UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

IN RE: POOL PRODUCTS DISTRIBUTION MARKET ANTITRUST LITIGATION	*	**MDL NO. 2328**
	*	**SECTION R/2**
THIS DOCUMENT RELATES TO:	*	
Kistler, et al. v. Pool Corporation, et al, No. 12-1284 (Indirect Purchaser Plaintiffs)	*	**JUDGE VANCE**
	*	**MAG. JUDGE WILKINSON**

SPECIAL MASTER'S PRELIMINARY ALLOCATION REPORT
(Regarding Hayward/IPP proposed settlement)

Pursuant to this Court's Order of August 22, 2014, and in accordance with Fed. R. Civ. Pro. 53, the undersigned Special Master respectfully submits the following preliminary recommendations for allocating the $1.5 million settlement fund resulting from the Indirect Purchaser Plaintiffs (IPP) settlement with Hayward Industries, Inc. ("Hayward").[1] First, the Special Master recommends an apportionment among a single class of IPP plaintiffs rather than separate apportionments among the four states of Arizona, California, Florida, and Missouri. Second, the Special Master proposes a *pro rata* allocation among claimants based on the dollar amount of settlement-qualifying Pool Products purchased by each claimant during the settlement period. Third, the Special Master recommends certain documentation protocols for verification of claims by the Claims Administrator. Finally, the Special Master suggests enhancement payments to the Class Representatives in this settlement of $1,500 each.

[1] This report is preliminary since the Court has not yet ruled on the motion by Class Counsel for preliminary approval of the proposed settlement, and changes to these recommendations may be necessary depending upon the ruling of the Court on that motion.

I. BACKGROUND

This antitrust dispute arises from allegations that three manufacturers of pool products, Hayward, Pentair Water Pool & Spa, Inc. ("Pentair"), and Zodiac Pool Systems, Inc. ("Zodiac") participated in a conspiracy with distributor Pool Corporation ("PoolCorp") and its affiliates involving unlawful vertical agreements for the purposes of raising, fixing, maintaining, and/or stabilizing the price of Pool Products[2] in the Pool Distribution Market at artificially high levels. The IPP class, through Class Counsel, alleges defendants' conduct violated state antitrust provisions of (1) Ariz. Rev. Stat. §§ 44-1401, *et seq.*; (2) the Cartwright Act, Cal. Bus. & Prof. Code §§ 16720, *et seq.*; (3) the Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200, *et seq.*; (4) the Florida Deceptive and Unfair Trade Practices Act, Fl. Stat. §§ 501.201, *et seq.*, including §501.204, and (5) the Missouri Merchandising Practices Act, Mo. Ann. Stat. §§ 407.010, *et seq*. The complaint further alleges that class members were harmed by this anticompetitive conduct through pass-through overcharges (estimated at 4.97% of the price by Dr. Gordon Rausser) on purchases made from dealers in the PoolCorp distribution network. Hayward and the other alleged co-conspirators deny the allegations.

According to the Amended Settlement Agreement, the Settling Plaintiffs are defined as those Indirect Purchaser Plaintiffs residing (at the time of purchase) in one of four Settling Jurisdictions—Arizona, California, Florida, and Missouri—who purchased Pool Products not for resale within the Settling Jurisdiction at any time from January 1, 2008 through July 16, 2013.

[2] As defined in the amended Settlement Agreement, "Pool Products" means "the equipment, products, chemicals, parts or materials for the construction, maintenance, repair, renovation or service of residential and (except in the State of Missouri) commercial swimming pools, including, among other goods, chemicals, pumps, filters, heaters, covers, cleaners, steps, rails, diving boards, pool liners, pool walls, and white goods (the parts necessary to maintain pool equipment) manufactured by Defendants and sold directly or indirectly by Pool Corporation, or any of its subsidiaries, including, but not limited to, SCP Distributors LLC ('SCP') and Superior Pool Products LLC ('Superior') (collectively, 'Pool Corporation')."

Within the state of Missouri only, the purchase also must have been for personal, family, or household use.

The parties have litigated this case for approximately two years, engaging in written discovery, deposing more than 80 witnesses, consulting with experts, reviewing relevant documents, responding to motions, and attending and participating in Court hearings. The original complaint of the IPP class has been amended twice.[3] The Settlement Agreement between Hayward and the IPP class was developed after this discovery process and following two day-long mediations. The Parties submitted a joint motion for preliminary approval of this Settlement on June 10, 2014. Hayward also entered into a parallel settlement with the Direct Purchaser Plaintiffs to resolve all claims related to the Action. In consideration for the $1.5 million in funds paid into this "all-in" settlement, the IPP class in turn agrees to release all claims against Hayward. Following a Motion Hearing before this Court on August 14, 2014, the Parties submitted a revised Joint Motion for Preliminary Approval on August 22, 2014. The Parties also filed a Motion to Supplement their Motion for Preliminary Approval with an Amendment to the Settlement Agreement on September 29, 2014.

On August 22, 2014, this Court issued an Order appointing Richard C. Stanley as Special Master for the proposed Hayward/IPP settlement. The Order charged the Special Master with recommending a plan of allocation for the settlement fund. Pursuant to that Order, the Special Master submits this report.

Based upon conversations with Class Counsel and the Magistrate Judge, and upon review of the Court's Order, the Special Master has undertaken to examine and make recommendations upon the following four issues: (1) whether the settlement fund (after deduction of attorney's fees,

[3] *See* Third Amended Complaint, Rec. Doc. 290. The Special Master used the Third Amended Complaint for the purposes of this report.

litigation costs, and administrative costs) should be apportioned among claimants according to their state of residence, such that a separate fund would be created for each state; (2) a method of allocation of settlement funds among IPP class members; (3) a recommended protocol for determining valid and payable claims; and, (4) recommendations for enhancement payments to the named class representatives.

A. Documents Considered

In addition to the pleadings in this action, the Special Master has reviewed the following documents:

a) Indirect Purchaser Plaintiffs' Third Amended Class Action Complaint;

b) Hayward Industries, Inc.'s Answer and Affirmative Defenses to Indirect Purchaser Plaintiffs' Third Amended Class Action Complaint;

c) Depositions of Class Representatives: Jean Bove of California, Kevin Kistler of Arizona, Peter Mougey of Florida, and Ryan Williams of Missouri;

d) The Settlement Agreement;

e) First Amendment to Settlement Agreement, filed September 29, 2014.

f) Proposed Claim Form, filed August 22, 2014, Rec. Doc. 468-11;

g) Proposed Notice Plan, filed August 22, 2014, Rec. Doc. 468-8;

h) Memorandum in Support of Joint Motion for Preliminary Approval of Proposed Class Settlement ("Memorandum in Support");

i) Transcript of Motion Hearing dated August 14, 2014, Rec. Doc. 462;

j) Expert Report of Dr. Keith Leffler dated April 10, 2014;

k) Supplemental Report of Dr. Gordon Rausser dated July 6, 2014;

l) Expert Report of Dr. Gordon Rausser in Support of Class Certification for Settlement dated August 28, 2014;

m) Direct Purchaser Plaintiffs' Responses to the Matters Raised by the Court in Pretrial Order No. 27; and,

n) This Court's Order and Reasons, dated May 24, 2013, issued in response Defendant's Motion to Dismiss Indirect Purchasers' State Law Claims, Rec. Doc. 250.

II. Recommendations of the Special Master

1. Apportionment of Settlement Fund

The Hayward/IPP settlement resolves claims by residents of four states made under similar state law statutory schemes. Although the relevant statutes of each state are different, the Special Master inquired of Class Counsel whether it was their contention or belief that any material differences existed among these state laws that could support substantially different recoveries for residents of the four states in question. Class Counsel responded that, in their view, there was no substantial difference in the available recovery to IPP class members under these state statutes. Our review of the relevant laws and independent research supports this conclusion.[4] If successful on their claims at trial, plaintiffs in each state would be entitled to recover the 4.97% pass-through overcharge as damages,[5] assuming a full recovery. Moreover, the statute of limitations for each

[4] In its Order and Reasons dated May 24, 2013 (Rec. Doc. 250), the Court found that each state involved in this class action either expressly allows for standing in antitrust cases by indirect purchaser plaintiffs pursuant to *California v. ARC America Corp*., 490 U.S. 93, 101-02 (holding the *Illinois Brick* rule which limits federal antitrust recoveries under the Sherman Act to direct purchasers does not preempt recovery for indirect purchasers under state antitrust laws) or the state has not disallowed such claims under existing state law. The Court has concluded, therefore, that recovery of alleged damages for indirect purchasers under the applicable laws of the four states in question is, at the very least, permissible.

[5] A 4.97% overcharge estimate is used in this allocation report based upon on Dr. Rausser's supplemental expert report dated July 6, 2014 and his report dated August 28, 2014 in support of class certification of the direct purchaser settlement. The Special Master notes that these two reports were prepared for the direct purchaser class and use a timeframe of January 2008-November 2011, which is different from the time period used in the amended Settlement Agreement. The expert who calculated damages for the indirect purchaser class, Dr. Leffler, used Dr. Rausser's original report and overcharge estimate, adopting that overcharge estimate on behalf of the IPP class, but has not

state law claim is four years or more, which generally supports the validity of claims within the settlement period (January 1, 2008 through July 16, 2013).[6] Arizona alone allows for the possibility of trebling of damages, but only when the finder of fact determines that "the violation is flagrant." Ariz. Rev. Stat. Ann. § 44-1408. Similarly, under the Missouri Merchandising Practices Act, the court has the discretion to award punitive damages in addition to actual damages. Mo. Ann. Stat. § 407.025. The Special Master, however, is not aware of any facts that would demonstrate that an increase in compensation for Arizona or Missouri claimants is warranted for the purposes of this settlement. Because each statute provides a substantially similar basis for recovery of compensatory damages, the Special Master does not recommend a state-by-state apportionment of this settlement fund for IPP plaintiffs.

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issued a new report since Dr. Rausser's numbers were revised. Assuming Dr. Leffler would again attest to the full overcharge being passed-on to the indirect class, Dr. Rausser's 4.97% overcharge estimation would be the maximum recovery that could reasonably be advanced by the indirect purchaser plaintiffs. Dr. Leffler also does not touch on how far beyond November 2011 the overcharge extends, though the class in this settlement includes claimants who made purchases up to July 2013. The Special Master has not independently examined, and thus does not opine on, the scope or credibility of either report at this time, but notes that these opinions are the source for his recovery calculation in the event that the Court finds that further investigation on this issue should be required.

[6] In Arizona, the claim is "barred if it is not commenced within four years after the cause of action accrues" Ariz. Rev. Stat. Ann. § 44-1410; In California, under the Unfair Competition Law, "any action to enforce any cause of action pursuant to this chapter shall be commenced within four years after the cause of action accrued," Cal. Bus. & Prof. Code § 17208, and the statute of limitations for Cartwright Act claims is also four years. *See Bulletin Displays, LLC v. Regency Outdoor Adver., Inc.*, 518 F. Supp. 2d 1182, 1185 (C.D. Cal. 2007); In Florida, "an action founded on a statutory liability" such as the Florida Deceptive and Unfair Trade Practices Act is subject to a four-year limitation period. Fla. Stat. Ann. § 95.11(3)(f); In Missouri, "An action upon a liability created by a statute," such as the Missouri Merchandising Practices Act, is subject to a five-year limitation period. Mo. Ann. Stat. § 516.120.

The first complaint in this action was filed on May 17, 2012 (Rec. Doc. 1), which would indicate that some claims included within the Settlement Agreement (January 1, 2008 through May 16, 2008) *may* be time-barred by a four-year statute of limitations. This issue has not been litigated, however, and the Defendants obviously saw value in including these claims within the Settlement Class when the Agreement was signed. Claims that are potentially time-barred may be deserving of a lesser recovery in certain circumstances, but such a determination could require a fact-intensive inquiry that would increase significantly the cost to administer this settlement. Therefore, weighing the cost of administration and the limited potential recovery to class members available under this settlement, the Claims Administrator recommends at this time to treat all claims similarly within the class period, but reserves the option to revisit this issue in the context of any future settlements.

Originally, Class Counsel suggested that a percentage of the settlement fund should be apportioned to each state corresponding to data metrics such as census data, or the dollar amount of pool products sold in that State. After further consideration, and reviewing how that apportionment might be calculated and implemented, however, such a division seemed unnecessary (and perhaps even arbitrary) in light of the substantial homogeneity of available recoveries for compensatory damages under the state laws at issue here.

For example, using estimated purchases of relevant Pool Products from PoolCorp from January 2008 through November 2011 in Arizona, California, Florida and Missouri by residential pool owners from Dr. Leffler's report section IV. ¶10, ($71,738,241 in Arizona; $274,214,615 in California; $126,597,277 in Florida; and $9,379,303 in Missouri) the resulting percentages of sales rounded to the nearest hundredth of a percent would be:

AZ = 14.89%

CA = 56.90%

FL = 26.27%

MO = 1.95%

More precise sales data for the time period would, of course, be used in any final calculation, but this window of time provided a basis for a fair estimate, and was information readily available for review. These percentage estimates (excluding sales to commercial pool owners) would require further adjustment to account for Missouri law, which allows recovery only to plaintiffs who bought Pool Products for personal, family, or household use. Accordingly, the percentages of the other states would be increased and Missouri's allocation would be decreased to account for this difference in the law—perhaps requiring revised estimates from Dr. Leffler. Assuming Missouri's

portion could be reduced appropriately, and increasing the portions of the remaining states, an approximation of a state-by-state distribution would be similar to the following:

AZ = 15%

CA = 57%

FL = 26.5%

MO = 1.5%

Because the $1,500,000 settlement fund represents an "all-in settlement," attorney's fees, court costs, and settlement administration expenses must be deducted from the total settlement amount. After deducting $500,000 for attorneys fees and litigation costs as well as $135,000 estimated for settlement administration expenses,[7] the remaining $865,000 in the settlement fund (the "net settlement amount") would be designated for class recovery. Using the foregoing estimates, only 1.5% of that amount would be allocated to Missouri. This method would result in allocating only $12,975 *in globo* of the net settlement amount to satisfy the claims of all Missouri class members, which may raise questions as to the adequacy of the settlement for such claimants.

The Special Master recommends against a state-by-state allocation for another reason. Given the substantial similarity in available compensatory recoveries under the applicable state laws, setting aside estimated amounts into four distinct pools of funds (based on state of residence) from the net settlement amount will have the potential dual negative effect of (1) underallocating funds to a claimant group of one state while (2) overallocating funds to a claimant group residing in another state, with no practical ability to allow legitimate claimants from the underallocated

[7] The Court inquired of Class Counsel whether there would be a cap on attorney fees and expenses from the settlement. In response, Class Counsel proposed a cap of one-third of the settlement amount for attorneys' fees and litigation costs (to cover an estimated $211,000 in expenses and as partial compensation for 4,300 attorney hours). *See* Memorandum in Support at 6 n. 5. In the Memorandum in Support, Class Counsel also reported that settlement administration expenses were not anticipated to exceed $135,000. *See id.* at 6 n. 6.

state to gain access to available funds in any other state. Without a compelling need as a matter of law to sub-divide the available settlement funds in this manner, the potential would exist to foreclose a group of claimants from access to available settlement funds, which, in the opinion of the Special Master, could undermine the overall fairness of the settlement. Accordingly, the Special Master recommends against apportionment of the Hayward/IPP net settlement amount on a state-by-state basis.

2. Allocation Model

Allocation of the net settlement amount should begin with the principle that this is not a "refund" case, but a case in which plaintiffs seek recovery of the potentially inflated portion of the purchase price of identified Pool Products. Counsel for the IPP plaintiffs allege that the conduct of each of the co-conspirators raised prices to consumers by 4.97% during the relevant time period on all Hayward, Pentair, and Zodiac products purchased through the PoolCorp distribution network.[8] Accordingly, the maximum allowable recovery available per claimant should not exceed the putative 4.97% overcharge on total purchases of PoolCorp-distributed Pool Products. Because the overcharge is a relatively small percentage of a total purchase, the Special Master recommends that there be no *de minimis* threshold for claimants to establish a valid claim.

[8] Although this IPP settlement is with Hayward only, the Plaintiffs' claims are based on a legal theory that would result in joint and several liability among the three manufacturers, the distributor, and the distributor's affiliates alleged to have participated in anti-competitive behavior. *See* Christopher R. Leslie, *Judgment-Sharing Agreements*, 58 DUKE L.J. 747, 752 (2009) ("[A]ntitrust law provides for joint and several liability."); s*ee also A.* Mitchell Polinsky & Steven Shavell, *Contribution and Claim Reduction Among Antitrust Defendants: An Economic Analysis*, 33 STAN. L. REV. 447 (1981). Based on this theory of joint and several liability, Hayward settlement funds may be used to compensate plaintiffs who suffered economic harm as a result of the actions of any of the alleged co-conspirators. Accordingly, claimants may recover under the Settlement Agreement with Hayward for overcharges on Pool Products manufactured by any of the three manufacturer defendants—not just Hayward Pool Products. *See*, *e.g.*, *In re Cathode Ray Tube (CRT) Antitrust Litigation*, MDL No. 1917, 2013 WL 5429718 at *1 (N.D. Cal. June 20, 2013) report and recommendation adopted, 2013 WL 5391159 (N.D. Cal. Sept. 24, 2013) (allowing recovery under the class definition for indirect purchasers who purchased from any of the manufacturer defendants).

In response to an inquiry posed by the Special Master, Class Counsel clarified that the class definition[9] is intended to include only a single claimant for each qualifying "IPP" purchase to the exclusion of any other indirect purchasers that may have existed in the chain of commerce between PoolCorp and the ultimate end-user of the Pool Products. Stated more plainly, general contractors, pool contractors, and pool maintenance companies that purchased Pool Products from dealers that were part of the PoolCorp distribution network will not be considered eligible claimants under the "end-user" refinement of the class member definition.[10] This refinement, of course, does eliminate in a theoretical sense the possibility of multiple eligible claimants for a single Pool Products purchase, but it also leaves the Court with an administrative issue in that the "end-user" is least likely to have detailed documentation of purchase information from the dealers that would be useful to calculate antitrust losses. For this reason, the Special Master recommends (in Section II 3 of this report) allocation of the net settlement funds using a standardized cost recovery protocol with an option for those claimants with more complete documentation to submit itemized claims.

For claimants submitting a valid and eligible claim under either method described in section 3 below, distribution of net settlement funds would be allocated *pro rata* among all eligible

[9] The proposed settlement class is defined as follows in the Memorandum in Support: "All individuals residing or entities operating in Arizona, California, Florida or Missouri, who or which, between January 1, 2008 and July 16, 2013, purchased indirectly from PoolCorp (and not for resale) Pool Products in Arizona, California, Florida or Missouri manufactured by Hayward, Pentair, or Zodiac. Excluded from the Settlement Class are (1) individuals residing or entities operating in Missouri, who or which did not purchase Pool Products primarily for personal, family, or household purposes, and (2) Defendants and their subsidiaries, or affiliates, whether or not named as a Defendant in this Action, and governmental entities or agencies." Memorandum in Support at 4.

[10] Following the reasoning in Dr. Leffler's report at ¶5.C, "the overcharges resulting from the alleged illegal activity will have been embedded in the costs faced by any intermediaries that resell to the indirect class members." Although a home building contractor is not reselling pool equipment, but selling an entire house that includes such equipment, the contractor would not qualify for recovery under Dr. Leffler's economic theory because the builder is capable of passing on the overcharge to the indirect class members. *See id.* The same theory would presumably hold true for pool maintenance technicians who buy pool products to service the pools of their customers and who are later reimbursed through their billing to those customers. *See id.* Dr. Leffler's report further draws upon the testimony of participants in the pool retailing and service markets to establish this pass-on of the overcharge to the end-user. *Id.* at ¶ 17. Accordingly, under the economic theory advanced by the IPP class, only end-user consumers will be able to recover from the settlement. Any intermediaries within the chain of commerce are considered to fall outside the class definition because they purchased the products "for resale," broadly speaking.

claimants up to the claimed damages of 4.97% overcharge. Claims without sufficient supporting documentation or that otherwise do not meet the eligibility criteria shall be deemed "Ineligible." A single claimant may have both ineligible and eligible claims. The Claims Administrator should determine the appropriate category for each Pool Product listed on a claim form. Before deeming a claim ineligible, the Claims Administrator first should send notice to the Claimant explaining the deficiency or reason for ineligibility and requesting appropriate further documentation. Finally, claimants should have the right to appeal the Claims Administrator's determination on their claims in writing to the Special Master within 30 days of the mailing of the notice of denial.[11] If net settlement funds should remain after full recovery by eligible claimants, the remaining settlement funds should be treated as *cy pres* to be allocated at the Court's discretion.

3. Protocol for Establishing Valid Claims

In establishing a viable claims processing protocol for the IPP class in the Hayward settlement, the Special Master sought to facilitate recovery to eligible IPP class members, keeping in mind two inherent limitations posed by this settlement: (1) any settlement administration expenses will necessarily reduce the available funds for claimant recovery; and (2) the very likely less-than-ideal document-retention habits of a typical Pool Products end-user. Addressing the first concern, any claims protocol established should be efficient and capable of being administered with ease for claimants and limited cost by the Claims Administrator to ensure the maximum amount available for claimant recovery. The following recommended claims protocols, therefore, begin with a set of eligibility questions that appropriately screen out inappropriate claims and minimize administrative costs by creating a clear eligibility framework. Addressing the second

[11] Pursuant to the terms of this Court's August 22, 2014 Order appointing the Special Master, the Special Master's decision, after considering the written appeal, shall be subject to review by the district court, but without further recourse on appeal. Rec. Doc. 467, Order at 2. Should this Court wish to establish different terms for the finality of the Special Master's claims determination, the Court can, of course, amend this aspect of its Order.

concern, the Special Master proposes a Standardized Recovery Model for the typical consumer who has retained less-than-complete documentation, and an alternative Itemized Recovery Model for those consumers who can submit full documentation of their purchases of Pool Products in the relevant time period.

A. Eligibility Questions

Consistent with the Amended Settlement Agreement, the Settlement Class is defined as "all individuals residing or entities operating in Arizona, California, Florida or Missouri, who or which, between January 1, 2008 and July 16, 2013, purchased indirectly from PoolCorp (and not for resale) Pool Products in Arizona, California, Florida or Missouri manufactured by the Defendants. Excluded from the Settlement Class are (1) individuals residing or entities operating in Missouri, who or which did not purchase Pool Products primarily for personal, family, or household purposes, and (2) Defendants and their subsidiaries, or affiliates, whether or not named as a Defendant in this Action, and governmental entities or agencies."

Based on this class definition, the Special Master has determined that the claimant must answer, by a sworn declaration under penalty of perjury, the following eligibility questions when submitting a claim:

1. Did you purchase Pool Products (as listed in the claims form) manufactured by Hayward, Pentair, or Zodiac between January 1, 2008 and July 16, 2013 in Arizona, California, Florida or Missouri? (Yes / No)
2. Were you the end-user, i.e., the owner/lessee/manager of the property where the pool was located at the time of purchase—and not a builder, maintenance contractor, or similarly-situated person/entity capable of passing-on an overcharge to another? (Yes / No)

3. For Missouri claimants only, was the pool for which the Pool Products were purchased used for your personal, family, or household purposes? (Yes / No)
4. Are you a subsidiary or affiliate of a defendant in this action or a government agency? (Yes / No)
5. Please list the municipal address(es) of the pool(s) where the Pool Products were installed or used. (Fill in the blank)
6. Please list the name(s) and address(es) of the dealer(s)/supplier(s) from whom you purchased Pool Products in the time period above. If you purchased from more than one dealer, please indicate which purchases were from which dealer on the attached chart. (Fill in the blank)

A claimant must answer "yes" to the first three questions and "no" to the fourth question to have an eligible claim. The address(es) identified in the fifth question should be used as a fraud-check to prevent duplicate or overlapping claims for the same property during the same time period. Finally, the answer to the sixth question will allow the Claims Administrator to verify that the consumer's supplier is listed within the PoolCorp customer database.[12] After answering these initial eligibility questions, the claimant will proceed to identify which Pool Products they purchased, and should be able to estimate their potential recovery using either a standardized or an itemized claims protocol.

For the Standardized Recovery Model, the Claims Administrator will analyze sales data for each of the types of Pool Products included in the definition and establish a standardized price

[12] Where the Claims Administrator is unable to find an exact match in PoolCorp's database based on the information provided in the Claim Form, the Claims Administrator should attempt to use other reliable information sources to determine if the company or individual from whom the consumer purchased the products could be listed under another name in the database before denying the claim.

for items within all of the given categories of Pool Products. The claimant then will attest on the claim form to how many items were purchased from each category, list the approximate purchase date and the dealer for each purchase, and then receive a standardized credit for that amount.[13] Claimants must further simultaneously affirm that the product was manufactured by Hayward, Pentair, or Zodiac by checking a box on the form next to each category. Under the Standardized Recovery Model, the claimant also must attach at least one form of "verifying" information, choosing from (a) a receipt, (b) a photograph of the Pool Product, (c) a serial number of the equipment, (d) a confirmation of their purchase by their pool supplier (e.g., a printout of the consumer's purchases), or (e) warranty information and/or an owner's manual for the product. The Claims Administrator will have discretion to determine the sufficiency of the verifying information. For example, assuming the Claims Administrator establishes an average price of $500 for a particular category of pool pump, a claimant would check off that they bought that type of pool pump from a qualifying dealer in the relevant time period in one of the four states and could choose to submit a photo of the pump to receive a Standard Recovery Credit of $24.85 on that item (the amount of the 4.97% overcharge).

For the Itemized Recovery Model, claimants also will list each item they purchased, affirm that it was manufactured by Hayward, Pentair, or Zodiac, and provide the date of purchase and quantity purchased. As part of this itemized protocol, however, claimants also must submit "verifying" documentation to the Claims Administrator showing that their actual purchase price for each listed item was greater than the standard price established by the Claims Administrator

[13] Aside from substantial administration cost-savings, this standardized method could increase claim rates by simplifying claim submission and relying less on documentation that, based on common sense and the testimony of the Class Representatives, an end-user is unlikely to retain. This method also allows a claimant to estimate their potential recovery based on average sales prices and thereby evaluate whether or not they are interested in participating in the claims process based on that estimate.

for that item. Furthermore, if the itemized method is used, the claimant must submit documentation of pricing for all purchases claimed. The claimant should not be allowed to pick and choose when to use the standardized pricing guidelines and when to use their own documentation of price.[14] Moreover, incomplete documentation of price, such as a global receipt rather than an itemized invoice or receipt, should not be acceptable. The default pricing of the Standardized Protocol should be used in the absence of complete proof of purchase price for each product claimed on the form. Using either the standard model or itemized model, claimants again should be able to estimate a dollar amount of their purchases from which they can calculate a potential recovery.

At the conclusion of the claims process, the Claims Administrator will sum the total dollar amounts to be paid to all eligible claimants under the standardized and itemized models (including any enhancement payments to class representatives) to determine whether the aggregate eligible recovery exceeds the net settlement amount. If the aggregate eligible recovery exceeds the net settlement amount, the Claims Administrator should reduce, *pro rata*, each eligible claim such that the aggregate recovery amount equals the net settlement amount. If the aggregate eligible recovery to claimants is less than the net settlement amount, the remaining funds should be allocated to a *cy pres* fund to be paid at the Court's discretion.

4. <u>Class Representative Enhancements</u>

Courts commonly permit enhancement payments to Class Representatives in antitrust cases such as this where an element of consumer protection is involved. *See* Theodore Eisenberg & Geoffrey P. Miller, *Incentive Awards to Class Action Plaintiffs: An Empirical Study*, 53 UCLA L. REV. 1303 (2006). Pursuant to the *National Association of Consumer Advocates, Standards and*

[14] A standardized recovery model is conceptually fair in part because some items purchased will be greater than the "standard" amount and some will be less. If claimants could opt-out of the standard model for purchases that are over the standard amount, while still gaining the benefit of increased credits on purchases they made above the standard amount, the standardized recovery model would become a less accurate approximation of actual purchases.

Guidelines for Litigating and Settling Consumer Class Actions, 255 F.R.D. 215, 237-239 (Second Edition, 2006), in most cases, incentive payments of up to $5,000 can "be justified by the bare fact that the class representative consented to act on behalf of the absent class members, assuming the fiduciary responsibilities and inconveniences that accompany that role." Smaller amounts may be justified based on how early the case settled, the number of class representatives, or proportionality in terms of the total recovery. *See id.* Courts have great discretion in awarding enhancement payments. To determine an appropriate award of enhancement payments, for example, courts in the Sixth Circuit look to the following factors: (1) the action taken by the Class Representatives to protect the interests of Class Members and others and whether these actions resulted in a substantial benefit to Class Members; (2) whether the Class Representatives assumed substantial direct and indirect financial risk; and (3) the amount of time and effort spent by the Class Representatives in pursuing the litigation. *Gascho v. Global Fitness Holdings, LLC*, No. 2:11-CV-436, 2014 WL 1350509 (S.D. Ohio Apr. 4, 2014).

Within the Eastern District of Louisiana, in *In re Vioxx Products Liability Litigation*, Judge Fallon ordered a $1,000 incentive payment to the named plaintiff in a settlement with a total benefit value of $95,000, noting that the Class Representative was actively engaged in the litigation. MDL No. 1657, 2013 WL 5295707 (E.D. La. Sept. 18, 2013). This section of the Court, similarly, ordered incentive payments to four class representatives of $2,000 each in *In re Educational Testing Service Praxis Principles of Learning & Teaching, Grades 7-12 Litigation* from a total settlement fund of $11.1 million, reasoning that the class members were willing to be subject to discovery and were involved in initiating litigation on behalf of the class. 447 F. Supp. 2d 612 (E.D. La. 2006).

In recommending enhancement payments to the four class representatives in this case, the Special Master considered the time and effort each plaintiff devoted to preparing for their deposition and their efforts on behalf of the class. *See Gascho*, 2014 WL 1350509. Each class representative reviewed the complaint with Class Counsel before agreeing to serve as a named plaintiff in the case, submitted to a deposition lasting approximately two to five hours, reviewed the allegations of the complaint with an attorney the night before the deposition, and gathered requested documents. These depositions were helpful to the Special Master in developing this report, as each Class Representative testified as to the types of documentation typically retained by pool owners. Accordingly, the Special Master recommends that an incentive payment is justified in this case for Class Representatives' service on behalf of the class in this settlement.

The total settlement amount in this case is $1,500,000. Taking into account the proportionality of incentive award to the total settlement and consistent with precedent in this Court, therefore, the Special Master recommends enhancement payments of $1,500 each to the four Class Representatives. Although an award up to $5,000 could be justified under the *NACA Guidelines*, the Special Master is mindful that this settlement represents only a partial settlement of the claims in litigation.[15] Two other manufacturers and PoolCorp (and its affiliates) remain active in the litigation. If other settlements or a trial on the merits should follow, further awards to Class Representatives may be appropriate.

[15] Class Counsel represented to this Court at the August 14, 2014 hearing that the settlement represents a 6% recovery of total damages to the class, estimated at $24 million, Transcript at 13, and should be considered an "ice-breaker" settlement.

DATED: October 1, 2014.

Respectfully submitted,

/s/ Richard C. Stanley
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