

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

MDL No. 2328

IN RE: POOL PRODUCTS
DISTRIBUTION MARKET ANTITRUST
LITIGATION

SECTION: R(2)
JUDGE VANCE
MAG. JUDGE WILKINSON

THIS DOCUMENT RELATES TO ALL INDIRECT-PURCHASER PLAINTIFF CASES

ORDER AND REASONS

Indirect-Purchaser Plaintiffs (IPPs), together with Hayward Industries, Inc. (Hayward) and Zodiac Pool Systems, Inc. (Zodiac) move the Court to grant final approval of a class action settlement between IPPs and Hayward and a class action settlement between IPPs and Zodiac.¹ In support of their final approval motion, the parties submitted a supplemental memorandum notifying the Court that a *cy pres* distribution of settlement funds would likely be necessary.²

Before the Court may find that the *cy pres* distribution is appropriate, the Fifth Circuit requires that the unclaimed funds "be distributed for a purpose as near as possible to the legitimate objectives underlying the lawsuit, the interests of class members, and the interests of those similarly situated."

¹ R. Doc. 622.

² R. Doc. 655.

Klier v. Elf Atochem N. Am., Inc., 658 F.3d 468, 474 (5th Cir. 2011) (quoting *In re Airline Ticket Comm'n*, 307 F.3d at 682); see also *In re Lease Oil Antitrust Litig. (No. II)*, MDL No. 1206, 2007 WL 4377835, at *21 (S.D. Tex. Dec. 12, 2007) ("In applying cy pres principles, it is appropriate for a court to consider (1) the objectives of the underlying statute(s), (2) the nature of the underlying suit, (3) the interests of the class members, and (4) the geographic scope of the case." (internal citations omitted)). Stated differently, there must be a nexus between the harm that the plaintiffs suffered and the benefit the cy pres distribution is expected to provide. See William B. Rubenstein, et al., *Newberg on Class Actions* § 12.33 (5th ed. 2010).

For example, in *In re Publication Paper Antitrust Litigation*, the purchaser plaintiffs alleged that the defendants conspired to fix the prices of publication paper in violation of federal antitrust laws. No. 3:04 MD 1631(SRU), 2005 WL 2175139, at *1 (D. Conn. Sept. 7, 2005). Following approval of the parties' settlement, the court explained, "[b]ecause the plaintiffs' claims here are based on antitrust injury, the next best use for the settlement funds is to disburse those funds to charitable institutions designed to guard against antitrust injury and protect consumers." *In re Publ'n Paper Antitrust Litig.*, No. 3:04 MD 1631(SRU), 2009 WL 2351724, at *2 (D. Conn. July 30, 2009).

The court awarded *cy pres* distributions in varying amounts to the American Antitrust Institute, Public Justice, Class Action Preservation Project, and Consumer Watchdog. *Id.*

The Eastern District of New York made *cy pres* distributions to similar organizations in *In re Visa Check/MasterMoney Antitrust Litigation*. No. 96-cv-5238(JG), 2011 WL 5029841, at *9 (E.D.N.Y. Oct. 24, 2011). The plaintiffs in *Visa Check* alleged that the defendants' practices of requiring merchants who accepted the defendants' credit cards to also accept their debit products was an illegal tying arrangement under the Sherman Act. *Id.* at *1. Following distribution to the claimants, the court awarded in varying amounts *cy pres* distributions to the American Antitrust Institute, Consumers Union, and U.S. Public Interest Research Group. *Id.* at *9.

Here, the parties have failed to demonstrate any nexus between their underlying claims and the proposed *cy pres* beneficiaries. IPPs represent that they have thoroughly researched various entities related to "commercial and residential pools and the swimming pool industry." But IPPs' claims have nothing to do with swimming. Considering the objectives underlying the lawsuit and the interests of the class members and those similarly situated, the *cy pres* distribution should instead be directed to organizations focused on researching and rectifying

antitrust violations like those alleged in this case. See *Klier*, 658 F.3d at 474. Only after a recipient with "reasonably approximate" interests cannot be identified will the court consider approving a *cy pres* distribution to some other organization. See William B. Rubenstein, *et al.*, *Newberg on Class Actions* § 12.33 (5th ed. 2010). Accordingly, the Court orders the parties to submit a new list of appropriate *cy pres* entities, focusing first on organizations dedicated to antitrust and consumer issues.

IT IS ORDERED that the parties shall submit within fourteen (14) days of entry of this order a supplemental joint memorandum providing the Court with a new list of potential *cy pres* entities.

The Court defers ruling on the parties' Motion for Final Approval of the Settlements Between Indirect Purchaser Plaintiffs and Hayward Industries, Inc., and Between Indirect Purchaser Plaintiffs and Zodiac Pool Systems, Inc. until it considers the parties' new submission.

New Orleans, Louisiana, this 10th day of July, 2015.

A handwritten signature in black ink, reading "Sarah S. Vance", is written over a horizontal line.

SARAH S. VANCE

UNITED STATES DISTRICT JUDGE