IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

IN RE: URETHANE ANTITRUST LITIGATION	**MDL 1616** **Civil No. 04-md-01616-JWL**
This Document Relates To: **The Polyether Polyol Cases**	

CLASS PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT WITH BASF CORPORATION

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I. INTRODUCTION

Class representatives Plaintiffs Seegott Holdings Inc., Quabaug Corporation and Industrial Polymers, Inc. (collectively, "Class Plaintiffs") submit this Memorandum in support of their Motion seeking preliminary approval of a class settlement ("Settlement") with Defendants BASF Corporation ("BASF") and authorization to disseminate notice to Class members. A copy of the Settlement Agreement, dated September 21, 2011 ("SA"), is attached hereto as Exhibit A. *See* Fed. R. Civ. P. 23(e)(3).

This Settlement with BASF represents an outstanding result for the Class. It provides for a cash payment of $51 million, payable in three equal annual installments, representing approximately 2.5% of BASF's sales to Class members during the Class Period. The settlement payment provides a significant and certain cash benefit to the Class while the litigation continues against the sole remaining defendant, The Dow Chemical Company ("Dow").[1]

With the recently proposed Huntsman settlement of $33 million and the proposed BASF settlement of $51 million, Class Plaintiffs have secured for the Class a total of $84 million in the past few months. Class Plaintiffs now have reached settlements with four of the five defendants named in their complaint. The total monetary value of the settlements is $139.3 million.

This resolution of the case against BASF is the product of extensive arm's-length, good faith negotiations. Experienced counsel for Class Plaintiffs and for BASF participated in numerous face-to-face settlement meetings and conference calls. Because merits discovery is nearly complete, the parties had virtually all relevant facts disclosed during discovery at their disposal in making settlement assessments and in crafting and finalizing the settlement.

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[1] The BASF Settlement does not affect Dow's joint and several liability for the alleged conspiracy, as BASF's sales to Class members remain in the case as a basis for damages recoverable at trial. SA ¶ 43.

Based on the foregoing, Class Plaintiffs' counsel, who have litigated this case for more than six years and are highly experienced in litigating price-fixing cases, believe that the Settlement is fair and reasonable and represents an outstanding result for the Class. Class Plaintiffs respectfully submit that the Settlement satisfies the standards for preliminary approval under Rule 23 of the Federal Rules of Civil Procedure—namely, it is sufficiently fair and reasonable to warrant class-wide notice.

Rather than await resolution of the litigation against the last remaining defendant, Dow, Class Counsel believe it is appropriate to begin distributing the Huntsman and BASF settlement proceeds to the Class as soon as practicable after final approval of the proposed BASF settlement. Accordingly, when they file their motion for final approval of the proposed BASF settlement, Plaintiffs also will seek Court approval of a proposed plan of allocation and distribution of the BASF and Huntsman settlement funds. In addition, Class Plaintiffs intend to seek an award of attorneys' fees and reimbursement of litigation costs to compensate Class Counsel's efforts in creating those funds for the Class.[2]

Accordingly, Class Plaintiffs respectfully request that their motion for preliminary approval be granted, and notice be disseminated to the Class outlining the proposed settlement, the plan of allocation and distribution, and the petition for attorneys' fees.

II. BACKGROUND

Plaintiffs filed their initial complaints in 2004 alleging that Defendants Huntsman, Bayer, BASF, Dow and Lyondell violated the Sherman Antitrust Act, 15 U.S.C. § 1, *et seq.*, by

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[2] Settlement proceeds may not be distributed to Class members until after the Effective Date of the proposed BASF and Huntsman settlements, *i.e.*, after entry of a final approval order and, if an appeal is taken, affirmance of such order. *See* SA ¶ 24 (defining "Effective Date"); *id.* ¶ 31 (governing distributions). Class Counsel will not seek a pre-Effective Date disbursement of attorneys' fees, but in limited circumstances may decide to seek litigation expenses prior to the Effective Date in order to prepare effectively for trial. *See* Parts V.C. & VI, *infra*.

conspiring to fix, raise, maintain or stabilize the prices of and to allocate customers and markets for Polyether Polyol Products[3] sold in the United States. First Am. Consol. Compl. ¶¶ 1-2.

Class Plaintiffs reached a settlement with Bayer, which this Court approved on August 30, 2006. *See* Dkt. No. 425. Under that settlement, Bayer paid Plaintiffs $55.3 million—which represented approximately 1% of Bayer's sales of the relevant products during the class period—and agreed to provide Class Plaintiffs with access to documents and witnesses without expensive and protracted discovery.

Nearly two years later, and following a period of class certification discovery, the Court certified a litigation class on July 29, 2008. *See* Dkt. No. 708. For the next two years, from September 2008 through December 2010, the parties engaged in merits discovery, exchanging and reviewing millions of pages of documents, responding to dozens of interrogatories, filing various discovery-related papers with the Court, and deposing more than 100 witnesses domestically and overseas. But for a few outstanding items, merits discovery is now closed. *See* Scheduling Order No. 7, Dkt. No. 1952; Scheduling Order No. 8, Dkt. No. 1989, at 2. The parties recently embarked on expert discovery and the case is set for trial in January 2013. *See id.* at 7.

Earlier this year, Class Plaintiffs reached settlements with two other defendants, Lyondell and Huntsman. With Huntsman, Class Plaintiffs achieved an excellent monetary settlement of $33 million, representing approximately 1.4% of Huntsman's relevant sales. Lyondell recently emerged from bankruptcy with sparse resources available to satisfy a meaningful judgment and Class Plaintiffs therefore determined not to seek a monetary payment from Lyondell, but instead to focus their efforts on recovering damages from the other defendants. The Court has scheduled

[3] "Polyether Polyol Products" are defined below in Section III.C.

a fairness hearing to consider the Huntsman and Lyondell settlements on September 27, 2011.

III. THE SETTLEMENT AGREEMENT

The Settlement provides a substantial monetary payment to the Class and contains other important provisions that will benefit the Class in their continuing litigation against Dow. The Settlement's key terms are discussed below.

A. The Settlement Fund

BASF will pay a total of $51 million in cash to the Class. SA ¶ 26. Within 10 business days after the Court's preliminary approval of the Settlement, BASF will pay into escrow an initial $17 million. *Id.* BASF will pay another $17 million into escrow no later than one year after the first payment, and a final $17 million into escrow no later than two years after the first payment. *Id.*

B. Valuable Assistance with Documents, Data and Information

BASF also agrees to assist Class Plaintiffs in several important respects in the further prosecution of this matter against Dow. SA ¶ 38. Specifically, BASF promises: (i) to provide Class Plaintiffs with assistance in authenticating documents and data through the testimony of qualified representatives, either at deposition or trial or through declarations or affidavits; (ii) to respond informally to any reasonable requests that Class Plaintiffs make about BASF transactions in class Products as well as the costs of producing, marketing and selling those Products previously produced by BASF; and (iii) to produce, in response to reasonable requests of Class Counsel, such data and documents not previously produced as BASF can make available to Class Counsel without undue effort or expense. SA ¶¶ 38(a)-(c).

C. The Parties and the Settlement Products

The Settlement is binding on BASF,[4] Class Plaintiffs,[5] and the Class, which includes all persons and entities who have not timely excluded themselves from the certified litigation class and who have purchased: (1) propylene oxide-based polyether polyols; (2) monomeric or polymeric diphenylmethane diisocyanates (MMDI or PMDI – collectively, MDI); (3) toluene diisocyanates (TDI); (4) MDI-TDI blends or (5) propylene oxide-based polyether polyol systems (except those that also contain polyester polyols) (hereinafter "Polyether Polyol Products"), directly from defendants at any time from January 1, 1999 through December 31, 2004 (the "Class Period"). SA ¶¶ 3, 15. Excluded from the Class are Defendants, their respective parents, employees, subsidiaries and affiliates, and all government entities. *Id.* ¶ 3. This Class definition encompasses the same litigation Class that the Court certified. *See* Dkt. No. 708, Mem. and Order (July 29, 2008), at 8.

D. Released Claims

The Agreement releases only BASF (and its current and former officers, directors, employees, agents, parents, and subsidiaries) from all claims relating in any way to any conduct prior to the Agreement's effective date relating to the pricing, purchase, selling, discounting, marketing, manufacturing, or distributing of the Products in the United States. SA ¶ 25. Importantly, however, the Agreement provides that BASF's sales shall remain in the continuing

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[4] "BASF" means BASF Corporation, and its respective past and present, direct and indirect, parents (including but not limited to BASF SE), subsidiaries, affiliates, officers, directors, employees, agents, attorneys, servants, and representatives (and the parents', subsidiaries', and affiliates' past and present officers, directors, employees, agents, attorneys, servants, and representatives), and the predecessors, successors, heirs, executors, administrators, and assigns of each of the foregoing. SA ¶ 1.

[5] "Plaintiffs" (or "Class Representatives") are defined in the Settlement Agreement as "Seegott Holdings Inc., Quabaug Corporation and Industrial Polymers, Inc." SA ¶ 8.

litigation against Dow, which remains jointly and severally liable for all damages caused by the conspiracy, less only the amounts paid by settling Defendants. *Id.* ¶ 43.

IV. THE PROPOSED SETTLEMENT SHOULD BE PRELIMINARILY APPROVED

A. The Standards Governing Preliminary Approval Are Easily Satisfied

Under Rule 23(e), once a class is certified, any settlement requires the Court's approval. The first step, which this motion seeks, is preliminary approval. At this stage, "the Court makes a preliminary evaluation of the fairness of the proposed settlement and determines whether it has any reason to not notify the class members of the proposed settlement or to not hold a fairness hearing." *In re Motor Fuel Temperature Sales Practices Litig.*, 258 F.R.D. 671, 675 (D. Kan. 2009); *accord Lucas v. Kmart Corp.*, 234 F.R.D. 688, 693 (D. Colo. 2006). If the Court grants preliminary approval, it directs notice to the class members and sets a final approval hearing, the second step in the process. *DeJulius v. New England Health Care Employees Pension Fund*, 429 F.3d 935, 939 (10th Cir. 2005); *Motor Fuel Temp.*, 258 F.R.D. at 675; *American Med. Ass'n v. United Healthcare Corp.*, No. 00-cv-2800, 2009 WL 1437819, at *3 (S.D.N.Y. May 19, 2009).

The Court must approve a settlement if it is fair, reasonable and adequate. *Jones v. Nuclear Pharmacy, Inc.*, 741 F.2d 322, 324 (10th Cir. 1984). The standards in the Tenth Circuit for assessing, at the final approval hearing, whether the settlement is fair, reasonable and adequate are well established. The district court should consider: (1) whether the proposed settlement was fairly and honestly negotiated; (2) whether serious questions of law and fact exist, placing the ultimate outcome of the litigation in doubt; (3) whether the value of an immediate recovery outweighs the mere possibility of future relief after protracted and expensive litigation; and (4) the judgment of the parties that the settlement is fair and reasonable. *Rutter & Wilbanks Corp. v. Shell Oil Co.*, 314 F.3d 1180, 1188 (10th Cir. 2002); *Jones*, 741 F.2d at 324.

The Court must consider these factors at the final approval hearing, but they are a useful guide at the preliminary approval stage as well. *Motor Fuel Temp.*, 258 F.R.D. at 680; *Lucas*, 234 F.R.D. at 693. The Court, however, need not consider final approval of the terms of the settlement until the final approval hearing. *DeJulius*, 429 F.3d at 939. Accordingly, the Court's examination of these standards for purposes of preliminary approval is less stringent than for final approval. *Motor Fuel Temp.*, 258 F.R.D. at 675-76. This is especially the case where, as here, the settlement is negotiated after the class has been certified. *Motor Fuel Temp.*, 258 F.R.D. at 675; *D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001). This Settlement satisfies each of these factors.

In evaluating the fairness of a settlement, "courts are not to decide the merits of the case or resolve unsettled legal questions." *Wilkerson v. Martin Marietta Corp.*, 171 F.R.D. 273, 284 (D. Colo. 1997). Instead, the court determines whether the proposed settlement is "within the range of possible approval." *In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 205 (5th Cir. 1981); *Motor Fuel Temp.*, 258 F.R.D. at 675; *AMA*, 2009 WL 1437819, at *3. The Court's assessment of whether the proposed settlement falls within the preliminarily acceptable range is informed by the "strong judicial policy in favor of settlements of class actions." 5 *Moore's Federal Practice* § 23.161[1] (3d ed.); *see Wilkerson*, 171 F.R.D. at 284; *Alvarado Partners, L.P. v. Mehta*, 723 F. Supp. 540, 551 (D. Colo. 1989) (noting strong judicial policy in favor of settlements, particularly in class actions). Settlement of complex litigation generally "is encouraged by the courts and favored by public policy." 4 *Newberg on Class Actions* at § 11:41 (4th ed. 2002).

1. The Settlement Was Fairly, Honestly and Extensively Negotiated

A settlement is considered to be fairly and honestly negotiated when reached after arm's-length negotiations by experienced counsel. *See Marcus v. Kansas Dept. of Revenue,* 209 F. Supp. 2d 1179, 1182 (D. Kan. 2002) (finding this factor satisfied where the "settlement was reached after arm's-length negotiations" "by experienced counsel for the class"); *In re New Mexico Natural Gas Antitrust Litig.*, 607 F. Supp. 1491, 1506-07 (D. Colo. 1984) (finally approving settlement where court was "wholly satisfied that the negotiations took place at arms length"); *In re King Resources Co. Sec. Litig.*, 420 F. Supp. 610, 626 (D. Colo. 1976) (finally approving settlements where court found "that each settlement was arrived at through arms-length and extensive negotiations between counsel for the plaintiffs and counsel for settling defendants and that such counsel engaged in no collusion whatever in arriving at such settlements").

This settlement is the result of extensive arms'-length negotiations by experienced counsel for Class Plaintiffs and BASF. Counsel participated in multiple face-to-face meetings and phone calls where they exchanged their respective views on the merits of Plaintiffs' case against BASF, BASF's defenses, and the monetary amount for which BASF should settle. Importantly, the substantive negotiations between the parties were informed by a significantly developed factual record. Indeed, by the time the last series of in-person meetings occurred in July 2011, the parties had all but completed merits discovery, and thus had a firm grasp of the facts underlying Class Plaintiffs' claims and BASF's defenses. *See, e.g., Lucas,* 234 F.R.D. at 691 (preliminarily approving settlement after "extensive discovery, including the production of over 100,000 pages of documents and more than 50 depositions"); *In re Lorazepam &*

Clorazepate Antitrust Litig., 205 F.R.D. 369, 376 (D.D.C. 2002) (approving settlement reached after "substantial factual investigation and discovery").

Moreover, the terms of the Settlement—the ultimate result of the parties' negotiations—speak for themselves. The $51 million settlement fund, which represents approximately 2.5% of BASF's relevant sales, net of discounts and excluding sales to those who opted-out of the litigation class, is a significant recovery for the Class. Compared to settlements reached in other price-fixing class actions, it is well within the range of reasonableness and surely justifies notice to the class. *See In re Packaged Ice Antitrust Litig.*, 2011 WL 717519, at *9 (E.D. Mich. Feb. 22, 2011) (approving $13.5 million settlement "represent[ing] approximately 2.5% of the total commerce of" the settling defendant); *In re Pressure Sensitive Labelstock Antitrust Litig.*, 584 F. Supp. 2d 697, 702 (M.D. Pa. 2008) (approving $8.25 million settlement that constituted about 1.5% of the settling defendants' class sales); *In re Automotive Refinishing Paint Antitrust Litig.*, 2004 WL 1068807, at *2 (E.D. Pa. May 11, 2004) (approving $48 million settlement representing approximately two percent of sales).

In sum, the history of the parties' negotiations as well as the settlement's terms reveal that the settlement was fairly, honestly and vigorously negotiated.

2. Disputed Questions of Law and Fact Remain

The Court also "consider[s] the existence of serious questions of law and fact which place the ultimate outcome of the litigation in doubt." *King Resources*, 420 F. Supp. at 625. The risks to Class Plaintiffs in further litigating the complex legal and factual issues raised by their claims militate in favor of settlement.

Whenever a settlement is presented for approval, there is a possibility that it could be disapproved and the parties and their counsel could later find themselves locked in continuing

litigation and a full-scale trial. Therefore, courts have recognized that it is not realistic to expect counsel to highlight potential weaknesses or to emphasize any particularly vulnerable point in their case. *See Packaged Ice,* 2011 WL 717519, at *10. Still, no outcome is guaranteed, and there are risks that can be identified.

Antitrust litigation generally involves complex issues of fact and law, and this case is no exception. To prove that BASF violated Section 1 of the Sherman Act, Class Plaintiffs must show the existence of a price-fixing agreement, that BASF was party to that agreement, and that its conduct injured Class Plaintiffs. While Class Plaintiffs have uncovered compelling evidence supporting their allegations, there can be no assurances in complex litigation, such as this, what the ultimate result might be before a jury. *See id.* ("Experience proves 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.") (citation omitted); *New Mexico Natural Gas*, 607 F. Supp. at 1505 ("No one can predict whether a jury would have ultimately found in favor of the plaintiffs. Succinctly stated, the competing liability positions do not lend themselves to ready evaluation of relative strength.").

To be sure, BASF consistently has denied liability in this matter, and would have asserted defenses regarding both liability and damages. BASF may have argued in its expert reports and at trial that the conspiracy damaged Class Plaintiffs (if at all) much less than Class Plaintiffs contend. Consequently, Class Plaintiffs and BASF would have presented a jury with vastly different damage estimates. "Damages would likely be established at trial through a 'battle of experts,' with each side presenting its figures to the jury and with no guarantee whom the jury would believe." *In re Warfarin Sodium Antitrust Litig.*, 212 F.R.D. 231, 256 (D. Del. 2002), *aff'd*, 391 F.3d 516 (3d Cir. 2004) (internal quotations, citation omitted).

Given the risks inherent in litigating the claims that Class Plaintiffs assert in this case, and the size of the monetary recovery and the other provisions obtained in Settlement, the Settlement is worthy of preliminary approval.

3. The $51 Million Guaranteed Recovery Outweighs the Mere Possibility of Future Monetary Relief

Next, the Court should "consider the vagaries of litigation and compare the significance of immediate recovery by way of the compromise to the mere possibility of relief in the future, after protracted and expensive litigation." *King Resources*, 420 F. Supp. at 625. Class Plaintiffs have a compelling case against BASF, but recovering a significant judgment against BASF would require many months, if not years, of more hard-fought litigation and ultimately a lengthy trial. "In this respect, it has been held proper to take the bird in the hand instead of a prospective flock in the bush." *Id.* (citations and internal quotations omitted).

There is no doubt that establishing liability and proving damages against BASF would have been expensive and time-consuming. Settlement is therefore appropriate in this matter for reasons similar to those stated in *South Carolina National Bank v. Stone*, 749 F. Supp. 1419, 1426 (D.S.C. 1990): "Although Plaintiffs will continue to pursue their claims against the non-settling Defendants, many additional hours would have been required to complete discovery, to prepare and respond to anticipated summary judgment motions, and to try the case against the settling Defendants."

Indeed, while merits discovery is nearing completion, many hours of experienced attorney work remain before this case can be tried. If the proposed settlement is approved, Class Plaintiffs need not invest in preparation for trial against BASF, and instead may devote all of their resources to prosecuting their claims against the sole remaining defendant, Dow. BASF's assistance with authentication of documents and data will greatly assist in those efforts and save

Plaintiffs' counsel considerable time and effort. *See In re Linerboard Antitrust Litig.*, 292 F. Supp. 2d 631, 643 (E.D. Pa. 2003) ("The provision of such assistance is a substantial benefit to the classes and strongly militates toward approval of the Settlement Agreement."). These non-monetary aspects of the Settlement inure to the Class's benefit as well.

In short, a settlement at this time results in a substantial, tangible, and immediate recovery for the benefit of Class Plaintiffs, without the attendant expense, risk and delay of trial and post-trial proceedings. *Accord Dep't of Energy Stripper Well Exemption Litig.*, 653 F. Supp. 108, 117 (D. Kan. 1986) ("The risks of continued litigation are substantial for all of the parties."); *King Resources*, 420 F. Supp. at 627 ("The Court recognizes that had these settlements not been reached, chances of the class prevailing against settling defendants would have been uncertain and disbursement of funds to the class, should it have prevailed, would undoubtedly have been delayed for some, perhaps lengthy, period of time given the high probability of an appeal or appeals in this case.").

4. Class Counsel Believe that the Settlement is Fair and Reasonable

Courts rely on the considered judgment of experienced counsel in evaluating the fairness of proposed class action settlements. *See, e.g.*, *Lucas*, 234 F.R.D. at 695 ("Counsels' judgment as to the fairness of the agreement is entitled to considerable weight.") (quoting *Marcus,* 209 F. Supp. 2d at 1183); *Wilkerson,* 171 F.R.D. at 288-89 ("[T]he recommendation of a settlement by experienced plaintiffs' counsel is entitled to great weight."); *Alvarado*, 723 F. Supp. at 548 ("Courts have consistently refused to substitute their business judgment for that of counsel and the parties."). Class Plaintiffs' counsel, who are among the most experienced and respected antitrust class action lawyers in the nation, have tirelessly advanced the Class's claims since the case's inception. In their considered judgment, the Settlement is more than fair and reasonable—

it represents an outstanding result for the Class.

Relying on the judgment of counsel makes particular sense in the context of preliminary approval. Because preliminary approval is provisional, and is followed by more formal and comprehensive review and objection procedures, "[t]he Court will ordinarily grant preliminary approval where the proposed settlement 'appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class and falls within the range of possible approval.'" *Motor Fuel Temp.*, 258 F.R.D. at 675 (quoting *AMA*, 2009 WL 1437819, at *3). Those criteria are satisfied here.

In sum, because the BASF settlement agreement satisfies each of the Tenth Circuit's stated criteria for approval, the Court should grant preliminary approval.

B. Settlement of BASF's Counterclaims Against Class Representative Seegott Holdings, Inc.

BASF asserted counterclaims in this litigation against Class Representative Seegott Holdings, Inc. ("Seegott") for breach of contract and unjust enrichment in connection with alleged breaches of a distributorship agreement. *See* Dkt. No. 323. BASF has agreed to settle those counterclaims at the same time it settles with the Class. The issue of settling the Seegott counterclaim arose during the class action settlement negotiations between Class Counsel and counsel for BASF. Counsel for both parties were careful to: (1) separate the negotiation of the Seegott counterclaim settlement from the settlement of class claims, deferring any detailed discussion of the settlement of the Seegott counterclaim until after the basic parameters of the class settlement were agreed to; and (2) assure that the settlement of the Seegott counterclaim had no effect on the amount or other salient conditions of the class settlement. The

BASF/Seegott settlement agreement is an attachment to the Settlement Agreement between the Class and BASF. *See* SA, Attachment B.

In exchange for a complete release of liability, Seegott has agreed to assign its rights to any portion of the BASF Settlement Funds to BASF Corporation. Thus, settlement of the counterclaim will not reduce the amount available for distribution to the rest of the Class or affect the amount any other Class members will receive. In short, the Class suffers no prejudice whatsoever in connection with the BASF/Seegott counterclaim settlement.

V. THE PROPOSED PLAN OF ALLOCATION AND DISTRIBUTION

At the same time they file their motion for final approval of the BASF settlement, Class Plaintiffs intend also to propose a Plan of Allocation and Distribution of the BASF and Huntsman net settlement funds. Outlined below are the proposed method of allocation (Part V.A), the proposed claims procedure (Part V.B), and the anticipated timing of the distribution (Part V.C).

A. Allocation of the Settlement Fund on a *Pro Rata* Basis

Class Plaintiffs will propose that the Net Settlement Fund (after payment of such fees and expenses, including costs of administering the distribution, as are ordered by the Court) be distributed to the members of the Class *pro rata* in proportion to the dollar amount of their purchases of Polyether Polyol Products during the Class Period. This is the same basis of allocation that the Court earlier approved in this case with respect to the Bayer Settlement Fund – and to which no Class members objected. *See In re Urethane Antitrust Litig. [Polyether Polyols Cases]*, No. MDL No. 1616, Dkt. 936, Ex. B (proposed plan for *pro rata* allocation) & Dkt. 994

(Order approving allocation plan).[6] Based on the information available to them at this time, Class Plaintiffs believe that a *pro rata* distribution based on Class member purchases is fair to all members of the class.

B. The Claims Procedure

If after a "fairness" hearing the Court approves the BASF Settlement, the Plan of Allocation and Distribution, and Class Counsel's Fee Petition, Class Plaintiffs propose to distribute settlement shares according to the same claims procedure utilized for the Bayer Settlement Fund.

To summarize briefly, that process entails: (1) distribution of personalized claim forms containing pre-printed data reflecting each Class member's eligible purchases as derived from Defendants' transaction databases; (2) review and processing of submitted claim forms by the Class Administrator; (3) calculation of each Class members' *pro* rata share of the net settlement

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[6] A number of courts, including this Court in the *Polyester Polyol* cases, have approved distribution of settlements *pro rata* based on purchases of multiple products affected by a conspiracy. *See In re Urethane Antitrust Litig. [Polyester Polyols Cases]*, No. MDL No. 1616, Dkt. 649, Ex. 2 at p.8, Part II (describing proposed *pro rata* allocation plan based on the dollar amount of class member purchases) & Dkt. 675 (Final Approval Order); *In re Hydrogen Peroxide Antitrust Litig.*, MDL No. 1682, Dkt. 519, Order dated 10/17/08, at 4 (Ex. B) (defining "Recognized Claim" according to class member purchases); In re *Automotive Refinishing Paint Antitrust Litig.*, 2004 U.S. Dist. LEXIS 29161 (E.D. Pa. Sept. 27, 2004), at *26 (approving distribution "*pro rata* to all Claimants based upon their direct purchases (net of discounts and freight counts) . . . .") (emphasis omitted); *In re Linerboard Antitrust Litig.*, MDL No. 1261, Dkt. 297-3 at 9 (class notice describing proposed *pro rata* allocation plan based on the dollar amount of class member purchases) (Ex. C) & 321 F. Supp. 2d 619, 626 n.6 (E.D. Pa. 2004) (order approving *pro rata* distribution of settlement funds); *In re Flat Glass Antitrust Litig.*, MDL No. 1200, Dkt. 539, Decl. of Robert N. Kaplan ¶¶ 126-130 (relevant portions attached as Ex. D) (describing proposed *pro rata* Plan of Distribution based on the dollar value of class member purchases), & Dkt. 548, Order dated 5/28/03, at ¶ 2 (Ex. E) (approving Plan of Distribution) (W.D. Pa.); *Thomas & Thomas Rodmakers, Inc. v. Newport Adhesives & Composites, Inc.*, No. CV-99-07796, Class Notice, at 3 (relevant portions attached as Ex. F) & Dkt. No. 603, Order dated Jan. 31, 2005 (approving *pro rata* plan of allocation described in the notice) (relevant portions attached as Ex. G).

fund; (4) submission to the Court of a recommended schedule of distribution; (5) a "distribution hearing," at which the Court will consider the recommended schedule of distribution and any objections thereto; and (6) upon Court approval of the recommended schedule of distribution, as presented to or as modified by the Court, distribution of the net settlement funds to Class members. This process is summarized in the proposed form of Notice, attached as Exhibit A to the proposed preliminary approval order, and will be described in greater detail in Class Plaintiffs' motion for approval of the proposed Plan of Allocation and Distribution.

These procedures were highly successful in distributing the Bayer settlement proceeds to the Class. Unfortunately, the earlier-submitted claim forms and the Class Administrator's *pro-rata* share calculations cannot be re-used and the claims process must be repeated in connection with the distribution of the BASF and Huntsman settlement proceeds. This is because the certified Bayer settlement class definition, which governed the Bayer distribution, and the certified litigation class definition, which governs the Huntsman and BASF settlement agreements and hence any related distribution, do not cover all the same products (although most products qualify under both definitions). This discrepancy arose because the Bayer settlement class definition was derived from the release negotiated with Bayer in 2006, whereas the litigation class definition was determined two years later in the course of contested class certification proceedings.

As a result of the differences between the two class definitions, some purchases that qualified for a distribution under the Bayer settlement are not eligible under the BASF and Huntsman settlements. For example, purchases of "prepolymers" qualified under the Bayer settlement class definition but are excluded from the litigation class definition governing the BASF and Huntsman settlements. *See* Mem. and Order of 7/29/08, Dkt. No. 708, at 7-8.

In sum, because not all purchases that qualified under the Bayer settlement class definition are included in the litigation class definition, the Class Administrator cannot re-use the Bayer settlement transaction data and claim forms to calculate *pro rata* shares for the BASF and Huntsman settlement distribution. Rather, a second claims process must be undertaken, including dissemination, submission and review of new claim forms.

C. Timing of the Distribution

Under the Settlement Agreement, settlement proceeds may not be distributed to Class members until after the Effective Date of the proposed BASF settlement, *i.e.*, after entry of a final approval order and, if an appeal is taken, affirmance of such order. *See* SA ¶¶ 24, 31.

Both Huntsman and BASF are paying their settlements in 3 installments over a period of approximately two and one-half years, with the last Huntsman installment of $11 million to be paid in June 2013 and the last BASF installment of $17 million expected in the fall of 2013. Rather than make Class members wait until 2013 for the final installments to be paid, Class Counsel will propose a series of distributions to enable Class Members to obtain the benefits of the settlements as early as practicable.

VI. THE PETITION FOR FEES AND EXPENSES

Class Counsel intend to ask the Court to award attorneys' fees equal to one-third of the BASF and Huntsman Settlement Funds, and for an award not to exceed $ 5.1 million to reimburse Counsel for the actual, reasonable, and necessary expenses incurred between December 31, 2008 and June 30, 2011 in prosecuting this litigation.[7] Each of these requests is well-supported by the facts and circumstances of this case and by precedent.

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[7] The Court's July 21, 2009 Order (Dkt. 995 ¶ 3) awarded reimbursement of Class Counsel's reasonable costs and expenses incurred from the inception of this matter through December 31, 2008. *See* Fee Petition Brief at 2, 18 (Dkt. 938).

A fee in the amount of one-third of the recovery is customary and normal in contingent fee litigation in the United States. Indeed, by Order dated July 21, 2009, this Court awarded Class Counsel a fee of one-third of the Bayer Settlement Fund. *See* Dkt. 995. Numerous other cases from within this district and the Tenth Circuit have concluded that one-third of the recovery is an appropriate fee award in a class action,[8] and a host of cases from around the country have reached similar results.[9] Notably, Class Counsel's fee request is no more than (or for some cases, less than) what is typically agreed to by clients and attorneys in complex

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[8] *See, e.g.*, *In re Universal Service Fund Tel. Billing Practices Litig.*, No. 02-MD-1468-JWL, 2011 WL 1808038, at *2-3 (D. Kan. May 12, 2011) (awarding fees equal to one-third of a judgment fund recovered by plaintiffs) (Lungstrum, J.); *Williams v. Sprint/United Mgmt. Co.*, No. 03-2200-JWL, 2007 WL 2694029, at *6 (D. Kan. Sept. 11, 2007) (awarding fees equal to 35% of a $57 million common fund) (Lungstrum, J.); *Lewis v. Wal-Mart Stores, Inc.*, No. 02-CV-0944-CVE-FHM, 2006 WL 3505851, at *1 (N.D. Okla. Dec. 4, 2006) (awarding one-third of the settlement fund and noting that a "one-third [fee] is relatively standard in lawsuits that settle before trial"); *In re United Telecommc'ns Sec. Litig.*, No. 90-2251-0, 1994 WL 326007, at *10-11 (D. Kan. June 1, 1994) (awarding 33.3% of the settlement fund as attorneys' fees).

[9] *See In re Ready-Mixed Concrete Antitrust Litig.*, No. 1:05-cv-00979-SEB-TAB, 2010 WL 3282591, at *3 (S.D. Ind. Aug. 17, 2010) (awarding fees equal to one-third of the settlement fund); *In re Auto. Refinishing Paint Antitrust Litig.*, MDL No. 1426, 2008 WL 63269, at *5 (E.D. Pa. Jan. 3, 2008) (noting it is "not unusual in antitrust class actions for the attorneys to receive awards for fees in the 30% range," and awarding fees equal to one-third of the settlement fund); *New England Health Care Employees Pension Fund v. Fruit of the Loom, Inc.*, 234 F.R.D. 627, 635 (W.D. Ky. 2006) ("[A] one-third fee from a common fund case has been found to be typical by several courts.") (citations omitted), *aff'd*, 534 F.3d 508 (6th Cir. 2008); *In re Ravisent Tech., Inc. Sec. Litig.*, No. Civ. A. 00-CV-1014, 2005 WL 906361, at *11 (E.D. Pa. Apr. 18, 2005) ("[C]ourts within this Circuit have typically awarded attorneys' fees of 30% to 35% of the recovery, plus expenses."); *In re Remeron Direct Purchaser Antitrust Litig.*, No. Civ. 03-0085 FSH, 2005 WL 3008808, at *15 (D.N.J. Nov. 9, 2005) ("A one third fee from a common fund has been found to be typical by several courts within this Circuit which have undertaken surveys of awards within the Third Circuit and others.") (citation omitted); *In re AremisSoft Corp. Sec. Litig.*, 210 F.R.D. 109, 134 (D.N.J. 2002) ("Scores of cases exist where fees were awarded in the one-third to one-half of settlement fund.") (citations omitted); *Klein v. PDG Remediation, Inc.*, Case No. 95-cv-4954, 1999 WL 38179, at *4 (S.D.N.Y. Jan. 28, 1999) ("33% of the settlement fund . . . is within the range of reasonable attorney fees awarded in the Second Circuit"); *Moore v. United States*, 63 Fed. Cl. 781, 787 (2005) ("one-third is a typical recovery"); *see also* 4 Herbert Newberg & Alba Conte, *Newberg on Class Actions* § 14:6 (4th ed. 2002) ("[e]mpirical studies show that . . . fee awards in class actions average around one-third of the recovery.").

commercial litigation. *See Flournoy v. Honeywell Intern. Inc.*, No. CV 2:05-184, 2007 WL 1087279, at *2 (S.D. Ga. Apr. 6, 2007) ("[t]he most common contingent fee is one third of the recovery. Forty percent fee contracts are common for complex and difficult litigation. . . ."). As Class Counsel will demonstrate in their fee petition, a fee of one-third of the settlement fund is particularly appropriate given the facts and circumstances of this case.

Counsel also should be reimbursed for the costs they have advanced in prosecuting this litigation. It is well established that attorneys who create a common fund for the benefit of the class are entitled to reimbursement from the fund of their actual reasonable litigation expenses. Such reimbursement at this stage will facilitate Class Counsel's ability to continue the vigorous prosecution of the Class claims against the remaining defendant, Dow.

Given that Huntsman and BASF are making their settlement payments in three installments, Class Counsel propose that their award of fees and expenses also will be taken in three installments.[10]

VII. NOTICE SHOULD BE DISSEMINATED TO THE CLASS

Rules 23(e) and 23(h) require that court-approved notice of the Settlement and Class Counsel's fee petition be distributed to all reasonably identifiable Class members. *DeJulius*, 429 F.3d at 939; 4 *Newberg on Class Actions* § 11.25 (4th ed. 2002). Rule 23(e)(1) provides that "[t]he court must direct notice in a reasonable manner to all class members who would be bound

[10] Prior to the Effective Date, the Settlement Agreement permits disbursements to Plaintiffs and Class Counsel for Court-awarded attorneys' fees and past, current or future litigation expenses. *See* SA ¶¶ 32, 35. If an appeal is taken from the final approval order, the Effective Date could be delayed for many months – likely overlapping with a period in which Class Counsel is engaged in resource-intensive trial preparation. In those circumstances, Class Counsel might seek reimbursement of litigation expenses (or an advance of future litigation expenses) prior to the Effective Date – subject to the mechanism for repaying the settlement fund in the event the settlement approval is vacated by a successful appeal. *See id.* ¶ 35. At all events, Class Counsel will not seek a pre-Effective Date disbursement of attorneys' fees.

by the proposal." *See also* Fed. R. Civ. P. 23(h)(1) (notice of a fee petition must be "directed to class members in a reasonable manner").

Here, Class Plaintiffs propose to follow the same dissemination plan approved by the Court to provide notice of the proposed plan of allocation of the Bayer settlement fund and to provide notice of the Huntsman and Lyondell settlements. *See* Dkt. Nos. 911, 1990, 1991. Specifically, Class Plaintiffs propose individual notice via first-class mail to those class members who were previously identified in connection with these prior mailings. To the extent that the mailing list has been updated, those added persons or addresses will also receive the mailed notice.

The proposed form of notice defines the Class (Part I); describes the allegations and pertinent procedural history of this class action (Part II); outlines the terms of the proposed settlement with BASF (Part III); the proposed plan of allocation and distribution (Part IV); the process for submitting a claim (Part V); and the petition for award of attorneys' fees and reimbursement of litigation expenses (Part VI); provides notice of the fairness hearing and how to object to the proposed settlement, allocation and distribution plan, or the fee petition (Part VII); and explains how Class members may obtain additional information, including a copy of the settlement agreement and other pertinent documents (Part VIII). *See* Ex. A to the proposed preliminary approval order.

The contents of the proposed Notice, and the proposed method of its dissemination, comport with Federal Rules of Civil Procedure 23(c)(2), 23(e), and 23(h), as well as due process. *See generally Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 175-77 (1974) (due process is satisfied by mailed notice to all class members who reasonably can be identified); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1025-26 (9th Cir. 1998) (finding that form and distribution of

notice was adequate where it complied with criteria described above).[11]

Accordingly, Class Counsel respectfully request that the Court approve the form and plan of dissemination of notice.

VIII. CONCLUSION

For the reasons stated herein, Class Plaintiffs respectfully request that the Court grant the motion for preliminary approval of the settlement with BASF, and order dissemination of the Notice, in the form and manner described above, to the Class Members. A proposed order is being submitted herewith.

Dated: September 21, 2011

Respectfully submitted,

/s/

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[11] Once the members of the Class have had an initial opportunity to opt out of the class, their rights "are protected by the mechanism provided in the rule: approval by the district court after notice to the class and a fairness hearing at which dissenters can voice their objections, and the availability of review on appeal." *Officers for Justice, et al. v. Civil Service Com'n of City and County of San Francisco*, 688 F.2d 615, 635 (9th Cir. 1982); *see In re Brand Name Prescription Drugs*, No. 94-cv-897, 1996 WL 167347, at *4 (N.D. Ill. Apr. 4, 1996) ("Neither Rule 23 nor due process requires that the objectors now be afforded a second opportunity to opt out" because they now oppose a settlement that did not exist at the time of class certification). Similarly, this Court should approve this Settlement without providing Class members a second opportunity to opt out.

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CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that on this 21st day of September, 2011, I electronically filed the foregoing with the clerk of the court by using the CM/ECF system which will send a notice of electronic filing to all counsel who have registered for receipt of documents filed in this matter. I also certify that I mailed a true copy of the foregoing document by first mail to the following non-CM/ECF participants:

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