UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT CHATTANOOGA

IN RE: CAST IRON SOIL PIPE AND FITTINGS ANTITRUST LITIGATION **THIS DOCUMENT RELATES TO:** **Direct Purchaser Class Action**	**No. 1:14-md-2508-HSM-CHS**

DIRECT PURCHASER PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND PLAN OF DISTRIBUTION

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Direct purchaser plaintiffs A&S Liquidating Inc., Hi Line Supply Co. Ltd., and Red River Supply, Inc. (here, "DPPs"), on behalf of themselves and as representatives of the Settlement Class certified by the Court in its November 29, 2016 Order Granting Preliminary Approval of Settlement between Direct Purchaser Plaintiffs and Defendants, Authorizing Dissemination of Class Notice, and Scheduling Hearing for Final Approval of Proposed Settlement (the "Preliminary Approval Order," Doc. 474), by and through the undersigned Settlement Class and Liaison Counsel, respectfully submit this brief in support of their motion seeking: (1) final approval of the Settlement with defendants McWane, Inc., and its unincorporated divisions, AB&I Foundry and Tyler Pipe Company (collectively, "McWane"), Charlotte Pipe and Foundry Company and Randolph Holding Company (collectively, "Charlotte Pipe,"), and the Cast Iron Soil Pipe Institute ("CISPI," who along with McWane and Charlotte Pipe, are collectively referred to as "Defendants"); and (2) approval of the proposed Plan of Distribution for the Settlement Funds.

I. BACKGROUND

The Joint Declaration of Solomon B. Cera, Robert N. Kaplan and Kit A. Pierson in Support of (1) Direct Purchaser Plaintiffs Motion for Final Approval of Settlement and (2) Settlement Class Counsels' Motion for an Award of Attorneys' Fees, Reimbursement of Expenses, and Incentive Awards for the Named Plaintiffs dated April 21, 2017 ("Jt. Decl.") is an integral part of this submission and is being filed concurrently. The Court is respectfully referred to the Joint Declaration for a further summary of the Settlement, a detailed description of the factual and procedural history of the litigation, the claims asserted, the extensive investigation and document review undertaken, the mediation and settlement negotiations, and the numerous risks and uncertainties presented in this litigation.

A. The Litigation Efforts of the Direct Purchaser Plaintiffs and Settlement Class Counsel

After four years of thorough investigation, hard-fought litigation and a vigorously-negotiated settlement overseen by two former federal judges, DPPs have achieved a substantial and valuable settlement on behalf of Settlement Class Members, most of whom are small- and medium-sized businesses.[1] The Settlement was achieved only after Settlement Class Counsel, among other things: (i) conducted a months-long investigation into potential antitrust violations in the cast iron soil pipe ("CISP") market, including witness interviews, extensive factual and economic research into the CISP market and a thorough analysis of possible causes of action (Jt. Decl. ¶ 1); (ii) filed a complaint on behalf of their clients in the Northern District of California on October 2, 2013, and prepared and filed DPPs' Consolidated Amended Complaint on August 11, 2014 (*Id*. ¶ 1, 7); (iii) opposed, argued and substantially defeated motions to dismiss filed by defendants McWane and Charlotte Pipe (*Id*. ¶¶ 8-9); (iv) negotiated with defense counsel on stipulations governing the confidentiality and use of discovery materials and the scope of expert and electronic discovery (*Id*. ¶ 6); (v) drafted and served Defendants with document requests and interrogatories (*Id*. ¶¶ 18, 23-24, 30, 32); (vi) reviewed and analyzed about one million pages of documents, and prepared for and took nearly 30 depositions of Defendants and non-parties (*Id*. ¶¶ 27, 36-37, 46); (vii) negotiated with defense counsel on the scope of the document discovery served on DPPs, and reviewed and produced thousands of pages of responsive documents on behalf of DPPs (*Id*. ¶¶ 38-45); (viii) prepared and negotiated numerous non-party subpoenas and reviewed and analyzed over tens of thousands of pages of documents produced in response to

[1] Defendants entered into settlement agreements, or obtained agreements to opt out of any litigation or settlement class, from many large purchasers, representing approximately 60% of Defendants' applicable sales of CISP. These entities have been specifically excluded from the Settlement Agreement and the definition of the Settlement Class certified by the Court's Preliminary Approval Order.

those subpoenas (*Id*. ¶¶ 33-37); (ix) briefed several discovery-related motions, including a motion to compel (*Id*. ¶¶ 15-17); (x) prepared and filed opening papers in support of DPPs' motion for class certification (*Id*. ¶¶ 13-14); (xi) prepared for and defended depositions of the DPPs and their class certification expert (*Id*. ¶¶ 14, 48); (xii) briefed and argued defendant McWane's motions to arbitrate the direct purchaser claims against it (*Id*. ¶¶ 10-12); and (xiii) participated in three mediation sessions and weeks-long settlement discussions with all Defendants, and negotiated the terms of the Settlement with Defendants (*Id*. ¶¶ 50-52]).

B. The Settlement is Structured to Give the Greatest Possible Recovery to Settlement Class Members

In consideration for Settlement Class Members' release of the claims asserted against Defendants in the direct purchaser case, Defendants have paid $30 million into the interest-bearing escrow account (the "Settlement Fund") established at Presidio Bank, the Court-appointed Escrow Agent. The Court's Preliminary Approval Order found that the requirements of Rule 23 were met, and certified the following Settlement Class:

> All persons or entities that purchased CISP in the United States directly from any of the Defendants, their subsidiaries, predecessors, or affiliates, from November 1, 2006, through December 31, 2013 (the "Settlement Class Period"). Excluded from the Settlement Class are the Known Opt-Outs, the Defendants, their parent companies, subsidiaries, predecessors, and affiliates, federal and state governmental entities and instrumentalities of federal or state governments, and any Settlement Class Member who has timely and validly elected to be excluded from this Settlement Class.

The Settlement in this case was structured to provide the largest possible monetary recovery to each of the entities that make up the Settlement Class. The amount of a Settlement Class Member's recovery from the Settlement Fund in this case will be determined by that entity's aggregate share of the total CISP purchases made by Settlement Class Members with valid, timely claims during the Settlement Class Period. This *pro rata* distribution ensures that the greater the

amount of CISP purchased by the approved claimant and Settlement Class Member, the larger its recovery from the Settlement Fund.

The Settlement in this case also offers benefits beyond those in many other antitrust class action settlements. This is because, as noted above, the Settlement Class excludes 40 large companies, referred to as the "Known Opt-Outs," with whom Defendants have separately settled or which entities have agreed to exclude themselves from any settlement class. The Known Opt-Outs represent over 60% of applicable purchases of CISP from Defendants. As the Settlement Fund will be shared only among Settlement Class Members (who represent a smaller percentage of applicable CISP purchases from Defendants during the Settlement Class Period), each of them will receive more from the Settlement Fund because the Known Opt-Outs cannot participate in the distribution.

By excluding the Known Opt-Outs from the Settlement Class definition, the agreement negotiated by Settlement Class Counsel ensures that these would-be claimants will not dilute the recoveries of (mostly) small- and medium-sized Settlement Class Members by exhausting the Settlement Fund with claims based on their large CISP purchases from Defendants.

Structuring the Settlement in this manner is consistent with the policies underlying both class actions (which offer redress for widespread wrongdoing by allowing aggregation of claims too small to be pursued in individual litigation) and private antitrust enforcement (where provisions allowing for treble damages and attorneys' fees to incentivize plaintiffs and their counsel to challenge conduct that the government cannot or will not pursue). *See Pillsbury Co. v. Conboy*, 459 U.S. 248, 262-263 (1983) ("This court has emphasized the importance of the private action as a means of furthering the policy goals of certain federal regulatory statutes, including the federal antitrust laws.").

As detailed in DPPs' preliminary approval brief, the Settlement contains a release of liability, for the period of November 1, 2006 through October 19, 2016 (the Settlement's Execution Date), that releases the Defendants and related Released Parties from Settlement Class Members' claims arising out of the conduct alleged, or which could have been alleged, in the Action, including any claim under any federal or state antitrust, unfair competition, unfair practices, fraud, racketeering, price discrimination, unjust enrichment, unitary pricing or trade practice law. [Doc. 466-1, at PageID #: 9497-98]. Excluded from the releases are: (a) claims relating to indirect purchases of CISP brought by prospective members of any class of indirect purchasers; or (b) claims arising in the ordinary course of business for product defect, product performance, or breach of warranty or for breach of contract based on product defect, product performance, or warranty, related to CISP. *Id.*

C. Notice to the Potential Settlement Class Members

There were two forms of notice of the Settlement which were provided to potential Settlement Class Members. First, on December 29, 2016, RG/2 Claims Administration, LLC, ("RG/2," the Court-appointed claims administrator)[2], mailed, via first-class mail, individual notice packets (which included the long-form notice and claim form in substantially the same formats approved by the Court's preliminary approval order) to potential Settlement Class Members. *See* Declaration of Tina Chiango of RG/2 Claims Administration, LLC, (the "RG/2 Decl."), at ¶ 5. The notice advised potential Settlement Class Members of the Settlement and their associated legal rights, including their rights to submit a claim, attend and be heard at the Fairness Hearing, object to the Settlement (including attorneys' fees, expenses, incentive awards and plan of distribution) in whole or part, or request exclusion from the Settlement. In accord with the Court's Preliminary

[2] Pursuant to the Settlement Agreement, notice and claims administration costs of up to $150,000 shall be paid from the gross Settlement Fund.

Approval Order, the notice informed potential Settlement Class Members of all relevant dates related to the exercise of their legal rights, and provided contact information for both RG/2 and Settlement Class Counsel if they needed additional details about the Settlement.

Second, the publication notice was published in the January 3rd, 2017 national edition of the *Wall Street Journal*, as well as in the January 2017 issue of *Supply House Times*, an important and widely-read plumbing industry publication. RG/2 Decl., at ¶ 6.

In addition, at the direction of Settlement Class Counsel, RG/2 established a website (www.cispantitrustsettlement.com) where potential Settlement Class Members could view and download numerous documents and filings relevant to the litigation and the Settlement, including the Consolidated Amended Class Action Complaint, the Court's order on the Defendants' motions to dismiss, the DPPs' class certification filings and accompanying expert declaration, as well as the Settlement Agreement, the DPPs' preliminary approval briefing, the Court's Preliminary Approval Order and PDFs of the notice and claim form. The settlement website also will be updated to include this brief and the other materials filed in support of final approval.

Pursuant to the Settlement notice, the deadline for Settlement Class Members to file a claim, as well as to opt-out of the Settlement, was February 13, 2017. 361 timely claims were received from Settlement Class Members. *See* RG/2 Decl., at ¶ 11. The deadline for Settlement Class Members to object to the Settlement is May 3, 2017; to date, no Settlement Class Member has filed an objection to the Settlement. Settlement Class Counsel will file (and post on the settlement website) a response to any such objections no later than ten days prior to the Fairness Hearing.

II. ARGUMENT

A. The Settlement Meets the Standard for Final Approval

The law favors the settlement of class action cases. *See Int'l. Union, United Auto., Aerospace & Agric. Implement Workers of Am. (UAW) v. General Motors Corp.*, 497 F.3d 615, 631 (6th Cir. 2007). To approve a proposed class action settlement, a court must determine whether it is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2); *see also Williams v. Vukovich*, 720 F.2d 909, 921-923 (6th Cir. 1983); *Olden v. Gardner*, 294 Fed. App'x. 210, 217 (6th Cir. 2008). This determination requires consideration of "whether the interests of the class as a whole are better served if the litigation is resolved by settlement rather than pursued." *In re Cardizem CD Antitrust Litig.*, 218 F.R.D. 508, 522 (E.D. Mich. 2003) (internal quote omitted).

In determining whether a proposed settlement is fair, reasonable and adequate, district courts in the Sixth Circuit use the following seven factors: "(1) the risk of fraud or collusion; (2) the complexity, expense and likely duration of the litigation; (3) the amount of discovery engaged in by the parties; (4) the likelihood of success on the merits; (5) the opinions of class counsel and class representatives; (6) the reaction of absent class members; and (7) the public interest." *UAW*, 497 F.3d at 631. The Settlement satisfies these factors.

1. The Settlement Was the Product of Informed, Non-Collusive Negotiations Undertaken at Arm's-Length and Overseen by Well-Respected, Experienced Mediators

Absent evidence to the contrary, it is presumed that settlement negotiations were conducted in good faith and that the resulting agreement was reached without collusion. *In re Southeastern Milk Antitrust Litig.*, No. 2:07-cv-208, 2013 U.S. Dist. LEXIS 70163, at *20 (E.D. Tenn. May 17, 2013). There is no evidence of fraud or collusion here. To the contrary, the negotiations that led to the Settlement followed years of hard-fought litigation, after the completion of extensive fact discovery that informed the parties' settlement posture, and were conducted under the auspices of

former U.S. District Judges Robert Echols and Layne R. Phillips, experienced and well-respected mediators. (Jt. Decl. ¶¶ 50-52). *See In re Southeastern Milk*, 2013 U.S. Dist. LEXIS 70163, at *19 - *20 ("The settlement agreement before the Court has been arrived at after the parties' claims and defenses have been subject to an intense and lengthy adversarial process" with "absolutely no evidence of fraud or collusion"); *In re Polyurethane Foam Antitrust Litig.*, 135 F Supp. 3d 679, 685 (N.D. Ohio 2014) (finally approving settlement when settlement talks had "assistance of respected mediators"). The informed, arm's-length negotiations that resulted in the Settlement supports final approval here.

2. The Complexity, Expenses, and Likely Duration of Continued Litigation Support Final Approval

"Settlements should represent 'a compromise which has been reached after the risks, expense and delay of further litigation have been assessed.'" *In re Cardizem*, 218 F.R.D., at 523 (quoting *Williams*, 720 F.2d at 922). "[T]he prospect of a trial necessarily involves the risk that Plaintiffs would obtain little or no recovery." *Id.* This is particularly true for class actions like this one, which are "inherently complex." *Southeastern Milk*, 2013 U.S. Dist. LEXIS 70163, at *14 (citing *In re Telectronics Pacing Sys., Inc.*, 137 F. Supp. 2d 985, 1013 (S.D. Ohio 2001)). "[S]ettlement avoids the costs, delays, and multitude of other problems associated with them." *Id.*

Without this Settlement, litigation of the direct purchaser class case would have continued for several more years. Assuming the Court granted the DPPs' class certification motion – which was not guaranteed – the parties would have then proceeded to summary judgment and ultimately trial. Each step would require the investment of large amounts of time and significant expense, primarily for expert witnesses that all parties would need. This Settlement ensures that Settlement Class Members will receive their recoveries without further delay and without incurring further expense. *See Polyurethane Foam*, 135 F. Supp. 3d at 685 (finally approving settlement when "a

lengthy trial, post-trial motions, and appeals from the jury's verdict would have piled on fees and costs, and would have delayed recovery (if any) by class members"). This factor favors final approval of the Settlement.

3. The Parties' Significant Discovery Informed their Settlement Posture

The discovery process in this case was intensive. (Jt. Decl. ¶¶ 18-49). Defendants and non-parties collectively produced approximately one million pages of documents, which were reviewed and analyzed by Settlement Class and Liaison Counsel and co-counsel. (*Id*. ¶ 27). In addition, nearly 30 depositions of parties and non-parties have taken place, including those of DPPs' class certification expert and the three Named Plaintiffs. (*Id*. ¶¶ 46-48). Settlement Class Counsel's thorough analysis of Defendants' and non-party documents and the deposition testimony of Defendant and non-party witnesses informed their decision to enter settlement negotiations, and Settlement Class Counsel had ample information to allow them to evaluate the fairness of the Settlement. *See Polyurethane Foam*, 135 F. Supp. 3d, at 685 ("All of this discovery matters for settlement purposes because it provides Direct Purchasers and the settling Defendants a clear picture of the relative merits of claims and defenses. The parties entered into these settlements with full view of the evidentiary record to assess the class claims.") This factor supports final approval of the Settlement.

4. The Likelihood of Success on the Merits

"The fairness of each settlement turns in large part on the strength of the parties' legal dispute." *Southeastern Milk*, 2013 U.S. Dist. LEXIS 70163, at *12. When considering the fairness of a class action settlement, the Court should assess it with regard to a "'range of reasonableness,' 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.'" *In re Packaged Ice Antitrust*

Litig., No. 08-MDL-01952, 2011 WL 6209188, at *10 (E.D. Mich. Dec. 13, 2011) (internal quote omitted).

"All litigation poses . . . risks of course but antitrust litigation especially so." *Southeastern Milk*, 2013 U.S. Dist. LEXIS 70163, at *14. DPPs are optimistic that they would ultimately succeed in proving their allegations at trial. However, Defendants vigorously deny that they engaged in the anticompetitive conduct alleged in the CAC and, absent the Settlement, would contest virtually all issues in the case. Defendants are represented by highly-experienced and competent lawyers prepared to defend this case through trial and appeal. Despite DPPs' confidence in their claims, DPPs acknowledge the risk that Defendants could prevail with respect to legal or factual issues, potentially reducing or eliminating the recovery of the direct purchaser class.

The risk of non-recovery has been, and would continue to be, present at every stage of the litigation. DPPs faced, or would face, the risks that: (a) the case would be dismissed at the pleadings stage; (b) the proposed direct purchaser class would not be certified; (c) McWane would prevail in its attempts to force a significant portion of the case into arbitration; and (d) that DPPs' claims would not survive summary judgment. (Jt. Decl. ¶¶ 53-54)

Trying the case after years of litigation would present its own set of risks. To fully succeed on their Section 1 claim against the Defendants, DPPs would have to prove at trial: (1) Defendants' liability for a conspiracy; (2) the impact of that conspiracy; (3) damages; and (4) fraudulent concealment. *In re Polyurethane Foam Antitrust Litig.*, 314 F.R.D. 226, 241 (N.D. Ohio 2014). To fully succeed on their Clayton Act Section 7 claim against defendant Charlotte Pipe, at trial DPPs would have to prove: (1) a relevant market; (2) the impact of Charlotte Pipe's acquisition of

Star Pipe's CISP assets; and (3) resultant damages. *See, e.g.*, *Cmty. Publishers, Inc. v. Donrey Corp.*, 892 F. Supp. 1146, 1152 (W.D. Ark. 1995), *aff'd.*, 139 F.3d 1180 (8th Cir. 1998).

DPPs would be relying primarily on circumstantial evidence of conspiracy to prove their Section 1 claim, and proving their Clayton Act Section 7 claim would require complex economic evidence presented almost exclusively by expert witnesses. The Settlement eliminates the risk of presenting jurors with a primarily-circumstantial case with complex economic theories. *See Polyurethane Foam*, 135 F. Supp. 3d, at 685-686 (finally approving settlement in case where success at trial would have required plaintiffs to "develop a persuasive, coherent approach to connecting the dots between e-mail, fax, phone conversations and the use of price increase announcements . . . over a ten-year-plus Class Period.")

A jury trial could turn on close questions of proof, many of which would be the subject of complicated expert testimony, particularly regarding damages, making the outcome of such trial uncertain for the parties. Had DPPs been unable to prove even one element of their claim, Defendants would have prevailed and the direct purchaser class would have recovered nothing. *See*, *e.g.*, *Cardizem*, 218 F.R.D. at 523 (approving settlement and noting that "the prospect of a trial necessarily involves the risk that Plaintiffs would obtain little or no recovery" and 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.").

In addition, given the stakes involved, a lengthy post-trial appeal was very likely, injecting additional risk of non-recovery that is obviated by the Settlement here. *See In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 536 (3d Cir. 2004) ("[I]t was inevitable that post-trial motions and appeals would not only further prolong the litigation but also reduce the value of any recovery to the class."). The "certain and immediate benefits to the Class represented by the Settlement

outweigh the possibility of obtaining a better result at trial, particularly when factoring in the additional expense and long delay inherent in prosecuting this complex litigation through trial and appeal." *Cardizem*, 218 F.R.D. at 525.

All those risks must be weighed against the Settlement consideration: $30 million in cash, which is valuable to Settlement Class Members. Weighing the risk and uncertainty of litigation against the Settlement's benefits warrants final approval.

5. The Judgement of Counsel with Significant Experience in Complex Antitrust Class Actions Supports Final Approval of the Settlement

In deciding whether a proposed settlement warrants final approval, "[t]he Court should also consider the judgment of counsel and the presence of good faith bargaining between the contending parties." *In re Delphi Corp. Sec. Derivative & "ERISA" Litig.*, 248 F.R.D. 483, 498 (E.D. Mich. 2008). Settlement Class Counsel's judgment "that the settlement is in the best interest of the Class 'is entitled to significant weight, and supports the fairness of the class settlement.'" *In re Packaged Ice Antitrust Litig.*, No. 08-md-01952, 2011 WL 717519, at *11 (E.D. Mich. Feb. 22, 2011) (quoting *Sheick v. Auto. Component Carrier LLC*, 2010 WL 4136958, at *18 (E.D. Mich. Oct. 18, 2010)).

Settlement Class Counsel have extensive experience prosecuting antitrust class actions and other complex litigation. They negotiated this Settlement at arm's length over a period of months with well-respected and experienced mediators and defense counsel. (Jt. Decl. ¶¶ 50-52). After careful analysis of the case and having taken significant discovery, Settlement Class Counsel believe that the Settlement is an excellent result for Settlement Class Members.

This factor supports final approval of the Settlement.

6. Minimal Opt-Outs and the Likely Positive Reaction of Absent Settlement Class Members Support Final Approval

Only two members of the Settlement Class requested exclusion from the Settlement Class,[3] and Settlement Class Counsel has not received any objections by Settlement Class Members as of the date of this brief. Given the total percentage recovery the Settlement provides, Settlement Class Counsel expect that the Settlement will get uniform support from Settlement Class Members. If that is true – or even if there are minimal objections – that fact will support the adequacy of the Settlement and final approval. *See, e.g.*, *Southeastern Milk*, 2013 U.S. Dist. LEXIS 70163, at *19 ("The lack of objections by class members in relation to the size of the class highlights the fairness of the settlements to unnamed class members and supports the approval of the settlements."); *In re Cardizem*, 218 F.R.D. at 527 ("If only a small number of objections are received, that fact can be viewed as indicative of the adequacy of the settlement.").

7. The Public Interest Supports the Resolution of the Direct Purchaser Class Case and Final Approval of Settlement

"[T]here is a strong public interest in encouraging settlement of complex litigation and class action suits because they are 'notoriously difficult and unpredictable' and settlement conserves judicial resources." *In re Cardizem*, 218 F.R.D., at 530 (quoting *Granada Invs. Inc. v. DWG Corp.*, 962 F.3d 1203, 1205 (6th Cir. 1992)). Settlement also "ends potentially long and protracted litigation among these parties and frees the Court's valuable judicial resources." *Southeastern Milk*, 2013 U.S. Dist. LEXIS 70163, at *21 (citing *In re Broadwing, Inc. ERISA Litig.*, 252 F.R.D. 369, 376 (S.D. Ohio 2006)).

[3] Dana Kepner Co., Inc. requested exclusion for itself and its subsidiary Western Industrial Supply, LLC. *See* RG/2 Decl., at ¶ 9.

"Society's interests are clearly furthered by the private prosecution of civil cases which further important public policy goals, such as vigorous competition by marketplace competitors." *Southeastern Milk*, 2013 U.S. Dist. LEXIS 70167, at *23 (citing *Pillsbury*, 459 U.S. at 262-263 ("This court has emphasized the importance of private action as a means of furthering the policy goals of certain federal regulatory statutes, including the federal antitrust laws.")).

This litigation sought to hold the Defendants accountable for their allegedly anticompetitive scheme, and challenged a far broader set of conduct than that investigated by the Federal Trade Commission (which imposed a consent decree and fined Charlotte Pipe for its 2010 acquisition of Star Pipe's CISP assets, but whose separate investigation of standard-setting activities of both McWane and Charlotte Pipe was closed without action being taken).

"Settlement of this antitrust action serves the public interest by ensuring effective enforcement of the antitrust laws and deterrence of anti-competitive conduct in the marketplace." *In re Cardizem*, 218 F.R.D., at 530. The resolution of the direct purchaser case through the Settlement further benefits the public by giving prompt consideration to those directly injured by Defendants' actions. Settlement Class Counsel see no countervailing public interest justifications present here that would suggest any reason not to approve the Settlement.

B. The Plan of Distribution is Fair and Reasonable

"[A]pproval of a plan of allocation of a settlement fund in a class action is governed by the same standards of review applicable to approval of the settlement as a whole: the distribution plan must be fair, reasonable and adequate." *In re Packaged Ice Antitrust Litig.*, 2011 WL 6209188, at *15 (internal citation and quotation omitted). "'An allocation formula need only have a reasonable, rational basis, particularly if recommended by experienced and competent class counsel.'" *Polyurethane Foam*, 135 F. Supp. 3d, at 686 (quoting *In re Visa Check/Mastermoney Antitrust Litig.*, 297 F. Supp. 2d 503, 519 (E.D.N.Y. 2003)). Generally, a plan of distribution is

reasonable if it reimburses class members based on the type and extent of their injuries. *See, e.g.*, *Thacker v. Chesapeake Appalachia, L.L.C.*, 259 F.R.D. 262, 270 (E.D. Ky. 2009). The plan of distribution proposed here meets that standard.

On or about December 29, 2016, using the addresses obtained from the transactional sales data that Defendants had previously produced in the litigation, RG/2 sent potential Settlement Class Members a copy of the approved notice and claim form by first-class mail, which summarized the *pro rata* manner in which Settlement Class Counsel proposes to distribute the Settlement Fund. *See* RG/2 Decl., at ¶ 5.

The Notice stated:

> The net Settlement Fund (net of Court-approved attorneys' fees, costs and expenses and incentive awards) will be distributed, on a *pro rata* basis based on the amount of CISP purchased directly from Defendants, to Settlement Class Members who submit valid and timely claim forms for purchases of CISP directly from the Defendants from November 1, 2006 through December 31, 2013. In other words, each Settlement Class Member shall be paid a percentage of the Settlement Fund that each class member's recognized claim bears to the total of all recognized claims submitted by all Settlement Class Members who submit claims.

Based on their extensive experience in litigating and settling antitrust class actions, Settlement Class Counsel propose the following Plan of Distribution for the proceeds of the Settlement in this case, net of Court-approved attorneys' fees, costs and expenses (including notice and claims administration costs) and incentive awards to the Named Plaintiffs: pay the net Settlement Fund *pro rata* to Settlement Class Members who have submitted valid, timely claims based on each Settlement Class Member's share of the total recognized class purchases of CISP by the Settlement Class Members during the Settlement Class Period.

Settlement distributions in many other antitrust class actions have proceeded in this manner, as numerous courts in the Sixth Circuit have recognized. *See, e.g.*, *Polyurethane Foam*, 135 F. Supp. 3d., at 686 ("Direct Purchasers' proposal to allocate net settlement funds on a pro

rata basis . . . is both reasonable and rational."); *Southeastern Milk*, 2013 U.S. Dist. LEXIS 70163, at *18 ("Furthermore, the settlement's monetary payments will be distributed to all class members according to their volume of milk production and sales . . . and *pro rata* treatment is presumptively fair across the class.").

This plan for distribution of the net Settlement proceeds is accurate, efficient, and simple. Settlement Class Counsel respectfully submit that their proposed plan of distribution is fair, reasonable, and adequate, and should be approved.[4]

III. CONCLUSION

For the reasons stated above and in the declarations accompanying this brief, Direct Purchaser Plaintiffs respectfully request that the Court finally approve the Settlement and approve the proposed Plan of Distribution.

Dated: April 21, 2017

Respectfully submitted,

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[4] After the claims administrator has finalized its determination of all claims filed by direct purchasers, Settlement Class Counsel will file a motion for distribution, accompanied by a declaration and report from the claims administrator in support, and a proposed order. The motion will summarize the report of the claims administrator, including the claims that the Claims Administrator recommends be approved by the Court. The proposed order, once executed by the Court, will authorize distribution (payment) of the net settlement proceeds *pro rata* to the approved claimants, and will also specify—after distribution of the funds—how any residual funds (e.g., uncashed checks) should be disbursed.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt on this 21st day of April, 2017.

/s/ Matthew P. McCahill
Matthew P. McCahill