 & at 15 n. 40. It is a fair inference that, if such a change would have been favorable to the Defendants, Dr. Johnson would have revealed it.

impact and calculating damages using methods common to the Settlement Class,[7] and this Court so found in approving the Hayward Settlement. Dkt No. 482 at 28-30.

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 treatment, the Court may be faced with dozens, hundreds, or even thousands 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.

C. Class Counsel Meet the Requirements of Rule 23(g)

Pursuant to Rule 23(g) of the FRCP, a court that certifies a class must appoint class counsel. "In appointing class counsel, the court must consider: (i) the work counsel has done in

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[7] Zodiac does not waive its objections, arguments or defenses with respect to Plaintiffs' expert evidence, should there be no final settlement of the action with respect to Zodiac.

identifying or investigating potential claims in the action; (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (iii) counsel's knowledge of the applicable law; and (iv) the resources that counsel will commit to representing the class . . . ." Fed. R. Civ. P. 23(g)(1)(A).

Class Counsel are highly experienced in class action litigation, having successfully prosecuted many antitrust and other complex class actions in courts throughout the United States. Since being appointed by the Court to the Plaintiffs' Executive Committee (Dkt No. 79), Class Counsel have vigorously prosecuted this case, and committed substantial resources to this effort. Class Counsel are qualified, experienced and capable of prosecuting this action, in satisfaction of Rule 23(g).

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

Assessment of a plan of allocation of settlement proceeds in a class action under Rule 23 is governed by the same standards of review applicable to the settlement as a whole; the plan must be fair, reasonable and adequate. *See Chicken Antitrust*, 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 Chicken Antitrust*, 669 F.2d at 238.

Here, under the Plan of Allocation, the Settlement Fund first will be used to pay attorneys' fees and expenses approved by the Court. The remaining amount (the "Net Settlement Fund") will be distributed to Settlement Class Members that submit valid and timely claims. The Net Settlement Fund will be distributed to Settlement Class Members on a pro rata basis among all Settlement Class Members who submit valid and timely Claim Forms. In other words, each Settlement Class Member shall be paid a percentage of the Net Settlement Fund that each

Settlement Class Member's recognized claim for the Net Settlement Fund bears to the total of all recognized claims submitted by all Settlement Class Members who file claims.

Notice of the proposed settlement will be given by mailing and publication, and Settlement Class Members will have the opportunity to opt out of, or to object to, the proposed Settlement. The notice also will include a Claim Form, which Settlement Class Members seeking to participate in the Settlement will need to complete and send to Plaintiffs' settlement administrator, GCG. A copy of Plaintiffs' proposed Claim Form is attached as Exhibit 4 to the Aranoff Declaration.

GCG will review the Claim Forms received both for timeliness in submission and for completeness, as well as to identify any "sham" claims. If a claim is found to be deficient, GCG will send the Settlement Class Member a letter to provide them with an opportunity to cure any deficiencies.

GCG similarly will review the amount of purchases from PoolCorp provided by each Settlement Class Member in its Claim Form with a view to determining whether further verification of the amount claimed is necessary. If so, GCG will request documentation or other additional information from the Settlement Class Member in support of the Class Member's claim.

Through the claims-review process, GCG will approve an amount for each Settlement Class Member's claim. If any Settlement Class Member disagrees with GCG's determination, the matter will be presented to the Court, on notice to the affected claimant, for resolution. Plaintiffs similarly will consider GCG's determination that particular claims were untimely, and, if warranted, make a recommendation to the Court whether to accept or reject the claims.

Once all timely and valid claims by Settlement Class Members are resolved, the total

amount of all of the Settlement Class Members' recognized claims will form the basis for each Settlement Class Member's pro rata share of the Net Settlement Fund. The proportion that each Settlement Class Member's recognized claim bears to the total amount of all recognized claims will determine the dollar share of the Net Settlement Fund that each Settlement Class Member will receive.

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 (JG) (VVP), 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").

Significantly, approval of this Plan of Allocation will not reduce any non-settling Defendant's damage exposure in the case. The overcharge that the Settlement Class Members allegedly paid on their purchases from PoolCorp at inflated prices will still be the basis for damages at trial (or for any later settlement distribution). Under settled law, damages proven against non-settling defendants are first trebled, and then the amount of any prior settlement would be deducted. *See*, *e.g.*, *Flintkote Co. v. Lysfjord*, 246 F.2d 368, 397-98 (9th Cir. 1957); *In re Nat'l Mortg. Equity Corp. Mortg. Pool Certificates Sec. Litig.*, 636 F. Supp. 1138, 1152 (C.D. Cal. 1986) (citing, in a RICO treble damages case, authorities that have "uniformly accepted" the *Flintkote* rule).

Finally, Plaintiffs will not seek incentive (or service) award payments to the named

Plaintiff Class Representatives.

VII. THE PROPOSED NOTICE PLAN SATISFIES THE REQUIREMENTS OF RULE 23

Under Rule 23(e), the court must direct notice in a reasonable manner for all class members who would be bound by a proposed settlement. The Due Process Clause also gives unnamed class members the right to notice of the settlement. *Fidel v. Farley*, 534 F.3d 508, 513-14 (6th Cir. 2008) (citation omitted). Additionally, in a settlement class maintained under Rule 23(b)(3), "the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. Fed. R. Civ. P. 23(c)(2)(B).

In compliance with Rule 23(c)(2)(B), Plaintiffs' proposed Notice includes: (i) a description of the nature of the action; (ii) the definition of the Settlement Class; (iii) the class claims and the defenses to them; (iv) a description of Settlement Class Members' opportunity to appear at the hearing; (v) a description of a Class Member's right to request exclusion from the Settlement Class; (vi) the deadline for filing such requests for exclusion; (vii) the consequences of remaining in the Settlement Class; and (viii) the manner in which to obtain further information. The Notice also discloses the amount of the Settlement, a statement of the attorneys' fees sought, the names and contact information of counsel, and the reasons for settlement. A copy of Plaintiffs' proposed Notice Form is attached as Exhibit 2 to the Aranoff Declaration.

Here, Plaintiffs' proposed Notice combines Notice of the Zodiac Settlement with notice for the Hayward Settlement that this Court recently approved preliminarily. This would minimize the cost incurred by the Class. In addition, a combined notice helps to avoid confusion that separate notifications of class certification and settlement may produce. Zodiac and Hayward

were given a reasonable opportunity to review and comment on the forms of notice prior to their submission to the Court.

Information from PoolCorp's transaction data will be used to determine addresses to mail hard-copy notices to Settlement Class Members. There are approximately 70,000 individual customer names in the PoolCorp transaction data. However, these entries are currently under review and will be reduced; for example, the review will seek to identify customer name variations, customers no longer in business, customers that have since consolidated with other customers, and the like. This is itself a nontrivial project in terms of time and expense, which would then be followed by the actual mailing of the notice itself. A summary notice also will be published in *Pool & Spa News* and *Aqua*, two leading sources for industry information. A copy of Plaintiffs' proposed Summary Notice is attached as Exhibit 3 to the Aranoff Declaration.

Once the notice process begins, GCG will establish a case-specific website, which will include information regarding the proposed settlement and its status, as well as links to settlement papers and court filings. GCG also will set up and staff a toll-free settlement phone "hot-line" to respond to Settlement Class Member questions.

VIII. ATTORNEYS' FEES AND EXPENSES

Plaintiffs' proposed Notice advises the Settlement Class Members that Class Counsel will ask the Court to approve from the 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 $1,150,000, which represents one-third of the Settlement.[8] Aranoff Decl. Ex. 2 at 8-9. *See, e.g.*, *Burford v. Cargill, Inc.*, No. 05-0283, 2012 WL 5472118 (W.D. La. Nov. 8, 2012) (33.33% approved); *Jenkins v. Trustmark Nat'l Bank*, 300 F.R.D. 291, 307 (S.D. Miss. 2014)

[8] Class Counsel's request for reimbursement of expenses incurred thus far is based on their actual expenses to prosecute the case to date. As of August 5, 2014, these expenses (including shared costs paid, held costs, and outstanding invoices received but not paid) total $3,017,947.04 before receipt of July bills.

(33.33% approved; "[I]t is not unusual for district courts in the Fifth Circuit to award percentages of approximately one third."). The Notice further advises that Settlement Class Members may object to Class Counsel's request for fees and reimbursement of costs. Aranoff Decl. Ex. 2 at 9.

IX. REQUEST TO APPOINT THE CLAIMS ADMINISTRATOR AND ESCROW AGENT

Plaintiffs respectfully request the appointment of GCG to serve as Claims Administrator of the Settlement. GCG is one of the country's largest and most experienced settlement administration firms, and is the Court-appointed claims administrator for the Hayward Settlement. *See* Dkt No. 483.

GCG estimated the cost to administer the Hayward Settlement at approximately $195,000. This figure is based on the size of the class here and GCG's experience in similar cases. Plaintiffs can anticipate that separately administering the Zodiac Settlement would roughly cost about the same amount. Thus, combining notice for these two settlements, as proposed by Plaintiffs, provides significant savings to the Settlement Class. Still, many factors can impact the ultimate cost of settlement administration. Accordingly, while this $195,000 figure represents an educated estimate of the costs, final administration costs could be higher or lower.

Plaintiffs also nominate for approval Citibank as escrow agent for the proposed Settlement. Citibank is the Court-approved escrow agent for the Hayward Settlement. *See* Dkt No. 483. Citibank's administration fee is 3 basis points (0.03%) per annum on the Zodiac Settlement.

X. CONCLUSION

For the forgoing reasons, Plaintiffs request that the Court enter the proposed Preliminary Approval Order in its entirety.

Dated: November 24, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the above and foregoing Memorandum in Support of Motion for Preliminary Approval of Settlement Between Direct Purchaser Plaintiffs and Defendant, Zodiac Pool Systems, 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 24th day of November, 2014.

/s/ Adam H. Weintraub
ADAM H. WEINTRAUB