

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA**

**IN RE: POOL PRODUCTS DISTRIBUTION
MARKET ANTITRUST LITIGATION**

**THIS DOCUMENT RELATES TO: ALL
ACTIONS**

* **MDL NO. 2328**
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* **SECTION R/2**
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* **Judge Vance**
* **Mag. Judge Wilkinson**
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**PLAINTIFFS' FIFTH STATUS REPORT ON FACT DISCOVERY PURSUANT TO
PRETRIAL ORDER NO. 17**

Pursuant to the Court's Pre-Trial Order Number 17, entered on March 7, 2013, direct purchaser plaintiffs ("DPPs") and indirect purchaser plaintiffs ("IPPs") hereby submit their fifth status report on the status of fact discovery. The DPPs' report on the status of discovery is included as Section I, the IPPs' report is included as Section II, and a report on the status of third-party discovery is included as Section III.

I. Status Report by the DPPs

a. Discovery From Defendants to DPPs

i. Search Terms

The parties have reached agreement on the search terms that defendants are to run across their own electronically stored information (ESI) to select documents to review for possible production.

ii. Transaction Data

In Pretrial Order No. 17, the Court ordered defendants to respond to plaintiffs' questions about the transactional data each has produced by March 13, 2013. Responses were received

from each defendant. On April 1, 2013, DPPs transmitted additional follow-up questions and requests resulting from each defendant's response. Responses from PoolCorp and Hayward are still outstanding, and PoolCorp has indicated its responses should be forthcoming by the end of the week. Hayward has not informed when its responses will be transmitted.

iii. Document Production

Since the opening of fact discovery, plaintiffs have received the following production of documents from the defendants:¹

- A January 16, 2013 production of catalogues from Pentair;
- A March 4, 2013 production from Zodiac predominantly comprised of catalogues;
- An April 5, 2013 production of transactional information from Hayward;
- An April 25, 2013 and a May 2, 2013 production of documents from PoolCorp.

iv. Depositions

The depositions of all defendant witnesses taken by DPPs to date are listed in the table in Attachment A.

b. Discovery From DPPs to Defendants

i. Search Terms

DPPs have applied the search terms to their collected ESI and a review of the resulting "hits" is underway.

ii. Document Production

DPPs are actively reviewing documents and intend to make further productions in the coming weeks.

¹ This list is intended to track defendants' rolling production of documents pursuant to PTO 16. It does not include individual documents produced in connection with depositions.

iii. Depositions

DPPs have produced five of the seven Direct Purchaser Plaintiff Class Representatives for depositions. A sixth Class Representative is scheduled for a deposition on June 27, 2013. The deposition of A Plus Pools was scheduled to go forward on April 25, 2013, but was postponed due to the illness of the designated witness. It will be rescheduled as soon as practicable.

Counsel for IPPs have indicated an intention to discover “downstream” information at the two remaining depositions of named Direct Purchaser Plaintiffs. In PTO No. 15, this Court ruled that such information is non-discoverable in the context of the action brought by the DPPs against the defendants. Despite the Court’s ruling as to the DPPs claims, the IPPs maintain that downstream information is relevant and discoverable as to the IPPs’ own claims against defendants. IPPs and DPPs are amenable to entering into a stipulation that would allow the IPPs to proceed with their questioning, but only in the indirect purchaser litigation. This would be accomplished by the use of a separate transcript with a caption that comports with the procedure contemplated by Pretrial Order No. 6, which specifies that “when a pleading is intended to apply to fewer than all of the cases, this Court’s docket number for each individual case to which the document number relates shall appear immediately after the words ‘This Document Relates To.’” The DPPs and IPPs proposed a stipulation to this effect to the Defendants, but they declined to enter into such a stipulation. Therefore, this matter is currently unresolved.

Status Report by the IPPs

IPPs’ counsel are cooperating with and supporting the efforts of counsel for DPPs on discovery matters. IPP Class representative depositions are scheduled for May 10 and May 24. The Florida class representative's deposition was cancelled for April 22nd and IPP counsel will file shortly a motion for leave to amend their complaint to substitute a class representative for the

State of Florida. IPP counsel will also shortly issue document subpoenas to certain third party retailers in California, Florida, Arizona, and Missouri requesting financial data for pass on issues. IPP counsel are participating and monitoring by internet video depositions the parties' current deposition schedule. There are no other discovery issues relating to the IPPs at this time.

II. Status Report on Third-Party Discovery

Pursuant to Pretrial Order No. 17, DPPs have served or attempted to serve subpoenas *duces tecum* on 40 third-party entities, and DPPs continue to pursue this discovery in an expeditious manner as required by that Order. On April 26, 2013, the Federal Trade Commission filed a notice of potential participation and a motion for a temporary stay of third-party discovery. ECF Nos. 223-24. A motion for expedited consideration of the stay was filed on April 29, 2013, and granted by the Court on May 30, 2013. ECF Nos. 225-26. The FTC claims that the DPPs' requests to the third-party subpoena recipients violate a common law "informant privilege," and seeks a complete stay of third-party discovery until May 31, 2013 to allow the FTC time to prepare to move to intervene and for a protective order. The FTC also seeks a continuation of the stay until such time that the Court rules on any such motion. DPPs believe that the "informant privilege" does not apply in the instant situation and that the relief requested by the FTC would be extremely disruptive to the DPPs' ability to obtain relevant and timely discovery in this action, and would necessitate an extension of the discovery and case schedule. Accordingly, DPPs intend to oppose the FTC's motion for a stay.

The third-party depositions noticed by defendant Pentair have been ongoing since April 1, 2013.

Dated: May 2, 2013

/s/ Russ M. Herman

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Liaison for Indirect Purchaser Class Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that the above and foregoing Plaintiffs' Fourth Status Report on Fact Discovery Pursuant to Pretrial Order No. 17 has been served on Direct Purchaser Plaintiffs' Co-Liaison Counsel, Russ Herman and Camilo Salas, III, 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 2nd day of May, 2013.

/s/ Leonard A. Davis

LEONARD A. DAVIS

Attachment A

Depositions of Defendant Witnesses Taken by DPPs			
<u>Date</u>	<u>Deponent Name</u>	<u>Company Affiliation</u>	<u>Deposition Location</u>
March 19, 2013	Jon Damaska	Zodiac	Chicago, IL
March 20, 2013	Scott Bushey	Zodiac	Chicago, IL
April 3, 2013	Pentair 30(b)(6) on Code of Conduct	Pentair	Raleigh, NC
April 4, 2013	Pentair 30(b)(6) on Corporate Structure & HR	Pentair	Raleigh, NC
April 16, 2013	Enrique Gomez	Zodiac	Miami, FL
April 17, 2013	David Albee	Hayward	Newark, NJ
April 18, 2013	Doug Bragg	Hayward	Newark, NJ
April 18, 2013	Pentair 30(b)(6) on IT	Pentair	Raleigh, NC
April 19, 2013	Stephen Markowitz	Zodiac	Philadelphia, PA
April 23, 2013	Craig Goodson	Zodiac	Atlanta, GA
May 2, 2013	Pool Corp. 30(b)(6) on Pricing & Acquisitions	Pool Corp.	New Orleans, LA