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 Pentair Water Pool & Spa, Inc. (Pentair), move the Court to grant final approval of a class action settlement between IPPs and Pentair.[1] In addition, Class Counsel for IPPs move the Court to approve the deduction of common benefit litigation expenses from the fund, and to approve their request for attorneys' fees.[2] Having considered the parties' legal memoranda and the evidence submitted at the fairness hearing held on January 8, 2016, the Court finds the settlement of this class action to be fair, reasonable, and adequate, and the Court awards attorneys' fees and expenses as provided in this order.

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1 R. Doc. 687.

2 R. Doc. 686.

I. Background

A. Factual Background

This is an antitrust case that direct-purchaser plaintiffs (DPPs) and indirect-purchaser plaintiffs (IPPs) filed against Pool and Manufacturer Defendants. Pool is the country's largest distributor of products used for the construction and maintenance of swimming pools (Pool Products).[3] Manufacturer Defendants are the three largest manufacturers of Pool Products in the United States: Pentair, Hayward Industries, Inc. (Hayward), and Zodiac Pool Systems, Inc. (Zodiac).[4]

Plaintiffs define "Pool Products" are the equipment, products, parts, materials, and chemicals used for the construction, renovation, maintenance, repair, and service of residential and commercial swimming pools. Pool Products include pumps, filters, covers, drains, fittings, rails, diving boards, and chemicals, among other goods. Pool buys Pool Products from manufacturers, including the three Manufacturer Defendants, and in turn sells them to DPPs, which include pool builders, pool retail stores, and pool

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[3] R. Doc. 290 at 14 ¶ 44 (IPPs' Third Amended Class Action Complaint).

[4] *Id.* at 8 ¶ 22.

service and repair companies (collectively referred to as "Dealers").[5] IPPs are pool owners who indirectly purchased Pool Products manufactured by the Manufacturer Defendants and distributed by Pool. The IPPs named in the Complaint and their states of citizenship are: Jean Bove (CA), Kevin Kistler (AZ), Peter Mougey (FL), and Ryan Williams (MO).[6]

IPPs allege violations of state laws on behalf of classes of individuals and entities who purchased Pool Products not for resale in California, Arizona, Florida, and Missouri. IPPs allege Pool conspired with each of the Manufacturer Defendants to restrict the supply of Pool Products to Pool's rival distributors. They allege that defendants' conduct resulted in higher prices, reduced output, and reduced customer choice for Pool Products sold indirectly to IPPs. They allege that the conduct of Pool and the Manufacturer Defendants violated various antitrust and consumer protection laws of California, Arizona, Florida, and Missouri. IPPs further allege that any price increases Pool charged were passed on by Pool Dealers to indirect consumers who own residential or commercial swimming pools, such as IPPs. IPPs claim to have suffered damages in the form of passed-on overcharges they

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5 *Id.* at 11 ¶ 31.

6 *Id.* at 6 ¶ 12-15.

paid for Pool Products as a result of defendants' conduct and claim that the overcharges are "identifiable and traceable" through the manufacturer, distributor, dealer (retailer), or service company to the ultimate consumer, such as IPPs in California, Arizona, Florida, and Missouri.

B. Procedural History

On November 21, 2011, the Federal Trade Commission (FTC) announced that it conducted an investigation into unfair methods of competition by Pool and entered a consent decree with Pool resolving the matter. Shortly after the FTC's announcement, several direct-purchaser plaintiffs filed suit in this and other districts. On April 17, 2012, the Judicial Panel on Multidistrict Litigation consolidated the suits for pretrial purposes in this Court.[7] On May 17, 2012, IPPs filed their initial consolidated class action complaint in the multidistrict litigation in this Court.

On September 5, 2012, IPPs filed their Second Amended Class Action Complaint.[8] That Complaint alleged that defendants' conduct violated various antitrust and deceptive trade practices laws of California, Arizona, Florida, and Missouri. Specifically, IPPs alleged violations of California's

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[7] R. Doc. 1.

[8] R. Doc. 149.

antitrust law, the Cartwright Act, Cal. Bus. & Prof. Code § 16720, *et seq.*; the Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200, *et seq.*; the state antitrust provisions of Ariz. Rev. Stat. §§ 44-1401, *et seq.*; the consumer protection provisions of the Florida Deceptive and Unfair Trade Practices Act, Fl. Stat. §§ 501.201, *et seq.*; and the consumer protection provisions of the Missouri Merchandising Practices Act, Mo. Rev. Stat. §§ 407.010, *et seq.*[9] IPPs based their claims on allegations of the same underlying conduct that DPPs alleged in their Sherman Act claims. Specifically, IPPs alleged that Pool pursued a deliberate strategy to restrain trade and monopolize the Pool Products Distribution Market through acquiring competitors and foreclosing actual and potential competition by conditioning access to its distribution network on manufacturers' promises not to supply Pool's rivals. IPPs also alleged that the Manufacturer Defendants agreed with Pool to eliminate existing distribution competitors and prevent new entrants from obtaining the products necessary to compete. IPPs alleged that they were injured because defendants' conduct caused them to pay higher prices for Pool Products than they would have otherwise paid absent defendants' illegal practices. Finally, IPPs alleged that defendants fraudulently concealed their

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[9] *Id.* at 2.

illegal conduct until November 2011 when the FTC investigation and related consent decree made public the nature of Pool's anticompetitive conduct.

On May 24, 2013, the Court dismissed IPPs' claims under the California Unfair Competition Law, Florida Deceptive and Unfair Trade Practices Act, and Missouri Merchandising Practices Act that were based on the theory that defendants engaged in fraud or misrepresentation. The Court dismissed IPPs' illegal group boycott claim under the Cartwright Act because IPPs failed to allege a horizontal agreement.[10] The Court also dismissed IPPs' claim that defendants fraudulently concealed their illegal conduct.[11]

The Court allowed IPPs to go forward with their California Unfair Competition Law and rule of reason Cartwright Act claims involving three vertical conspiracies (one between Pool and each Manufacturer Defendant), to the extent that the claims were predicated on a national market.[12] The Court also allowed IPPs to go forward with their Arizona Antitrust Act claims of three vertical conspiracies, to the extent that the claims were predicated on a national market, and their Arizona Antitrust Act claim of attempted

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[10] R. Doc. 250 at 19-20.

[11] *Id.* at 37-38.

[12] *Id.* at 21-22.

monopolization against Pool.[13] The Court also found that IPPs stated a claim under the Florida Deceptive and Unfair Trade Practices Act based on their allegations of attempted monopolization (by Pool) and three vertical conspiracies, to the extent that the claims were predicated on a national market.[14] In addition, the Court found that IPPs stated a claim under the Missouri Merchandising Practices Act based on their allegations of defendants' alleged anticompetitive agreements to exclude Pool's rivals and Pool's alleged attempted monopolization, to the extent that the claims were predicated on a national market.[15] IPPs then filed their Third Amended Class Action Complaint, which omitted the claims that the Court dismissed.

C. Settlement Agreement Background

1. Settlement Negotiations

Negotiations leading to the Settlement Agreement between IPPs and Pentair took place over the course of two years. Class Counsel for IPPs and counsel for Pentair mediated this action before the Honorable Layn Phillips, a former federal district judge and a respected mediator of antitrust disputes. Settlement negotiations included four full-day, in-person mediation sessions

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[13] *Id.* at 25-26.

[14] *Id.* at 29-30.

[15] *Id.* at 35.

on July 22, 2013, in Chicago and March 20, 2014; October 1, 2014; and March 5, 2015, in New York.[16] The parties reached an agreement at the March 5, 2015 mediation session and finalized the terms on March 31, 2015, as a result of follow-up email and telephone communications facilitated by Judge Phillips. IPPs and Pentair executed the Settlement Agreement on March 31, 2015.[17] The parties represent that they have not entered into any side agreements.[18]

2. Preliminary Fairness Determination

The Court preliminarily approved the IPP-Pentair Settlement and certified its Settlement Class on August 31, 2015.[19] Consistent with the Settlement Agreement, the Court appointed plaintiffs Kevin Kistler, Jean Bove, Peter Mougey, and Ryan Williams (collectively "Named Plaintiffs") as Settlement Class Representatives.[20] The Court appointed Thomas J.H. Brill (Law Office of Thomas H. Brill) as Lead Counsel for the Class, and Gerald E. Meunier and M. Palmer Lambert (Gainsburgh, Benjamin, David, Meunier &

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16 R. Doc. 659-3 at 2 ¶ 5 (Declaration of Layn R. Phillips).

17 *Id.*

18 R. Doc. 669 (Joint Response to Pretrial Order No. 40).

19 R. Doc. 674.

20 R. Doc. 675 at 3 ¶ 3 (procedural order).

Warshauer, L.L.C.), John F. Edgar (Edgar Law Firm LLC), Isaac L. Diel (Sharp McQueen PA), and Michael F. Brady (Brady & Associates) as Co-Counsel for the Settlement Class, finding that the appointments satisfied the prerequisites of Rule 23(g).[21] The Court also approved Angeion Group as the Claims Administrator for the settlement and First NBC Bank as Escrow Agent.[22] The Court further approved the proposed notice and claim forms, as well as the deadlines for submitting claims forms, opting out, and filing objections.[23] The Court scheduled a fairness hearing on January 8, 2016, to determine whether the Settlement is fair and to determine an award of attorneys' fees and expenses.

D. The Settlement Class

Consistent with the parties' Settlement Agreement, the Court certified the following Settlement Class:

> [A]ll 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

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21 *Id.* at ¶ 4.

22 *Id.* at 3-4 ¶¶ 5-6.

23 *Id.* at 4-9.

> 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.[24]

Also excluded from the class are any putative class members who excluded themselves by filing a timely, valid request for exclusion. The parties stipulated that certification of the Settlement Class is for settlement purposes only, and they retain all of their respective objections, arguments, and defenses regarding class certification in the event that settlement is not finalized.[25]

E. The Settlement Agreement

Pentair has paid $600,000 into an Escrow Account pending the Court's final approval of the Settlement. Interest from the account accrues to the benefit of the Settlement Class. The Settlement Agreement provides that the $600,000 settlement amount is an "all-in" figure, meaning that it reflects the *total* amount Pentair will pay in exchange for the released claims.[26] Accordingly, the settlement amount shall be used to pay: (1) the notice and administration costs; (2) attorneys' fees and litigation expenses; (3) incentive

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[24] R. Doc. 659-2 at 4 ¶ 5 (IPP-Pentair Settlement Agreement).

[25] *Id.*

[26] *Id.* at 11 ¶ 19.

awards; (4) class member benefits; and (5) any remaining administration expenses and any other costs of any kind associated with the resolution of the action.[27] Pentair also agreed to assist plaintiffs' counsel with document authentication and to answer plaintiffs' questions about transactional data previously produced by Pentair during discovery.[28]

The Agreement provides that it is intended to forever and completely release Pentair from all "Released Claims," which is defined as:

> any and all claims, demands, actions, suits, proceedings, causes of action, damages, liabilities, costs, expenses, penalties, and attorneys' fees, of any nature whatsoever, whether class, individual, or otherwise in nature (regardless of whether any person or entity has objected to the settlement or makes a claim upon or participates in the Settlement Fund), whether directly, representatively, derivatively or in any other capacity that Releasors, or each of them, ever had, now has, or hereafter can, shall, or may have on account of, related to, or in any way arising out of, any and all known and unknown, foreseen and unforeseen, suspected and unsuspected injuries, damages, and the consequences thereof in any way arising out of or relating to the Action, which were asserted or that could have been asserted, including any claims arising under any federal or state antitrust, unjust enrichment, unfair competition, or trade practice statutory or common law, or consumer protection law.[29]

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27 *Id.*

28 *Id.* at 20 ¶ 31.

29 *Id.* at 9-10 ¶ 17.

In addition, releasors waive any rights or benefits conferred by Section 1542 of the California Civil Code, which states: "A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor."[30] Releasors also waive rights or benefits available under any law of any state or territory of the United States or District of Columbia, or by principle of common law, which is similar, comparable, or equivalent to Section 1542 of the California Civil Code, including but not limited to Section 20-7-11 of the South Dakota Codified Laws.[31]

F. Notice

Federal Rule of Civil Procedure 23(c)(2) governs the notice requirements for class certification. Specifically, the notice must state:

> (i) the nature of the action;
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> (ii) the definition of the class certified;
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> (iii) the class claims, issues, or defenses;
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> (iv) that a class member may enter an appearance through an attorney if the member so desires;

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30 *Id.* at 10 ¶ 18.

31 *Id.*

> (v) that the court will exclude from the class any member who requests exclusion;
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> (vi) the time and manner for requesting exclusion; and
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> (vii) the binding effect of a class judgment on members under Rule 23(c)(3).

Fed. R. Civ. P. 23(c)(2)(B). The notice here gave the class information about the terms of the settlement, the date of the final fairness hearing and deadlines for opting out of or objecting to the Settlement, and methods for contacting Class Counsel and Angeion. The notice also informed the class that Class Counsel intended to seek up to one-third of the Settlement in attorneys' fees and/or for reimbursement of expenses. In its preliminary approval order, the Court found that the notice met the requirements of Rule 23(c)(2). The Court also found that the proposed plan for disseminating the notice was the best notice practicable in accordance with Rule 23(c)(2)(B) and that it met the requirements of Due Process.[32]

Class Counsel has provided evidence that the notice was disseminated as planned, with one caveat. On September 4, 2015, Angeion sent email notice to 173,229 potential class members, using email addresses gleaned

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[32] R. Doc. 674 at 40-44.

from Hayward's and Zodiac's warranty and rebate databases.[33] Angeion determined that Pentair's warranty and rebate database contained an additional 102,706 email addresses for potential class members.[34] Due to an "internal error," however, Angeion did not email notice to these additional potential class members until October 30, 2015, beyond the deadline that the Court set in its preliminary approval order.[35] Because of Angeion's late emailing, these 102,706 additional potential class members received notice approximately 42 days before the claims filing deadline of December 11, 2015.[36] Though these putative claimants had less time within which to file a claim, this shorter time period is not unreasonable. *See Young v. Polo Retail, LLC*, No. C-02-4546 VRW, 2006 WL 3050861, at *6 (N.D. Cal. Oct. 25, 2006) (imposing a 45-day filing deadline). At the final fairness hearing, Class Counsel represented that no class member has requested an extension of time to file a claim. The Claims Administrator has received approximately 13 late claims, which were mailed after the December 11, 2015 filing deadline.

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33 R. Doc. 687-2 at 5 ¶ 12 (Declaration of Steven Weisbrot).

34 *Id.*

35 *Id.*

36 *Id.*

Nontheless, Angeion will consider this late claims along with the timely claims for distribution of the settlement funds.

Additionally, the manufacturers' email lists did not include all class members, because many affected class members may have never registered their warranties or submitted a rebate request. Thus, to reach unknown class members, Angeion implemented a three-part, paid notice campaign.

First, Angeion published short-form notice of the Settlement in major newspapers in the four states included in the class. The affidavit from Angeion's Executive Vice President includes a chart documenting the particular newspapers and dates of publication.[37] Second, Angeion executed an internet banner advertisement campaign and a Facebook and Google advertisement campaign.[38] Third, Angeion issued a national press release about the settlement.[39]

In addition to the notice campaign, Angeion has established and maintained an information website about the Settlement.[40] Angeion also

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37 *Id.* at 6-7 ¶¶ 14-15.

38 *Id.* at 8 ¶¶ 17-19.

39 *Id.* at ¶ 20.

40 *Id.* at ¶ 21.

established a toll-free number to permit class members to listen to FAQs and request long-form notice.[41]

Pentair has notified the appropriate state and federal officials as required by the Class Action Fairness Act. *See* 28 U.S.C. § 1715. The Act requires notice to be given no later than ten days after a proposed settlement of a class action is filed in court. *Id.* § 1715(b). And, under section 1715(d), a court may not grant final approval of a settlement until ninety days after the appropriate officials have been served with notice.

Here, Pentair moved for preliminary approval of its class action settlement with IPPs, and thus filed its proposed settlement in court, on July 6, 2015.[42] Pentair mailed notice to the necessary State and Federal officials on August 28, 2015.[43] Thus, Pentair did not comply with the Act's requirement of prompt notice. Nonetheless, more than ninety days have passed since Pentair served notice on the appropriate officials, and no officials have raised complaints or concerns. Therefore, the Court finds that the notice satisfies the Act, because the appropriate state and federal officials have had "sufficient notice and opportunity to be heard" about the settlement.

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41 *Id.* at ¶ 22.

42 R. Doc. 659.

43 R. Doc. 682 at 1-2 ¶ 4 (Declaration of Samantha P. Griffin).

In re Processed Egg Prods. Antitrust Litig., 284 F.R.D. 249, 258 n.12 (E.D. Pa. 2012) (collecting cases).

In sum, after reviewing evidence of the Claims Administrator's actual dissemination of the notice, and the notice provided to state and federal officials under the Class Action Fairness Act, the Court confirms that the notice complies with the requirements of Rule 23 and Due Process, and with the Act.

G. Plan of Allocation and Claims Process

Under the proposed plan of allocation, the $600,000 total settlement fund will be used to pay attorneys' fees and expenses approved by the Court, all settlement administration expenses, costs for notice, and any other costs associated with the settlement. So far, settlement administration expenses, total $193,357.04.[44] IPPs currently request $180,000 for common benefit expenses and fees, which would leave only $230,000 to satisfy class member claims.[45]

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[44] This is an increase from Class Counsel's original estimate of $145,000. *See* R. Doc. 659-1 at 9 n.8 (Memorandum in Support of Motion for Preliminary Approval); R. Doc. 695 at 1 n.1 (Motion for Approval of Payment of Notice Administration Expenses).

[45] *See* R. Doc. 686-1 at 3.

The Court also appointed a Special Master for the IPP settlement, and tasked the Special Master with formulating and recommending an allocation protocol that would apportion the settlement proceeds--net of claims administration expenses, attorneys' fees, and costs--to Class Members who submit valid claims from each of the four states involved (CA, AZ, MO, and FL).[46] In his supplemental report regarding the Pentair settlement, the Special Master recommended a claims procedure that gives claimants the option to recover under a "Standardized Recovery Model" or an "Itemized Recovery Model," depending on the types of documentation they have available. Consumers without extensive documentation will recover standard amounts for items purchased in particular categories of Pool Products. Consumers with extensive records can submit itemized claims based on their actual purchase prices. In any event, consumers will be able to recover only up to the alleged 4.97 percent overcharge on their eligible Pool Products purchases. After all claims are processed, if the aggregate eligible recovery exceeds the net settlement amount, then eligible claims will be reduced pro rata.[47]

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[46] *See* R. Doc. 672.

[47] *See* R. Doc. 673.

H. Opt-outs, Objections, and Claims

The deadline for opting out of the settlement was December 11, 2015. That deadline has passed, and no class members requested exclusion. Nor did any class members object to the settlement.

The claims filing deadline was also December 11, 2015. As of January 7, 2016, Angeion has received 3,474 claims for the Pentair settlement. The average purchase price amount claimed is $7,357.91.[48] Class Counsel estimates that there are approximately 500,000 class members nationwide, meaning that the claims submitted so far represent approximately 0.7 percent of the class.

II. Fairness Determination

A. Legal Standard: Fair, Adequate, and Reasonable

A class action may not be dismissed or compromised without the Court's approval and notification to all class members. Fed. R. Civ. P. 23(e). Before the Court approves a settlement, the Court must find that the proposed settlement is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2); *Newby v. Enron Corp.*, 394 F.3d 296, 301 (5th Cir. 2004).

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[48] R. Doc. 696 at 2 (Memorandum Regarding Close of Claims Period).

The Court must "ensure that the settlement is in the interests of the class, does not unfairly impinge on the rights and interests of dissenters, and does not merely mantle oppression." *Ayers v. Thompson*, 358 F.3d 356, 368-69 (5th Cir. 2004) (quoting *Reed v. Gen. Motors Corp.*, 703 F.2d 170, 172 (5th Cir. 1983)). Because the parties' interests are aligned in favor of settlement, the Court must take independent steps to ensure fairness in the absence of adversarial proceedings. *See Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 279-80 (7th Cir. 2002) (noting that the class action context "requires district judges to exercise the highest degree of vigilance in scrutinizing proposed settlements"); *see also* Manual for Complex Litigation (Fourth) § 21.61 (2004). The Court's duty of vigilance does not, however, authorize it to try the case in the settlement hearings. *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977).

The Fifth Circuit has identified six factors that courts should consider in assessing whether a settlement is fair, adequate, and reasonable: (1) evidence that the settlement was obtained by fraud or collusion; (2) the complexity, expense, and likely duration of the litigation; (3) the stage of the proceedings and the amount of discovery completed; (4) the factual and legal obstacles to plaintiffs prevailing on the merits; (5) the range of possible recovery and certainty of damages; and (6) the opinions of class counsel, class

representatives, and absent class members. *See Newby*, 394 F.3d at 301; *Ayers*, 358 F.3d at 369; *Reed*, 703 F.2d at 172.

B. Discussion

1. Settlement Obtained by Fraud or Collusion

There is no evidence that any fraud or collusion infected the process by which the parties arrived at the Settlement Agreement. The parties reached an agreement only after multiple formal sessions of arm's length mediation with former district judge Layn Phillips.

Next, the terms of the Agreement do not signal fraud or collusion. In its preliminary approval order, the Court reviewed the "Released Claims" provision in the Settlement Agreement and found the provision reasonable. The Agreement provides that they are intended to forever and completely release Pentair from all "Released Claims," which are defined as:

> any and all claims, demands, actions, suits, proceedings, causes of action, damages, liabilities, costs, expenses, penalties, and attorneys' fees, of any nature whatsoever, whether class, individual, or otherwise in nature (regardless of whether any person or entity has objected to the settlement or makes a claim upon or participates in the Settlement Fund), whether directly, representatively, derivatively or in any other capacity that Releasors, or each of them, ever had, now has, or hereafter can, shall, or may have on account of, related to, or in any way arising out of, any and all known and unknown, foreseen and unforeseen, suspected and unsuspected injuries, damages, and the consequences thereof in any way arising out of or relating to the Action, which were asserted or that could have been asserted,

> including any claims arising under any federal or state antitrust, unjust enrichment, unfair competition, or trade practice statutory or common law, or consumer protection law.[49]

Regarding unknown claims, the Agreement further specifies that this release constitutes a waiver of class members' rights under Section 1542 of the California Civil Code, which provides for a release against unknown claims, and "any other rights or benefits available under any law . . . which is similar, comparable, or equivalent to § 1542 of the California Civil Code, including but not limited to Section 20-7-11 of the South Dakota Codified Laws."[50]

In its preliminary approval order, the Court found that this release was not impermissibly broad.[51] Courts have consistently approved releases in class action settlements that discharge unknown claims relating to the factual issues in the complaint. *See DeHoyos v. Allstate Corp.*, 240 F.R.D. 269, 311-12 (W.D. Tex. 2007) (finding that release of unknown claims was not impermissibly broad); *In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 221 (5th Cir. 1981) ("[A] court may release not only those claims alleged in the complaint and before the court, but also claims which could have been alleged by reason of or in connection with any matter or fact set forth or

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49 R. Doc. 659-2 at 9-10 ¶ 17.

50 *Id.* at 10 ¶ 18.

51 R. Doc. 674 at 36-37.

referred to in the complaint."). As the Fifth Circuit explains, courts are required to enforce such broad provisions because they "contribute significantly to the public policy of encouraging the settlement of differences and compromise of disputes in which the execution and exchange of releases is the common and legally accepted means of consummation." *Ingram Corp. v. J. Ray McDermott & Co.*, 698 F.2d 1295, 1312 (5th Cir. 1983). Thus, the Court finds the provision to be reasonable.

As the Court also noted in its preliminary approval order, the Settlement does not give preferential treatment to the Class Representatives or any segment of the class.[52] The Special Master has recommended a modest incentive award of $500 for each Named Plaintiff, to compensate them for the assistance they have provided to Class Counsel in developing the facts in the case.[53] In addition, to the extent that class members' claims exceed the net settlement fund, the Special Master recommends that each claimant be compensated pro rata according to the claimant's calculated loss under the allocation plan. The Court finds this suggested allocation plan to be fair and unbiased.

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52 *Id.* at 35.

53 R. Doc. 673 at 3.

That class members received notice of the allocation plan and have not objected to it buttresses the Court's conclusion. Class members received notice that the attorneys would request up to one-third of the settlement and that notice and administration expenses would come out of the settlement. They also had access, via the settlement website, to the Court's preliminary approval order, which set forth in greater detail the proposed plan for allocating the net settlement fund among claimants. No class member has objected to the fairness of the settlement, the allocation plan, or the attorneys' request for one-third of the settlement.

Because the Court finds no indication that the Settlement is fraudulent or collusive, or that it unfairly discriminates among class members, this factor favors approving the Settlement.

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

Under this factor, the Court considers whether settling now avoids the risks and burdens of potentially protracted litigation. *Ayers*, 358 F.3d at 369. The Settlement eliminates the need for IPPs to litigate their claims against Pentair, which will save substantial time and expense. Moreover, this partial settlement allows IPPs to mitigate some of the risk inherent in continuing to litigate against Pool, the remaining defendant. It guarantees at least some

recovery for class members, regardless of how IPPs' claims against Pool may be resolved.

The complexity of this litigation also favors settlement. As the ongoing motions practice involving Pool indicates, this case involves complex issues of proof in connection with both IPPs' substantive claims and their motion for class certification. If the Court grants IPPs' motion for class certification, the parties will still likely have to withstand an interlocutory appeal of the Court's class certification order. A trial in this matter would be lengthy and would require numerous attorneys, paralegals, and witnesses. This case also requires expert testimony to establish market definition, causation, and damages (including, for IPPs, pass-through). After trial, the parties could still expect years of appeals. Therefore, the complexity and likely duration of this case weigh in favor of finding that partial resolution by settlement is a reasonable option for all parties involved.

3. Stage of the Proceedings

This factor asks whether the parties have obtained sufficient information "to evaluate the merits of the competing positions." *Ayers*, 358 F.3d at 369. The question is not whether the parties have completed a particular amount of discovery, but whether 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 or continuing to litigate. *In re Educ. Testing Serv. Praxis Praxis Principles of Learning & Teaching, Grades 7-12 Litig.*, 447 F. Supp. 2d 612, 620-21 (E.D. La. 2006) (citing *In re Train Derailment Near Amite, La.*, MDL No. 1531, 2006 WL 1561470, at *22 (E.D. La. May 24, 2006)). If the settlement proponents have taken affirmative steps to gather data on the claims at issue, and the terms of the settlement are not patently unfair, the Court may rely on counsel's judgment that the information gathered was enough to support a settlement. *In re Corrugated Container*, 643 F.2d at 211.

Here, settlement occurred after three years of litigation and extensive fact and expert discovery. Counsel participated in or attended over eighty fact witness depositions and reviewed over four million documents. In addition, IPPs defended against a complicated motion to dismiss, and the parties briefed class certification and *Daubert* motions. Because of the advanced stage of the litigation, counsel for all parties were familiar with the factual and legal issues in the case. Therefore, the Court is satisfied that the parties were sufficiently informed to assess the strengths and weaknesses of their positions and to make a reasoned evaluation of whether and on what terms to settle. This factor favors settlement.

4. The Obstacles to Prevailing on the Merits

As the Court summarized in its preliminary fairness order, IPPs face a number of obstacles to prevailing on the merits of their claims, which IPPs acknowledge in their motion for final approval of this settlement.

First, IPPs' claims are subject to complex problems of proof. Regarding liability, no claim is subject to a theory of *per se* illegality, which makes proof of anticompetitive conduct more difficult. Further, reports from Pool's expert indicate that IPPs will face proof challenges on the issues of impact and damages, including pass-through.

Second, class certification is disputed. Pool opposes IPPs' pending motion for certification of a litigation class. They challenge, among other things, IPPs' ability to demonstrate commonality and predominance under Rule 23.

Finally, the parties are presently engaged in a heated dispute over expert testimony. The Court is currently considering motions to exclude not only IPPs' economic expert, but also DPPs' economic expert, upon whose analysis IPPs' substantive claims and bid for class certification depend.

Moreover, even if IPPs survive summary judgment and receive class certification, the certification decision will be subject to interlocutory appeal. In sum, considering the risks IPPs face in surviving summary judgment,

attaining class certification, and prevailing at trial and on appeal, the probability of success factor favors approving the settlement.

5. Range of Possible Recovery

The Court "must establish the range of possible damages that could be recovered at trial, and, then, by evaluating the likelihood of prevailing at trial and other relevant factors, determine whether the settlement is pegged at a point in the range that is fair." *In re Corrugated Container*, 643 F.2d at 213. In particular, "[p]roof difficulties" are "permissible factors" for a court to consider when evaluating the fairness of a settlement. *In re Chicken Antitrust Litig. Am. Poultry*, 669 F.2d 228, 240 (5th Cir. 1982).

The Court considers whether the $600,000 total settlement fund is pegged at a fair point in the range of potential recovery, taking into account the risks present in this litigation. IPPs' expert suggests that estimated damages for class members during the class period are $23,951,893.[54] Although at first glance the settlement figure appears small in comparison to the universe of potential damages, plaintiffs' projected damages reflect a *best* case scenario for plaintiffs' actual damages. This damages estimate does not reflect the substantial risks of nonrecovery or diminished recovery plaintiffs

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[54] R. Doc. 687-1 at 31 n. 33 (Memorandum in Support of Motion for Final Approval).

face in this litigation, as discussed above. Indeed, the lower boundary of IPPs' range of possible recovery is zero. The $600,000 figure provides prompt and certain recovery of at least some of IPPs' alleged losses.

The class will also receive a non-monetary benefit as part of the settlement. Pentair has agreed to cooperate with IPPs to answer questions about its transactional data and to assist with authenticating records. This cooperation will assist IPPs as they proceed against Pool. After evaluating the range of possible recovery in light of the risks of non-recovery, the Court concludes that the $600,000 settlement fund is pegged at a fair point in the range. Thus, this factor weighs in favor of settlement.

6. Opinions of Class Counsel, Class Representatives, and Absent Class Members

The opinions of the affected parties are generally favorable towards the settlement. The Court is entitled to rely on the judgment of experienced counsel in its evaluation of the merits of a class action settlement. *Cotton*, 559 F.2d at 1330. Here, Settlement Class Counsel have expressed their approval of the Settlement after over three years of litigation and extensive fact discovery, as discussed above.

Further, no objections have been filed, and no class members have asked to opt out of the settlement. Although the Court is careful not too infer

too much from an absence of objectors and opt-outs, the lack of objectors and opt-outs suggests class-wide support for the proposed settlement. *See, e.g.*, *In re Cardizem CD Antitrust Litig.*, 218 F.R.D. 508, 527 (E.D. Mich. 2003) (explaining that a small number of opt-outs and objections can be viewed as indicative of the fairness of the settlement); *In re Excess Value Ins. Coverage Litig.*, No. M-21-84RMB, MDL-1339, 2004 WL 1724980, at *11 (S.D.N.Y. 2004) (reasoning that small number of objectors suggests support for settlement). In addition, a total of 3,474 class members have filed claims.

In sum, because all factors weigh in favor of settlement, the Court finds the Settlement to be fair, reasonable and adequate under Rule 23(e)(2) of the Federal Rules of Civil Procedure.

III. Attorneys' Fees and Costs

A. Class Counsel's Request

In the notice sent to the class, Class Counsel indicated that they would seek up to one-third of the settlement total for attorneys' fees and/or for reimbursement of expenses. Consistent with that notice, Class Counsel now request reimbursement of common benefit expenses in the amount of $55,920.40 and a common benefit fee award in the amount of $124,079.60, for a total of $180,000 or 30 percent of the total settlement fund. Class

Counsel's fee and expense request also sets forth a plan for allocating the requested award among the firms that have worked on the case.

To date, Class Counsel have expended a total of $332,637.10 on common benefit costs.[55] In connection with IPPs' settlements with Hayward and Zodiac, the Court awarded Class Counsel $276,716.70 to reimburse common benefit expenses.[56] The Court also awarded Class Counsel $43,282.30. Subtracting the reimbursement dedicated specifically to expenses already incurred leaves $55,920.40 in unreimbursed common benefit expenses.[57] Class Counsel have reported these unreimbursed expenses in accordance with a court-approved protocol to the court-appointed accountant, Philip A. Garrett.

Class Counsel have also expended approximately 5,923 hours in attorney and staff time on this litigation.[58] All of these hours have been reported to Mr. Garrett, and he found them to be appropriate common benefit

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55 R. Doc. 686-1 at 5.

56 R. Doc. 663 at 56-57. The Court also awarded Class Counsel $43,283.30 to be set aside for future litigation expenses. *Id*. at 40.

57 R. Doc. 686-1 at 5.

58 *Id*.

work. The requested fee award is approximately 20.7 percent of the total settlement fund.

In its preliminary fairness determination, the Court concluded that a total attorney award (including both fees and expenses) not exceeding one-third of the fund was consistent with other awards approved in this circuit and within the limit of what the Court deems reasonable. The Court now makes a more detailed inquiry into Class Counsel's request.

B. Legal Standard

The court must independently analyze the reasonableness of the attorneys' fees proposed in the settlement agreement. *See* Fed. R. Civ. P. 23(e); *Strong v. BellSouth Telecomm., Inc.*, 137 F.3d 844, 849-50. Here, the proposed fees amount to approximately 20.7 percent of the total settlement fund.

In a common fund settlement, in which the plaintiffs' attorneys are paid out of settlement proceeds, the interests of the attorneys conflict with those of the class. Put simply, the more money the attorneys get, the less the class gets. The Fifth Circuit has established twelve factors to consider in calculating reasonable fees and costs. *Johnson v. Ga. Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974). In common fund cases, district courts typically use either the percentage method or the lodestar method to calculate

attorney's fees. The Fifth Circuit endorses the use of the percentage method, cross-checked with the *Johnson* factors. *See Union Asset Mgmt. Holding A.G. v. Dell, Inc.*, 669 F.3d 631, 644 (5th Cir. 2012). The Court adopts that approach here.

A different standard applies to the expenses requested by Class Counsel. Typically, class action counsel who create a common fund for the benefit of the class (as counsel have done here), are entitled to reimbursement of reasonable litigation expenses from that fund. *See In re Heartland Payment Sys.*, 851 F. Supp. 2d at 1089; *City of Omaha Police & Fire Ret. Sys. v. LHC Grp.*, No. 6:12-1609, 2015 WL 965696, at *11 (W.D. La. Mar. 3, 2015). And, in the non-class context, the Fifth Circuit has disapproved the application of the *Johnson* factors to reduce expenses across-the-board. It explained:

> Fees may be increased above the lodestar; the cost of suit may not be. . . . [T]here appears to be no correlation between the Johnson factors and out-of-pocket expenses. While expenses incurred extravagantly or unnecessarily should be disallowed, this should be done on an item-by-item basis.

Copper Liquor, Inc. v. Adolph Coors Co., 684 F.2d 1087, 1101 (5th Cir. 1982), *overruled in part on other grounds, Int'l Woodworkers of Am., AFL-CIO & its Local No. 5-376 v. Champion Int'l Corp.*, 790 F.2d 1174 (5th Cir. 1986), *and, J.T. Gibbons, Inc. v. Crawford Fitting Co.*, 790 F.2d 1193 (5th Cir. 1986). This makes sense: unlike fees, expense reimbursements are not a reward.

They must be awarded simply to return counsel to the position they were in before the litigation began.

Finally, the Court must assess whether the total amount awarded to the attorneys, whether in fees or expenses, is fair to the class. As the Fifth Circuit holds, a district court abuses its discretion when it approves a settlement from which expenses may be sought without having any estimate as to what those expenses may be. *See In re Katrina*, 628 F.3d at 195. The Court must ensure that expenses will not "cannibalize the entire . . . settlement," and that money will remain for the class after administrative and litigation expenses have been deducted from the fund. *Id.* at 196. Thus, after assessing whether the fees and expenses requested are independently reasonable, the Court will ensure that the overall sum requested is reasonable.

C. Expense Request

Class action counsel who create a common fund for the benefit of the class, are entitled to reimbursement of reasonable litigation expenses from that fund. *See In re Heartland Payment Sys.*, 851 F. Supp. 2d at 1089. Here, the expenses incurred are reasonable. IPPs reached a settlement with Pentair only after completing fact and expert discovery, including the depositions of over eighty fact witnesses, and the review of over four million documents. This sort of work requires not only attorney hours but also money--for

discovery vendors, travel, copying, and so on. All of the expenses that Class Counsel seek from the fund fall within the categories pre-approved by Pretrial Order No. 9, and Mr. Garrett reviewed and approved all of them. Thus, Class Counsel's incurred expenses are reasonable and eligible for reimbursement.

As noted, however, in connection with the Hayward and Zodiac settlements, the Court awarded Class Counsel $320,000 for reimbursement of common benefit expenses. This amount consisted of $276.716.70 for common benefit expenses that Class Counsel had already incurred at that time, as well as $43,283.30 set aside for "future litigation expenses." Class Counsel now ask the Court to reimburse the $55,920.40 in common benefit expenses that they have incurred since the Hayward and Zodiac settlements, while leaving the $43,283.30 set-aside untouched. The Court finds this approach to be inappropriate here.

Class Counsel must use its reserve funds to satisfy the expenses incurred since the Court's approval of the Hayward and Zodiac settlements. These expenses are properly considered "future litigation expenses" as the Court used that phrase in its previous approval order. Applying $43,283.30 to counsel's $55,920.40 expense request leaves only $12,637.10 in unreimbursed common benefit expenses. Because these expenses are

reasonable and eligible for reimbursement, the Court awards Class Counsel $12,637.10 from the Pentair settlement fund to satisfy these costs.

D. Fees Request

The Court assesses the fees requested by Class Counsel according to the percentage method, cross-checked with the *Johnson* factors. *See Union Asset Mgmt.*, 669 F.3d at 644.

1. Benchmark Percentage

The Court begins by establishing a "benchmark" percentage, which it will then adjust for the circumstances of the case. *See, e.g., Camden I Condo. Ass'n v. Dunkle*, 946 F.2d 768, 774-75 (11th Cir. 1991) (citing *Paul, Johnson, Alston & Hunt v. Graulty*, 886 F.2d 268, 272 (9th Cir. 1989)); *In re Catfish Antitrust Litig.*, 939 F.Supp. 493, 501 (N.D. Miss. 1996); *see also* Manual for Complex Litigation (Fourth) § 14.122 (2004). In determining the benchmark, the Court will consider fee awards in similar cases, which the Court notes is one of the *Johnson* factors. To adjust the benchmark to the facts of this case, the Court will use the remaining *Johnson* factors, to the extent that they are applicable here.

The Manual for Complex Litigation states that a fee of 25 percent of a common fund "represents a typical benchmark." Manual, *supra*, § 14.121. The Ninth Circuit and Eleventh Circuit have adopted a benchmark of 25

percent in common fund cases. *See Staton v. Boeing Co.*, 327 F.3d 938, 968 (9th Cir. 2003); *Camden I Condo.*, 946 F.2d at 774-75.

Further, data on fee awards in class action settlements is available in several academic analyses of class action data. *See* Theodore Eisenberg and Geoffrey P. Miller, *Attorney Fees in Class Action Settlements: An Empirical Study*, 1 J. Empirical Legal Stud. 27 (2004); Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical Legal Stud. 811 (2010). The Eisenberg and Miller study examines (1) data based on published decisions from "all state and federal class actions with reported fee decisions between 1993 and 2002, inclusive, in which the fee and class recovery could be determined with reasonable confidence"; and (2) information reported on more than 600 common fund cases from 1993 and 2002 in *Class Action Reports (CAR)*. Eisenberg & Miller, *supra*, at 28.

The study finds a "strong correlation between the fee amount and the client recovery." *Id.* at 52. The study further indicates that a scaling effect exists, for "[a]s client recovery increases, the fee percent decreases." *Id.* at 54. The authors of the study suggest that the results can assist courts in determining fee awards:

> [B]ecause our study finds an overwhelming correlation between class recovery and attorney fees, the court can conduct a simple initial inquiry that looks only at these two variables in any case

> where the size of the class recovery can be estimated. The court need only compare the request in a given case with average awards in cases of similar magnitude. If the request is relatively close to average awards in cases with similar characteristics, the court may feel a degree of confidence in approving the award. If the request is significantly higher than amounts awarded in past cases, the court should inquire further.

Id. at 72. Eisenberg and Miller divided the cases into ten ranges of recovery (deciles) and then gave the mean and median fee percent, as well as the standard deviation, for each decile. *Id.* at 73.

The Court finds the study's data on the average percentage fee awarded in the recovery range comparable to this case useful in arriving at a benchmark percentage fee.[59] The $600,000 settlement fund falls within the less than 10 percent decile of client recovery, which includes recoveries less than $1.4 million. *Id.* at 73. Based on the *Class Action Reports (CAR)* data set, the mean fee percent for nonsecurities cases in this decile was 30.9 percent, with a standard deviation of 8.2 percent. *Id.* The data set generated from published decisions shows a mean fee percent for cases in this decile of 29.5 percent, with a standard deviation of 5.9 percent. *Id.* An average of the mean fee percentages of the two data sets would be 30.2 percent.

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[59] Eisenberg and Miller suggest that a fee request within one standard deviation of the mean is presumptively reasonable, and that one falling between one and two standard deviations from the mean may require further justification. *Id.* at 74.

The Fitzpatrick study gives a slightly lower figure, with a mean fee percent of 28.8 percent, with a standard deviation of 6.1 percent, for settlements up to $750,000. Fitzpatrick, *supra*, at 839. The Fitzpatrick study also indicates that the mean fee percentage for antitrust cases is 25.4 percent. *Id.* at 835.

Based on this data, the Court will use an initial benchmark of 27 percent, which is roughly the average of the two data sets in the Fitzpatrick study involving settlement funds of this size and settlements in antitrust litigation. The 27 percent benchmark is slightly lower than the 30.2 percent average in the Eisenberg and Miller study, but the Court notes that Eisenberg and Miller's percentages are significantly higher than the standard 25 percent benchmark adopted by the Ninth and Eleventh Circuits. Therefore, the Court finds 27 percent to be an appropriate benchmark. The Court will next determine whether the benchmark should be adjusted based on the circumstances of this case. In doing so, the Court will consider the other *Johnson* factors.

2. Johnson *Factors*

The twelve *Johnson* factors are: (1) the time and labor required; (2) the novelty and difficulty of the question; (3) the skill requisite to perform the legal service; (4) the preclusion of other employment by the attorneys due to

their accepting the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the residuals obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of professional relationship with the client; and (12) awards in similar cases. *Von Clark v. Butler*, 916 F.2d 255, 258 n.3 (5th Cir. 1990).

The *Johnson* factors are intended to ensure "a reasonable fee." 488 F.2d at 720. Because not all of the *Johnson* factors are always applicable, the Court will consider only the factors relevant to this case. *See In re Harrah's Entm't, Inc. Sec. Litig.*, No. 95-3925, 1998 WL 832574, at *4 (E.D. La. Nov. 25 1998) (citing *Uselton v. Commercial Lovelace Motor Freight, Inc.*, 9 F.3d 849, 854 (10th Cir. 1993)).

Time and labor required

The Court finds that the amount of time and labor required in this case warrants an adjustment of the benchmark percentage. IPPs reached a settlement with Pentair only after completing fact and expert discovery. IPPs' participation in fact discovery included participating in or attending the depositions of over eighty fact witnesses and reviewing approximately four million documents. IPPs also worked to secure an expert to support their

proof of liability and damages. Moreover, they reached this settlement only after successfully defending against a motion to dismiss and briefing both class certification and *Daubert* motions. The magnitude of the work required in connection with discovery, the motion to dismiss, negotiating the Settlement, preliminary approval of the Settlement, and the fairness hearing merits an increase in the benchmark percentage.

Novelty and difficulty of the question and skill required to perform the legal service

"An antitrust class action is arguably the most complex action to prosecute." *In re Linerboard Antitrust Litig.*, 296 F. Supp. 2d 568, 577 (E.D. Pa. 2003). Here, IPPs have had to analyze and argue, among other things, the difficult issue of indirect-purchaser standing under the laws of four different states. The Court does not doubt that handling this difficult case required considerable skill and experience. Given the inherent difficulty involved in antitrust class actions and the proof challenges presented by this case, as well as accounting for counsel's skill and expertise, the Court finds that an increase in the benchmark percentage is merited.

The customary fee

The Court has discussed, *supra*, the typical fees in antitrust cases involving comparable awards. Because the benchmark percentage is about

average for cases of this kind, the Court finds that this factor does not warrant an adjustment.

Whether the fee is fixed or contingent

Consideration of this factor is designed to "demonstrat[e] the attorney's fee expectations when he accepted the case." *Johnson*, 488 F.2d at 718. This factor considers the financial risks a contingency fee arrangement places on counsel. *See In re Enron Corp. Sec. Derivative & ERISA Litig.*, 586 F. Supp. 2d 732, 791 (S.D. Tex. 2008). Class counsel undertook this case on a contingency basis. But because the Court's benchmark is comparable to a reasonable contingency fee award, the Court finds that consideration of this factor does not justify an increase to the fee award.

Time limitations imposed by the client or the circumstances

Under this factor, the Court is to give a premium for "priority work that delays the lawyer's other legal work." *Johnson*, 488 F.2d at 718. The Court finds that no facts in this case suggest that this factor justifies an adjustment in the benchmark fee.

Amount involved and the results obtained

Counsel obtained a fair settlement for the plaintiff class. *See* Part II, *supra*. Counsel has secured a cash settlement that allows class members to recover their alleged losses, thus mitigating some of the risk inherent in

continuing with litigation against the remaining defendants. Yet because mitigating risk of continuing litigation is inherent in any settlement, the Court finds that this factor is neutral.

The experience, reputation, and ability of the attorneys

The Court is satisfied that the experience and reputation of the attorneys involved are of the highest quality. But as the Court has accounted for counsel's experience and skill in the *Johnson* factor considering the skill necessary to litigate the case, a further increase in the percentage is not warranted.

Undesirability of the case

The Court finds that although this is not the type of unpopular case that might stigmatize the lawyer who takes it, *see Johnson*, 488 F.2d at 719, there are some aspects of this case that made it undesirable. The risk of nonrecovery, discussed *supra*, is significant. Further, the relatively small size of the individual claims made undertaking expensive litigation on a contingent fee an unattractive proposition. Class certification would change this dynamic, but, here, there remains a serious risk that a class will not be certified. Accordingly, the Court finds that the risks inherent in this case warrant an increase in the fee award.

The nature and length of the professional relationship

There is no evidence of any special or lengthy professional relationship between class counsel and the class members. The relationship did not antedate the litigation, nor will it likely continue beyond the closure of this case. The Court finds that consideration of this factor does not warrant an increase in the fee award.

In sum, three of the *Johnson* factors merit an increase in the fee award to 30 percent. Applying 30 percent to the $600,000 total settlement amount yields $180,000 as an appropriate attorney fee award. Class Counsel's requested fee is $124,079.60.

E. Fairness to Class

As a general matter, Class Counsel's $124,079.60 fee request is reasonable under the Fifth Circuit's percentage method, cross-checked with the *Johnson* factors. At the same time, a fair portion of the Settlement must be reserved for the benefit of the class. All together, the fees and expenses requested by Class Counsel amount to thirty percent of the total settlement fund. Because the settlement amount is relatively small, Class Counsel's requested fee promises to overwhelm the amount of funds available for distribution to the class members. The settlement administration expenses

currently total $193,357.04. Awarding Class Counsel thirty percent of the total fund would leave only $230,000 to distribute among class members.

To ensure that Class Counsel's fee and expense award is fair to the class and will not "cannibalize" the settlement, *see In re Katrina*, 628 F.3d at 195, the Court will not award counsel thirty percent of the total settlement fund. Instead, Class Counsel shall not receive more than thirty percent of the funds available for distribution to the class. Subtracting the settlement administration expenses from the total fund leaves $406,642.96 available for distribution. One-third of this amount, and the total that Class Counsel's fees and expenses shall not exceed, is $135,546.29. Deducting Class Counsel's award of $12,637.10 to reimburse common benefit expenses leaves $122,909.19 to be dispersed among Class Counsel as common benefit fees. The total amount then remaining for distribution to the class is $271,096.67. This award to counsel strikes a fair balance between the attorneys' right to recover reasonable fees and expenses, and the class's right to the benefit of a fair portion of the settlement.

F. Apportionment of Fees

Class Counsel propose a method for allocating their requested award among the firms that have worked on the case.[60] Class Counsel represent that all of the firms that have worked on the case are represented in and agree with the proposed allocation plan. In the Fifth Circuit, attorneys may apportion fees among themselves without substantial involvement by the Court, so long as counsel develop a plan agreeable to all attorneys involved. *See Longden v. Sunderman*, 979 F.2d 1095, 1101 (5th Cir. 1992) (citing *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 216, 223 (2d Cir. 1987)); *see also Turner v. Murphy Oil USA, Inc.*, 472 F. Supp. 2d 830, 869-70 (E.D. La. 2007). Nonetheless, the Court must "closely scrutinize the attorneys' fee allocation, especially when the attorneys recommending the allocation have a financial interest in the resulting awards." *In re High Sulfer Content Gasoline Prods. Liab. Litig.*, 517 F.3d 220, 228 (5th Cir. 2008).

Counsel explains the proposed allocation plan in some detail in their motion. The Court has reviewed the plan. The plan sets out the number of hours spent by each firm, along with a description of the types of work done by each firm. All of these hours have been reported to Mr. Garrett, and he has

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[60] R. Doc. 686-3 at 1 (Declaration of M. Palmer Lambert, Exhibit II).

agreed that they represent appropriate common benefit work. The plan also lists the amount of money each firm has fronted for expenses, either in the form of held costs or assessments. Overall, the Court finds that the proposed allocation plan takes into account the work done and the expenses covered by each firm so far and arrives at a fair division of the requested award. Because the Court awards Class Counsel less in fees than the amount originally requested, Class Counsel shall proportionately reduce the proposed allocations to each firm. With this modification, the Court approves the proposed allocation of common benefit attorneys' fees and expenses. The Court retains jurisdiction for the purposes of supervising the allocation.

IV. Conclusion

For the foregoing reasons, the Court GRANTS the Joint Motion for Final Approval of Class Settlement.

The Court also orders that Class Counsel be awarded fees and expenses as set forth in this order.

New Orleans, Louisiana, this 21st day of January, 2016.

Sarah Vance

SARAH S. VANCE
UNITED STATES DISTRICT JUDGE