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 FINAL APPROVAL OF THE SETTLEMENTS BETWEEN PLAINTIFFS AND DEFENDANTS HAYWARD INDUSTRIES, INC. AND PLAINTIFFS AND ZODIAC POOL SYSTEMS, INC.

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Direct Purchaser Plaintiffs ("Plaintiffs") respectfully submit this memorandum of law in support of their motion for final approval of settlements with Plaintiffs and Defendants Hayward Industry, Inc. ("Hayward") and Zodiac Pool Systems, Inc. ("Zodiac," collectively with Hayward, the "Settling Defendants").[1] [2]

I. INTRODUCTION

The proposed Settlements with Hayward and Zodiac fall well within the criteria for final approval by the Court. These Settlements are the product of hard-fought litigation as well as extensive settlement negotiations, which included formal mediation sessions presided over by former federal judge Layn R. Phillips. The proposed Hayward Settlement provides the Settlement Class with $6,500,000 in cash, plus interest, and the proposed Zodiac Settlement provides the Settlement Class with $3,450,000 in cash, plus interest. In addition to the monetary settlements, each Settlement Agreement also requires the Settling Defendants to provide information related to their respective transactional data and authenticate documents. *See* Hayward Agreement ¶ 44; Zodiac Agreement ¶ 45.

Notably, as of March 11, 2015, no Class Member has objected to the proposed Settlements or Settlement Classes. The objections deadline is April 9, 2015.

In light of the uncertainty, complexity, and expenses inherent in litigation, these proposed Settlements are fair, reasonable, and adequate and should be finally approved.

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[1] The Hayward and Zodiac settlement agreements were negotiated and executed separately and independent from one another. Plaintiffs file one brief in support of final approval of both settlements for purposes of efficiency and because the same legal standards apply to both settlements.

[2] All capitalized terms not otherwise defined herein have the definitions set forth in the Settlement Agreement Between Direct Purchaser Plaintiffs and Defendant Hayward Industries, Inc., execution date May 13, 2014 ("Hayward Agreement"), and Settlement Agreement Between Direct Purchaser Plaintiffs and Defendant Zodiac Pool Systems, Inc. ("Zodiac Agreement"), executed on November 4, 2014. *See* Declaration of Ronald J. Aranoff in Support of Motions for Final Approval of Settlements Between Hayward Industries, Inc. and Zodiac Pool Systems, Inc. and Reimbursement of Expenses, dated March 12, 2015 ("Aranoff Decl."), Exhibit 1 (Hayward Agreement) and Exhibit 2 (Zodiac Agreement).

II. BACKGROUND

A. The Litigation

This litigation began in late 2011. Plaintiffs alleged a conspiracy between Pool Corporation, SCP Distributors LLC, and Superior Pool Products LLC (collectively, "PoolCorp"), and three of PoolCorp's leading suppliers—the Manufacturer Defendants—Hayward, Zodiac, and Pentair Water Pool and Spa, Inc. (collectively with PoolCorp, "Defendants"). As a result of the Court's rulings on Defendants' motions to dismiss (R. Doc. 221; R. Doc 346), Plaintiffs' Section 1 claim has been structured to assert three vertical conspiracies—between PoolCorp and each of the three Manufacturer Defendants—and one horizontal conspiracy comprised of the three Manufacturer Defendants and PoolCorp to raise the "free freight" minimum on product orders. 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. Both Hayward and Zodiac deny all the allegations of wrongdoing in this action.

B. The Settlement Negotiations

The Settlement Agreements with Hayward and Zodiac arise from extensive arm's-length and good faith negotiations. Aranoff Decl. ¶¶ 4, 13-30. The scope and details of the negotiations are described in the Aranoff Declaration attached hereto. Class Counsel, Hayward's Counsel, and Zodiac's Counsel, all highly experienced and capable, vigorously advocated their respective clients' positions in settlement negotiations. The parties participated in several formal mediation sessions before Hon. Layn R. Phillips (U.S. District Judge retired), a respected

mediator of disputes of this nature, as well as engaged in informal settlement discussions in person and by telephone. *Id*. ¶¶ 13-30. Prior to each mediation session, the parties prepared confidential mediation statements and supporting evidence. Aranoff Decl. ¶ 4.

1. The Hayward Settlement Negotiations

Class Counsel and Hayward's Counsel participated in two formal mediation sessions. The first mediation session, held on July 22, 2013, was unsuccessful. *Id*. ¶ 14. 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 (R. Doc. 334), the parties held a second mediation session on March 20, 2014. *Id*. ¶ 15. At that session, Plaintiffs and Hayward made 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*. ¶ 16. On March 28, 2014, Judge Phillips issued a mediator's 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*. ¶ 17. Plaintiffs and Hayward each accepted the mediator's proposal on April 1, 2014. *Id*. ¶ 18. Over the next few weeks, the parties negotiated the Settlement and signed the Settlement Agreement with an execution date of May 13, 2014. *Id*. ¶¶ 19-21.

2. The Zodiac Settlement Negotiations

Class Counsel and Zodiac's Counsel participated in three formal mediation sessions. The first mediation session, held on July 22, 2013, was unsuccessful. *Id*. ¶ 25. The parties held a second mediation session on March 20, 2014. *Id*. ¶ 26. The second mediation session was also unsuccessful. However, Class Counsel and Zodiac's Counsel continued to engage in 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 with Judge Phillips, during which Class Counsel and Zodiac's Counsel made progress, but nonetheless failed to reach a settlement. *Id.* ¶ 27. 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 again using a "double-blind" procedure. *Id.* ¶ 28. Plaintiffs and Zodiac each accepted the mediator's proposal on October 6, 2014. *Id.* ¶ 29. 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.* ¶¶ 30-31. Finally the parties signed the Settlement Agreement, with an execution date of November 4, 2014. *Id.* ¶ 32.

III. PROVISIONS OF THE SETTLEMENT AGREEMENTS

A. The Settlement Classes

Both the Hayward and Zodiac Settlement Agreements define the Settlement Class identically 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 Hayward Agreement ¶ 22; Zodiac Agreement ¶ 22. Also excluded from the Settlement Classes are any Class Members who timely elect to opt out of either or both of the Settlement Classes.

B. The Terms of the Settlement Agreements

The Settlement Agreements include the following relevant provisions:

***Settlement Amounts*:** Hayward has agreed to pay a settlement amount of $6,500,000 in cash and Zodiac has agreed to pay a settlement amount of $3,450,000 in cash. *See* Hayward

Agreement ¶ 35; Zodiac Agreement ¶ 34. Moreover, as part of the Zodiac Settlement, Zodiac agreed to waive its right to attorneys' fees to which it was entitled to in connection with a discovery dispute. *See* Zodiac Agreement ¶ 39. Additionally, the Settlement Agreements provide 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, and expenses. Hayward Agreement ¶¶ 34, 39; Zodiac Agreement ¶¶ 36, 40.

***Cooperation*:** Hayward and Zodiac have each agreed to answer questions about their respective transactional data, if necessary, and authenticate documents and certify business records. *See* Hayward Agreement ¶ 44; Zodiac Agreement ¶ 45.

Releases: In exchange for the consideration described above, Plaintiffs have agreed to release Hayward and Zodiac from any and all claims arising out of or resulting from Defendants' alleged unlawful conspiracy. *See* Hayward Agreement ¶¶ 29-31; Zodiac Agreement ¶¶ 29-31.

IV. PRELIMINARY APPROVAL ORDERS AND CERTIFICATION OF SETTLEMENT CLASSES

On September 26, 2014 and December 22, 2014, the Court preliminarily approved, respectively, the Hayward Settlement and the Zodiac Settlement. R. Doc 483; R. Doc. 547. For each Settlement, the Court certified the class for settlement purposes, and authorized Class Counsel to disseminate Notice and Claim forms by direct mail and publication. *Id*. Further, for each Settlement, the Court determined that the Settlement Class satisfied the Rule 23(a) requirements of numerosity, commonality, typicality and adequacy. R. Doc 483 ¶ 2; R. Doc. 547 ¶ 2. The Court also found that the Settlement Classes satisfied the Rule 23(b)(3) requirements of predominance and superiority. *Id*. Upon the Zodiac Settlement preliminary approval grant, the Court vacated the notice and final approval schedule directed for the Hayward Settlement, and

issued a new joint schedule applicable to both Settlements. R. Doc. 547 at 1. Thus, there is no need for the Court to revisit any of the Rule 23(a) or (b)(3) requirements with respect to the Settlements.

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

The Settlement Class Members are entitled to notice of the proposed Settlement and an opportunity to be heard. *See* Fed. R. Civ. P. 23(e); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985). Notice of the Settlements and proposed Settlement Classes was made jointly, per the Court's December 22, 2014 Order. *See* R. Doc. 547. The Notice was designed to provide members of the proposed Settlement Classes with (among other things) (1) a clear and detailed description of the terms of the Settlements; (2) the date of this Court's hearing on final approval of the Settlements; (3) the deadlines for opting out of the proposed Settlement Classes or notifying the Court of an objection to the Settlements; (4) phone and internet contact information for the Settlements administrator, to permit members of the proposed Settlement Classes to obtain answers to questions or other information; and (5) notice that, in the event the Court finally approves the Settlements, Class Counsel will seek from the Court reimbursement of costs and expenses the amount not to exceed one-third of each Settlement. The Notice was accompanied by a Claim Form, the format of which was agreed between Plaintiffs, Hayward, and Zodiac, and approved by the Court. R. Doc. 547.

A. The Notice

On January 16, 2015, Garden City Group, LLC ("GCG"), the Settlements Claims Administrator retained by Class Counsel, mailed the Notice and Claim Forms (the "Notice Packet") to approximately 74,842 Class Members identified using the transaction data produced by PoolCorp. *See* Declaration of Jennifer M. Keough Regarding Notice and Settlement

Administration, ("Keough Decl."), attached hereto ¶¶ 6-8. As of March 11, 2015, GCG received 221 Notice Packets returned by the U.S. Postal Service with forwarding address information that were promptly re-mailed to the updated address provided. *Id*. ¶ 9. In addition, 10,568 Notice Packets were returned by the U.S. Postal Service without forwarding address information. *Id*. In total 64,274 Class Members were sent Notice Packets that were not subsequently returned to GCG. *Id*. ¶ 10. As of March 11, 2015, Plaintiffs are not aware of any objections to the Hayward and Zodiac Settlements, although objections are due by April 9, 2015. *Id*. ¶ 19. GCG received only 9 requests for exclusion from the Hayward and Zodiac Settlements. *Id*. ¶ 18; *see id*. Exhibit C (identifying opt-outs). Requests for exclusion are due by April 9, 2015. R. Doc ¶ 547. As of March 11, 2015, GCG has received 1,222 Claim Forms. *Id*. ¶ 14. Plaintiffs anticipate receipt of additional Claim Forms since the claims submission deadline is December 11, 2015.

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

As per the approved Notice plan, Plaintiffs also supplemented direct mail distribution with publication of a Summary Notice in industry publications, and maintain a website and toll-free telephone number. Summary Notice was published in the following industry publications: *Pool & Spa News* (January 23, 2015 issue) and *Aqua* (February 2015 issue). *Id*. ¶ 11. Plaintiffs also maintain a website,[3] administered by GCG, dedicated to the Hayward and Zodiac Settlement. *Id*. ¶ 12. The website has been operational since January 15, 2015, and is accessible twenty-four hours a day, seven days a week. The website provides information, including important deadlines, and answers frequently asked questions. Website visitors can also download a Notice Packet, the Court's preliminary approval orders, the Settlement Agreements, and other relevant documents. As of March 11, 2015, the website received 508 visits. *Id*.

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

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

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

The Court's preliminary approval orders directed that notice of the two proposed settlements be given by individual mailing and publication. R. Doc 483 ¶¶ 9-11; R. Doc. 547 ¶¶ 9-11. This notice plan, which Plaintiffs have since implemented, fulfills the requirements of Due Process and Rule 23. *See In re Train Derailment Near Amite, La.*, MDL No. 1531, 2006 WL 1561470, at *19 (E.D. La. May 24, 2006) (Court held that the mailing of notice of class certification, claim submission and opt-out procedures to all known plaintiffs and the publication of the notice in local newspapers was "reasonably calculated, under all of the circumstances, to apprise the interested parties of the pendency of the action" and to afford them the opportunity to opt out if they so desired); *In re Prudential–Bache Energy Income P'ships Sec. Litig.*, MDL No. 0888, 1995 WL 20613, at *2 (E.D. La. Jan. 6, 1995) (first class mail and publishing notice

complied with fundamental due process rights as notice reasonably calculated, under all circumstances, to apprise interested parties).[4]

D. Both Settling Defendants Have Satisfied CAFA's Additional Notice Requirement

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

Zodiac filed a declaration of CAFA compliance on January 9, 2015 (R. Doc. 560).[5] The Declaration states that Zodiac satisfied CAFA's notice requirement by serving notice to the appropriate state and federal officials on November 26, 2014. *Id.* at 1-2. As required by CAFA, this notice was served within ten (10) days after the November 24, 2014 filing of the proposed Zodiac Settlement with the Court.

Hayward filed a declaration of CAFA compliance on February 25, 2015. R. Doc. 597.[6] The Declaration states that Hayward satisfied CAFA's notice requirement by serving notice to the appropriate state and federal officials on February 6, 2015. *Id* at 1-2. Although Hayward

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

[5] Declaration of J. Brent Justus Regarding Zodiac's Compliance with 28 U.S.C. § 1715.

[6] Declaration of Richard Hernandez Regarding Hayward Industries, Inc.'s Compliance with 28 U.S.C. § 1715.

failed to meet the CAFA 10-day notice deadline, the Court should hold this of no moment because Hayward has served notice more than 90 days before the final fairness hearing, being held on May 14, 2015. Thus, providing federal and state officials sufficient notice and opportunity to be heard concerning the [s]ettlement. *See In re Processed Egg Products Antitrust Litig.*, 284 F.R.D. 249, 258 n. 12 (E.D. Pa. 2012) ("Over ninety days have elapsed since [defendant] served the appropriate state or federal officials with the CAFA notice, and there have been no requests for hearings or objections to the settlement made. It follows that, although the notice requirements under CAFA have not been fully met on a technical basis, the substance of the requirements have been satisfied insofar as giving federal and state officials sufficient notice and opportunity to be heard concerning the [s]ettlement."); *Kay Co. v. Equitable Prod. Co.*, No. 2:06-CV-00612, 2010 WL 1734869, at *4 (S.D. W.Va. Apr. 28, 2010) ("Although [defendant] sent notice packets to the appropriate State and Federal officials, it did not provide such notice promptly after the Agreement was filed, as required by CAFA.... Since more than 100 days have passed since service was perfected and since there have been no adverse comments from any of the aforesaid State or Federal officials, the Court FINDS that compliance with CAFA is satisfactory.") (capitalization in original).

VI. THE PROPOSED SETTLEMENTS SHOULD BE GIVEN FINAL APPROVAL BECAUSE THEY ARE FAIR, REASONABLE, AND ADEQUATE

A. Standard for Granting Final Approval of the Settlements

It has long been settled that compromises of disputed claims are favored by the courts. *See Williams v. First Nat'l Bank*, 216 U.S. 582, 595 (1910). This is particularly true in the context of class actions. *See, e.g.*, *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977). Class action settlements minimize the litigation expenses of the parties and reduce the strain that litigation imposes upon already scarce judicial resources. The Fifth Circuit has repeatedly held

that, as a result of their highly-favored status, settlements "will be upheld whenever possible because they are a means of amicably resolving doubts and preventing lawsuits." *Miller v. Republic Nat'l Life Ins. Co.*, 559 F.2d 426, 428 (5th Cir. 1977) (internal quotations omitted). *Turner v. Murphy Oil USA, Inc.*, 472 F. Supp. 2d 830, 843 (E.D. La. 2007) ("[T]here is a 'strong judicial policy favoring the resolution of disputes through settlement' .... The public interest favoring settlement is especially apparent in the class action context where claims are complex and may involve a large number of parties, which otherwise could lead to years of protracted litigation and sky-rocketing expenses.") (quoting *Smith v. Crystian*, 91 F. App'x 952, 955 (5th Cir. 2004)).

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

B. The Proposed Settlements Meet the Standards for Final Approval

1. The Proposed Settlements Were Achieved Without Fraud or Collusion

"The fact that a class action settlement is reached after arms' length negotiations by experienced counsel generally gives rise to a presumption that the settlement is fair, reasonable, and adequate." *In re Train Derailment*, 2006 WL 1561470, at *19; *see Faircloth v. Certified Fin. Inc.*, No. 99-3097, 2001 WL 527489, at *4 (E.D. La. May 16, 2001); Newberg on Class Actions § 11:41. 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 Settlements are the product of hard-fought, arm's-length negotiations by experienced counsel with the assistance of a mediator. *See In re Currency Conversion Fee Antitrust Litig.*, 263 F.R.D. 110, 122 (S.D.N.Y. 2009), *aff'd sub nom Priceline.com, Inc. v. Silberman*, 405 F. App'x 532 (2d Cir. 2010) (settlement reached after mediation is entitled to a presumption of arms-length dealings and fairness); *Billitteri v. Secs. Am., Inc.*, No. 3:09-cv-01568-F, 2011 WL 3586217, at *10 (N.D. Tex. Aug. 4, 2011) ("[T]here is no evidence that the settlement was obtained by fraud or collusion. On the contrary, this settlement was diligently negotiated after a long and hard-fought process that culminated in ultimately successful mediation ....") (citation omitted).

Settlement negotiations with Hayward spanned nearly one year and included formal mediation sessions, teleconferences and email exchanges. Aranoff Decl. ¶¶ 13-16. Moreover, the Hayward Settlement was reached only after the parties agreed to a double-blind mediator's proposal. Aranoff Decl. ¶¶ 17-18. The best interests of the Settlement Class were of paramount importance throughout the negotiation process.

Similarly, settlement negotiations with Zodiac spanned over one year and included three formal mediation sessions and settlement discussions, which included an in person meeting. Aranoff Decl. ¶¶ 24-27. The Zodiac Settlement was also reached only after the parties agreed to a double-blind mediator's proposal. Aranoff Decl. ¶¶ 28-29. Again, the best interests of the Settlement Class were of paramount importance throughout the negotiation process.

Moreover, Class Counsel conducted its own extensive and in-depth investigation of the facts of this case, and concluded that each of these Settlements was in the best interest of the class. By the time these settlements were reached fact discovery had closed; Class Counsel had reviewed over 4 million pages of documents produced by Defendants, and had deposed fact witnesses. *See* Aranoff Decl. ¶¶ 5-9. Accordingly, Plaintiffs had significant knowledge of Defendants' alleged antitrust conspiracy and the strengths and weaknesses of the parties' claims and weaknesses when each of the Settlements was reached.

Furthermore, the parties have been represented by seasoned class action litigators. Class Counsel is experienced in similar antitrust class actions, and unreservedly recommended each of these Settlements. Counsel for Hayward, McCarter and English LLP, and Counsel for Zodiac, McGuire Wood, LLP, are similarly experienced and likewise support the Settlement. "[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).

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

Courts recognize that antitrust class actions are "long, complex and expensive" to prosecute. *In re Lease Oil Antitrust Litigation (No. II)*, 186 F.R.D. 403, 424 (S.D. Tex. 1999); *see also*, *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 118 (2d Cir. 2005) ("Federal

antitrust cases are complicated, lengthy, and bitterly fought."); *In re Linerboard Antitrust Litig.*, 296 F. Supp. 2d 568, 577 (E.D. Pa. 2003) ("[a]n antitrust class action is arguably the most complex action to prosecute.... The legal and factual issues involved are always numerous and uncertain in outcome") (internal quotations omitted). It is well-established that antitrust class action litigation has "undeniable inherent risks, such as whether the class will be certified and upheld on appeal, whether the conspiracy as alleged in the Complaint can be established, whether Plaintiffs will be able to demonstrate class wide antitrust impact and ultimately whether Plaintiffs will be able to prove damages." *In re Packaged Ice Antitrust Litig.*, No. 08-MD-1952, 2011 WL 717519, at *10 (E.D. Mich. Feb. 22, 2011). Continuing this litigation against Hayward and Zodiac would entail a lengthy and complex battle.

Hayward and Zodiac were capable and fully prepared to defend themselves and continue litigating this case. Had the case continued, Hayward and Zodiac would have asserted various defenses, and a jury trial might well turn on questions of proof, making the outcome inherently uncertain for the parties. *In re Linerboard Antitrust Litig.*, 292 F. Supp. 2d 631, 639 (E.D. Pa. 2003); *In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 475–76 (S.D.N.Y. 1998) ("Antitrust litigation in general, and class action litigation in particular, is unpredictable . . . . [T]he history of antitrust litigation is replete with cases in which antitrust plaintiffs succeeded at trial on liability, but recovered no damages, or only negligible damages, at trial, or on appeal."). A trial on the merits of this case would entail considerable expense, including numerous experts, further pre-trial motions, and thousands of additional hours of attorney time. Moreover, even after trial is concluded, there would likely be one or more lengthy appeals.

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

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

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

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

4. The Probability of Plaintiffs' Success on the Merits

To assess the reasonableness of a proposed settlement seeking monetary relief, an inquiry "should contrast settlement rewards with likely rewards if case goes to trial." *In re Chicken Antitrust Litig. 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 (internal quotations omitted).

Neither side could confidently expect a complete victory at trial that would not be subject to the potential risk and delay of appeal.[7] Although Class Counsel are confident that the Plaintiffs claims are meritorious, there is always an inherent risk of recovering little or nothing at trial given the inherent uncertainties in this type of litigation. *In re Packaged Ice*, 2011 WL 717519, at *7 ("Experience proves that, no matter how confident trial counsel may be, they cannot predict with 100% accuracy a jury's favorable verdict, particularly in complex antitrust litigation." Under the proposed Settlements, the Settlement Classes secure the Settlement Amounts without the risk of trial or delays by appeal. Moreover, even assuming a favorable verdict and damages were awarded at trial, any resulting recovery likely would not be seen for years, and would be greatly diminished by the continued costs of litigation. In light of these considerations, Plaintiffs and Class Counsel respectfully submit that certain recovery through settlement is the preferred result.

5. The Range of Possible Recovery

The range of possible recovery must be juxtaposed against the likelihood of recovery. In evaluating the reasonableness of a proposed settlement, "the present value of the damages plaintiffs would likely recover if successful, appropriately discounted for the risk of not prevailing, should be compared with the amount of the proposed settlement." *In re Prudential Ins. Co. America Sales Practice Litig. Agent Actions*, 148 F.3d 283, 322 (3d Cir. 1998) (internal

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

quotations omitted).[8] Moreover, the determination of reasonable settlement is not susceptible to a mathematical equation yielding a particularized sum. *See In re Relafen Antitrust Litig.*, 231 F.R.D. 52, 73 (D. Mass. 2005) ("A fine-tuned equation by which to determine the reasonableness of the size of a settlement fund does not exist."); *In re Combustion, Inc.*, 968 F. Supp. 1116, 1129 (W.D. La. 1997) ("The proposed settlement need only reflect a fair, reasonable, and adequate estimation of the value of the case in view of what might happen at trial.").

Here, the proposed Settlements totaling $9.95 million in cash are within the range of possible recovery. These Settlements represent approximately 4% of Plaintiffs estimated class-wide damages ($266.8 million). R. Doc. 473-1 at 9; *see In re Prudential Sec. Inc. Ltd. P'ships Litig.*, MDL No. 1005, 1995 WL 798907 (S.D.N.Y. Nov. 20, 1995) (approving settlement of between 1.6% and 5% of claimed damages). As the Court stated, in *Parker v. Anderson,* 667 F.2d 1204 (5th Cir. 1982):

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

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

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

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.*, 2005 WL 3148350, at *21. Here, Class Counsel has considerable experience in complex class action litigation and antitrust law and has agreed to settle this action. Plaintiffs have also agreed to the terms of the Hayward and Zodiac settlements.

Further, as of March 11, 2015, Class Counsel has not received any objections, and only eight exclusion requests. Keough Decl. ¶¶ 18-19. The objections deadline is April 9, 2015. To the extent any timely objections are received after the filing of this brief, Class Counsel will address those objections in any reply filings as provided for in the Court's December 22, 2014 Order. R. Doc. 547 ¶ 20. The attitude of absent class members, expressed either directly or indirectly by their failure to object after notice or high level of participation in the proposed settlement program, is an additional factor on which district courts generally place heavy emphasis. *See In re Oil Spill by Oil Rig Deepwater Horizon*, 295 F.R.D. 112, 150 (E.D. La. 2013) ("one indication of the fairness of a settlement is the lack of or small number of objections"); *Quintanilla v. A & R Demolition Inc.*, No. H-04-1965, 2008 WL 9410399, at *5 (S.D. Tex. May 7, 2008) ("If only a small number of objections are received, that fact can be viewed as indicative of the adequacy of the settlement").

In light of the foregoing analysis, Plaintiffs respectfully submit that the Settlements are fair, reasonable and adequate, and warrant this Court's final approval.

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

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

The Plan of Allocation as set forth in the Notice describes in detail how each of the Settlement Funds will be allocated. Under the Plan of Allocation, up to one-third of each of the Hayward Settlement Fund ($2,166,667) and the Zodiac Settlement Fund ($1,150,000) may be used to pay Class Counsel's expenses upon Court approval. Additionally, the parties have agreed to deduct notice costs from each of the Hayward Settlement and Zodiac Settlements, out of the Settlement Funds. The remaining amounts (the "Net Hayward Settlement Fund" and the "Net Zodiac Settlement Fund," respectively) will be distributed to class members that submit valid and timely claims.

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

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").

In connection with the preliminary approval of the Zodiac Settlement, Class Counsel addressed in its briefing why the proposed Plan of Allocation is fair and reasonable. In its December 22, 2015 Preliminary Approval Order, this Court took note of the proposed Plan of Allocation and, after a review of Plaintiffs' submission held, "the allocation plan to be fair and unbiased." *In re Pool Products Distribution Market Antitrust* Litig. MDL No. 2328, 2014 WL 7338958, at *13 (E.D. La. Dec. 22, 2014) (Vance, J.). No facts have changed since the Court made its finding at Preliminary Approval. In sum, the Plan of Allocation in this case is based on recognized principles and falls within the mainstream of distribution plans routinely approved.

VIII. CONCLUSION

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

Dated: March 12, 2015

Respectfully submitted,

/s/ *Leonard A. Davis*

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

Direct Purchaser Plaintiffs' Liaison Counsel

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

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

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

Executive Committee Counsel for the Direct Purchaser Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that the above and foregoing Memorandum in Support of Motion for Final Approval of the Settlements Between Direct Purchaser Plaintiffs and Defendants Hayward Industries, Inc. and 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 12th ay of March, 2015.

/s/ *Leonard A. Davis*