IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

IN RE: URETHANE ANTITRUST LITIGATION	)	No. 04-MD-01616-JWL
This Document Relates To: The Polyether Polyol Cases	)	

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT WITH BAYER, CONDITIONAL CERTIFICATION OF A SETTLEMENT CLASS, AND AUTHORIZATION OF DISSEMINATION OF NOTICE

I. INTRODUCTION

Plaintiffs Seegott Holdings, Inc., and Industrial Polymers, Inc., on behalf of themselves and all others similarly situated, by and through their counsel, submit this Memorandum in support of their Motion seeking preliminary approval of a settlement with Bayer AG, Bayer Corporation, Bayer MaterialScience AG and Bayer MaterialScience LLC (collectively "Bayer"), conditional certification of the Settlement Class, and authorization of the dissemination of Notice. A copy of the "Settlement Agreement" executed as of January 4, 2006 and amended on January 31, 2006, is attached hereto as Exhibit "A."[1]

The settlement reached with Bayer, the first in this case, is for a substantial amount—$55.3 million. The settlement provides important benefits to the class. Not only does it yield a significant financial recovery; it also requires Bayer to provide extensive cooperation to plaintiffs, which will assist in their case against the remaining defendants. Courts have long recognized that "icebreaker" settlements of this nature provide invaluable assistance to antitrust plaintiffs. *See, e.g., In re Linerboard Antitrust Litig.*, 292 F. Supp. 2d 631, 643 (E.D. Pa. 2003); *In re Corrugated Container Antitrust Litig.*, 1981 WL 2093, at *19 (S.D. Tex. June 4, 1981). Bayer's cooperation with the class is important, given that this case arises from a private, rather than government, investigation into the conduct at issue.

The Agreement further provides that Bayer's sales will remain in the case for purposes of computing the treble damages claim against the non-settling defendants. In other words, Plaintiffs and the Settlement Class retain their ability to recover from the remaining defendants

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[1]The Settlement Agreement was amended to increase the settlement amount to $55.3 million (Settlement Agreement ¶ 28), and to clarify that the release only applies to purchases in the United States and its territories or for delivery in the United States and its territories. *Id.* ¶ 27.

the entire damages caused by the alleged conspiracy, even those attributable to Bayer, less only the amount paid by Bayer in settlement. *See Corrugated Container*, 1981 WL 2093, at *17.

Plaintiffs respectfully submit that the proposed settlement satisfies the Fed. R. Civ. P. 23(e) standard for preliminary approval—namely, it is sufficiently fair and reasonable as to warrant class-wide notice. *Marcus v. Kan. Dep't of Revenue*, 206 F.R.D. 509, 512-13 (D. Kan. 2002); *In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 205 (5th Cir. 1981); *see also Manual for Complex Litigation, Fourth* § 13.14 (2004).

II. THE BASIC TERMS OF THE SETTLEMENT AGREEMENT

The Bayer settlement arises from extensive arm's-length, good faith and arduous negotiations. Counsel participated in numerous meetings, as well as extensive negotiations over the phone during a four-month period. The parties' negotiations resulted in the Settlement Agreement. The significant settlement terms are outlined below:

1. *Settlement Amount*: The Agreement provides that Bayer will pay the Settlement Class $55.3 million in cash (the "Settlement Amount"). Bayer has already deposited this amount into an escrow account, and the funds have been invested in United States Treasury obligations or United States Treasury Money Market funds. Agreement at ¶¶ 28, 33. Interest on the Settlement Amount is accruing for the benefit of the Settlement Class. *Id.* at ¶ 33.[2]

[2]Consistent with other antitrust class action settlements, the Agreement provides that Bayer has the right to rescind the Agreement if purchases of the products at issue during the Class Period made by Class Members who opt out of the Class are thirty (30%) percent or more of total sales of the Products during the Class Period, (Agreement at ¶¶ 29, 30), or in the event the settlement is not finally approved by this Court or on appeal. *Id.* at ¶ 40. In the event of a rescission, the amounts then in the settlement fund shall be returned to Bayer, except for any disbursements previously paid on incurred in connection with notice, taxes and the other administration of the settlement. *Id.* at ¶ 30, 40.

2. *The Parties and the Settlement Products*: The Agreement is binding on Bayer, the plaintiffs, and the proposed settlement class, other than any class members who timely exclude themselves from the settlement class (hereafter the "Settlement Class"), which shall include all persons and entities who purchased polyether polyols, monomeric or polymeric diphenylmethane diisocyanate ("MDI"), and/or toluene diisocyanate ("TDI") whether sold separately or in a combined form with or without other chemicals added thereto, (hereinafter, the "Products"[3]), whether directly from defendants in the United States and its territories or for delivery in the United States and its territories from January 1, 1999 through December 31, 2004 (the "Class Period"), other than defendants and governmental entities, which are specifically excluded from the class definition. (*Id.* at ¶15).

3. *Cooperation*: Bayer also agrees to provide extensive cooperation to the Class Plaintiffs, including, *inter alia*: (a) production of documents, including transactional documents, price announcements and documents relating to communications between defendants about the prices at which the products would be or had been sold in the United States; (b) making available in the United States at Bayer's expense current and former directors, officers, and employees with knowledge of relevant facts for interviews, depositions, affidavits, and testimony; (c) assistance in authenticating documents; and (d) agreeing that its counsel will meet with counsel for plaintiffs as often as reasonably necessary to identify relevant evidence and to assist in establishing the liability of the non-

[3] The Class Plaintiffs First Amended Complaint (to be filed on February 3, 2006) will include this definition, which serves as an umbrella covering all such products sold by the defendants under various trade names. A specific list of Bayer's trade names is attached to the proposed long form notice, which is attached as Exhibit "A" to the proposed order granting preliminary approval of the settlement.

settling defendants. *Id.* at ¶41.

4. *Assistance with Notice*: Bayer has agreed to provide assistance with the dissemination of Notice to the Settlement Class. In particular, Bayer has agreed to supply Plaintiffs' Co-Lead Counsel with the names and current addresses, in electronic or other reasonably appropriate format, of its customers who purchased the products directly from it in the United States and its territories or for delivery in the United States and its territories during the Class Period. *Id.* at ¶¶23-24.

5. *Released Claims*: The Agreement releases only Bayer (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 Effective Date of the Agreement relating to the pricing, selling, discounting, marketing, manufacturing, and/or distributing of the "Products" in the United States. Importantly, however, the Agreement provides that Bayer's sales shall remain in the continuing litigation against the non-settling defendants, who remain jointly and severally liable for all damages caused by the conspiracy. *Id.* at ¶¶ 26, 27.

The settlement is in the best interests of the class and should be preliminarily approved by the Court, with notice provided to the Settlement Class. Plaintiffs therefore request the entry of an Order:

1. Finding that the proposed settlement with Bayer is sufficiently fair, reasonable and adequate to allow dissemination of notice to the Settlement Class;

2. Finding that the prerequisites for a class action have been satisfied and certifying the proposed class for settlement purposes;

3. Approving the forms of notice attached as Exhibits "A" and "B" to the proposed order granting preliminary approval of the settlement (the "Order");

4. Directing that Notice be disseminated;

5. Establishing a deadline for filing requests for exclusion from the Settlement Class as set forth in the proposed Order;

6. Establishing a deadline for filing objections to the proposed settlement;

7. Establishing a date for hearing on final approval of the proposed settlement; and,

8. Staying all proceedings against Bayer except those proceedings provided or otherwise required by the Agreement.

III. ARGUMENT

A. Standards Governing Preliminary Approval of a Settlement.

Fed. R. Civ. P. 23(e) governs court approval of class action settlements, and requires that court-approved notice of the proposed settlement be distributed to all reasonably-identifiable members of the class. *DeJulius v. New England Health Care Employees Pension Fund*, 429 F.3d 935, 939 (10th Cir. 2005); 4 *Herbert Newberg & Alba Conte, Newberg on Class Actions* §11.25 (4th ed. 2005). Settlement classes are appropriate, provided they satisfy the relevant mandates of Rule 23. *See, e.g., Epstein v. Wittig*, 2005 WL 3276390, at *1 (D. Kan. Dec. 2, 2005) (describing preliminary approval); *Marcus*, 206 F.R.D. at 513; *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 148 F.3d 283, 307-08 (3d Cir. 1998); *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 619-22 (1997).

Where, as here, the parties reach a settlement before a class has been certified, the plaintiffs may move and the Court may simultaneously grant conditional class certification, preliminary approval of the proposed settlement, and approval of the form of notice to the prospective class members. *See, e.g., City P'ship Co. v. Lehman Bros.,*

Inc., 344 F. Supp. 2d 1241, 1244 (D. Colo. 2004); *In re Sprint Corp. Sec. Litig.*, 2004 WL 955859, at *1 (D. Kan. 2004); *Marcus*, 206 F.R.D. at 513. If the court grants preliminary approval, notice of the settlement is provided to the putative class members, who are informed of the final approval hearing date by way of the notice. *See DeJulius*, 429 F.3d at 939. The Court need not consider final approval of the terms of the settlement and certification of the class until the final approval hearing. *Id.*

Accordingly, preliminary approval is subject to a more flexible standard than final approval. *Marcus*, 206 F.R.D. at 513. The question at the preliminary approval stage is whether "the proposed settlement agreement is sufficiently reasonable, adequate, fair, and consistent with the requirements of Rule 23 of the Federal Rules of Civil Procedure, to warrant notice thereof to the class members and a fairness hearing thereon." *Id.* On a motion for preliminary approval, the court neither decides the merits of the underlying case, *Lake v. First Nationwide Bank*, 156 F.R.D. 615, 622 n.6 (E.D. Pa. 1994), nor crafts a settlement for the parties. Instead, the court determines whether the proposed settlement is "within the range of possible approval." *In re Corrugated Container*, 643 F.2d at 212.

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] (2005); *In re PaineWebber Ltd. P'ships Litig.*, 147 F.3d 132, 138 (2d Cir.1998) (noting "strong judicial policy in favor of settlements, particularly in the class action context"); *Alvarado Partners, L.P. v. Mehta*, 723 F. Supp. 540, 551 (D. Colo. 1989) (same). Settlement of complex litigation generally "is encouraged by the courts and favored by public policy." 4 *Newberg on Class Actions* at

§ 11:41.

To effectuate this policy, courts adhere to "an initial presumption of fairness when a proposed class settlement, which was negotiated at arm's length by counsel for the class, is presented for court approval." 4 *Newberg on Class Actions* at § 11.41 (collecting cases). "When a settlement is reached by experienced counsel after negotiations in an adversarial setting, there is an initial presumption that the settlement is fair and reasonable." *Marcus v. Kan. Dep't of Revenue*, 209 F. Supp. 2d 1179, 1182 (D. Kan. 2002).

The presumption of fairness carries particular weight in the context of preliminary approval. Because preliminary approval is provisional, and is followed by more formal and comprehensive review and objection procedures, any doubts should be resolved in favor of preliminary approval. *See, e.g., In re Vitamins Antitrust Litig.*, 2001 WL 856292, at *4 (D.D.C. Jul. 25, 2001) (explaining that preliminary approval is appropriate absent "obvious deficiencies" raising doubts about the fairness of the settlement) (quoting *Manual for Complex Litigation, Third* § 30.41 (West 1999)). The Settlement Agreement contains neither obvious deficiencies nor any settlement terms casting doubt upon its fairness. At this stage of the proceedings, the proposed Settlement Agreement falls well within the range of reasonableness, fairness and possible approval, and thus warrants preliminary approval.

B. The Proposed Settlement Should be Preliminarily Approved and Notice Should be Disseminated to the Class.

Under the proposed settlement, the Settlement Class will obtain a significant recovery of $55.3 million, which is already accruing interest for the benefit of the class. It bears emphasis that this is the first agreement plaintiffs have reached with any of the defendants, providing a number of important benefits. Courts have long recognized that early settlements of this type

create value beyond their direct pecuniary benefit to the class. Early settlements can serve as "icebreaker" agreements, strengthening plaintiffs' hand in the litigation and encouraging future settlements. *See, e.g., Linerboard*, 292 F. Supp. 2d at 643; *Corrugated Container*, 1981 WL 2093, at *19. Settlement with a single defendant in a price-fixing case tends to bring other co-defendants "to the point of serious negotiations." *Corrugated Container*, 1981 WL 2093, at *19.

Of particular importance is the fact that the Settlement Agreement requires Bayer to provide extensive assistance to the Class Plaintiffs. Agreement at ¶¶ 41-42. This cooperation is extremely valuable to the class, given that this case stems from an independent investigation by counsel rather than one initiated by the government. Bayer's early-stage cooperation affords the class access to documents and witnesses without protracted and expensive discovery—a significant class-wide benefit. *See, e.g., Denney v. Jenkens & Gilchrist*, 230 F.R.D. 317, 339 (S.D.N.Y. 2005); *In re Auto. Refinishing Paint Antitrust Litig.*, 2004 WL 1068807, at *2 (E.D. Pa. May 11, 2004); *Linerboard*, 292 F. Supp. 2d at 643; *In re Mid-Atl. Toyota Antitrust Litig.*, 564 F. Supp. 1379, 1386 (D. Md. 1983); *Corrugated Container*, 1981 WL 2093, at *16; *In re Ampicillin Antitrust Litig.*, 82 F.R.D. 652, 654 (D.D.C. 1979).

Indeed, the value of a first settlement is so great that first-settling defendants often obtain a substantial discount relative to the remaining defendants. The *Linerboard* court, for instance, approved a settlement with the first-settling defendant for approximately one-third the percentage of sales ultimately obtained from the other defendants. *Compare Linerboard*, 292 F. Supp. 2d at 643 (approving icebreaker settlement for approximately 0.4% of sales), *with In re Linerboard Antitrust Litig.*, 321 F. Supp. 2d 619, 633 (E.D. Pa. 2004) (approving settlements with final two defendants for 1.6% and 2% of sales). In accepting this discounted recovery from the first-settling defendants, the *Linerboard* court emphasized the "substantial" intangible

benefits to the class of the icebreaker agreement. 292 F. Supp. 2d at 643.

Moreover, the proposed settlement with Bayer is well within the range of icebreaker settlements reached in other antitrust price-fixing class actions. The cash payment represents approximately 1% of Bayer's sales during the Class Period. Other courts have approved settlements for a similar percentage of sales. *See Linerboard*, 292 F. Supp. 2d at 643 (icebreaker settlement of approximately 0.4% of sales); *Fisher Bros., Inc. v. Mueller Brass Co.*, 630 F. Supp. 493, 499 (E.D. Pa. 1985) (icebreaker settlement of 0.2% of sales); *In re Plastic Additives Antitrust Litig.*, Docket No. 03-CV-2038 (E.D. Pa. Sept. 16, 2004) (icebreaker settlement of less than 1% of sales); *In re High Fructose Corn Syrup Antitrust Litig.*, Civil Action No. 95-1477, MDL No. 1087 (C.D. Ill. July 15, 1996) (icebreaker settlement of roughly 1% of sales); *In re Flat Glass Antitrust Litig.*, Docket No. 97-550, MDL No. 1200 (W.D. Pa. June 21, 1999) (icebreaker settlement of 1.5% of sales).

Not only does the Settlement Agreement provide for substantial recovery and significant cooperation by Bayer, it also specifically provides that the non-settling defendants remain jointly and severally liable for the full damages caused by the alleged conspiracy, including all sales made by Bayer. (Agreement at ¶46). *See Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 646 (1981). In this regard, the Settlement Agreement is similar to the icebreaker settlement approved in *Corrugated Container*, where the court noted the "valuable provision" under which plaintiffs reserved their right to recover full damages from the remaining defendants, less the actual amount of the initial settlement. 1981 WL 2093, at *17; *see also In re Uranium Antitrust Litig.*, 617 F.2d 1248 (7th Cir. 1980). Here, too, the class members will be able to recover their

full damages, with no diminution other than deduction of the actual Bayer settlement amount.[4] As in *Corrugated Container*, ensuring that Bayer's sales remain in the case confers a substantial benefit upon the class.

For these reasons, the significant benefits conferred by this settlement more than justify preliminary approval. Not only is the recovery of $55.3 million substantial, the Bayer settlement increases the likelihood of future settlements with the remaining defendants. Moreover, it provides for the invaluable cooperation of a major manufacturer of the Products and permits class members to recover their full damages from non-settling defendants. All of these factors militate in favor of this Court finding the settlement within the "range of possible approval" and authorizing notice to the class.

C. The Proposed Settlement is the Result of Arm's-Length Negotiations By Experienced Counsel.

The parties' view of the settlement as fair and reasonable is entitled to great weight. *Rutter & Wilbanks Corp. v. Shell Oil Co.*, 314 F.3d 1180, 1188 (10th Cir. 2002). Courts properly take into account the considered judgment of experienced counsel in evaluating the fairness of proposed class-action settlements. "[T]he recommendation of a settlement by experienced plaintiffs' counsel is entitled to great weight." *Wilkerson v. Martin Marietta Corp.*, 171 F.R.D. 273, 288-89 (D. Colo. 1997). "Courts have consistently refused to substitute their business judgment for that of counsel and the parties." *Alvarado*, 723 F. Supp. at 548.

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[4]This framework stands in contrast to other cases, like *Linerboard*, where defendants entered into a "sharing agreement" with one another, which required plaintiffs to remove all of the settling defendant's sales from the case against the remaining defendants. Here, there is no sharing agreement among the defendants, nor any provision in the Agreement precluding plaintiffs from seeking damages from the non-settling defendants on account of Bayer's sales.

Here, the proposed settlement was reached after extensive arm's-length negotiations by respected and experienced counsel for both plaintiffs and Bayer. These negotiations were protracted, hard-fought and conducted in the utmost good faith. Moreover, Plaintiffs' Co-Lead Counsel are among the most experienced antitrust and class action attorneys in the country. For example, Co-Lead Counsel Cohen, Milstein, Hausfeld & Toll recently represented two certified classes of bulk vitamin purchasers victimized by a ten-year global price-fixing and market allocation conspiracy. *In re Vitamins Antitrust Litig.*, M.D.L. No. 1285 (D.D.C.). They secured a landmark partial settlement of $1.1 billion before trial, and later obtained a treble-damage verdict of $148,617,702 on the unsettled claims. Likewise, Co-Lead Counsel Fine, Kaplan and Black has served as lead or co-lead counsel in several large antitrust class actions, including, among others, *In re NASDAQ Market-Makers Antitrust Litig.*, M.D.L. No. 1023 (S.D.N.Y.), in which plaintiffs achieved settlements totaling $1.027 billion. More information on Co-Lead Counsels' extensive antitrust and class action experience is available at the firms' respective websites: http://www.cmht.com/antitrust.php; and http://www.finekaplan.com.

In this case, the considered judgment of experienced counsel and the terms of the Settlement Agreement amply illustrate the fairness and reasonableness of the settlement.

D. The Court Should Approve The Forms of Notice.

Federal Rule of Civil Procedure 23(e)(1)(B) provides that "[t]he court must direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise." Here, plaintiffs propose individual notice via first-class mail to those class members who can be reasonably identified. Notice, in the form attached as Exhibit "A" to the proposed preliminary approval Order, will be mailed by first-class mail, postage prepaid, to all persons and entities identified by Bayer and the other non-settling

defendants[5] as direct purchasers of the Products in the United States and its territories or for delivery in the United States and its territories at any time during the period from January 1, 1999 through December 31, 2004. In addition, a summary notice, in the form attached as Exhibit "B" to the proposed preliminary approval Order, will be published in Chemical Week. Moreover, both the mailed Notice and the Summary Notice will apprise class members that the Settlement Agreement can be reviewed online at the following website: www.PolyetherPolyolSettlement.com.

Rule 23 requires that a notice state: the nature of the action; the definition of the proposed class; the class claims; that a class member may enter an appearance through counsel if the member so desires; that the court will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded; and the binding effect of a class judgment on class members. *See* Fed. R. Civ. P. 23 (c)(2)(B). Such a notice complies with due process requirements. *See DeJulius*, 429 F.3d at 939.

The proposed notice (the "Notice") clearly satisfies the required elements. The contents of the proposed Notice, and the proposed method of its dissemination, comport with Federal Rules of Civil Procedure 23(c)(2) and 23(e), 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); *In re Mid-Atl. Toyota Antitrust Litig.*, 564 F. Supp. at 1384 (approving class notice plan); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011,

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[5]Plaintiffs are submitting herewith a motion and proposed "Order to Facilitate Dissemination of Notice" which would require the non-settling defendants to provide Plaintiffs' Co-Lead Counsel with the names and addresses, in electronic or other reasonably appropriate format, of their customers who purchased the Products directly from them in the United States and its territories or for delivery in the United States and its territories during the Class Period.

1025-26 (9th Cir. 1998); *In re Lease Oil Antitrust Litig.*, 186 F.R.D. 403, 429 (S.D. Tex. 1999).

Accordingly, the Court should approve the forms of Notice.

E. The Proposed Class Should Be Conditionally Certified.

Conditional certification is appropriate to facilitate notice of a preliminarily approved settlement. *See, e.g.*, *DeJulius*, 429 F.3d at 939 (describing simultaneous preliminary settlement approval and conditional class certification); *Rutter & Wilbanks*, 314 F.3d at 1183-84 (same); *In re Cardizem CD Antitrust Litig.*, 391 F.3d 812, 815 (6th Cir. 2004) (same); *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 526 (3d Cir. 2004) (same); *In re Vitamins Antitrust Class Actions*, 327 F.3d 1207, 1208 (D.C. Cir. 2003) (same); *Marcus*, 206 F.R.D. at 513 (certifying class and preliminarily approving settlement); *City P'ship*, 344 F. Supp. 2d at 1244 (describing certification of class as part of preliminary settlement approval); *Gottstein v. National Ass'n for Self Employed*, 2000 WL 1732338, at *1 (D. Kan. Nov. 2, 2000) (simultaneous preliminary approval and conditional class certification). As set forth below, the proposed Settlement Class satisfies the requirements of Federal Rule of Civil Procedure 23.

1. The Requirements of Rule 23(a) Are Met.

Horizontal price-fixing class actions are certified routinely in this District and elsewhere. *See In re Universal Serv. Fund Tel. Billing Practices Litig.*, 219 F.R.D. 661 (D. Kan. 2004); *Law v. Nat'l Collegiate Athletic Ass'n*, 167 F.R.D. 178 (D. Kan. 1996); *In re Aluminum Phosphide Antitrust Litig.*, 160 F.R.D. 609 (D. Kan. 1995); *In re Vitamins Antitrust Litig.*, 209 F.R.D. 251, 258 (D.D.C. 2002) ("[I]t has long been recognized that class actions play an important role in the private enforcement of antitrust actions.").

Plaintiffs here seek certification of a Settlement Class defined as follows:

> All persons and entities who purchased polyether polyols, monomeric or polymeric diphenylmethane diisocyanate ("MDI"), and/or toluene diisocyanate ("TDI"), whether sold separately or in a combined form with or without other chemicals added thereto, directly from a defendant at any time from January 1, 1999, through December 31, 2004 in the United States and its territories or for delivery in the United States and its territories (excluding all governmental entities, any defendants, their employees and their respective parents, subsidiaries and affiliates).

Plaintiffs moving for class certification must first satisfy the requirements of Rule 23(a)—numerosity, commonality, typicality, and adequacy of representation. Plaintiffs here move for certification under Rule 23(b)(3), which further requires that common questions predominate over individual questions and that a class action be a superior method for adjudication. The proposed Settlement Class satisfies each of these elements.[6]

a. Numerosity

No magic number is required to satisfy the numerosity requirement of Rule 23(a) (1). *See, e.g., Horn v. Associated Wholesale Grocers, Inc.*, 555 F.2d 270, 276 (10th Cir. 1977) (finding class of forty-six plaintiffs large enough to warrant certification); *Olenhouse v. Commodity Credit Corp.*, 136 F.R.D. 672, 679 (D. Kan. 1991) (finding good faith estimate of at least fifty class members warrants certification). Bayer's customer lists alone readily satisfy the numerosity requirement of Rule 23(a). Because of the large number of putative class members and their geographical distribution throughout the United States, joinder is highly impractical.

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[6] For class certification purposes, the court accepts the allegations of the complaint as true. *Universal Serv. Fund*, 219 F.R.D. at 665.

See In re Home-Stake Prod. Co. Sec. Litig., 76 F.R.D. 351, 361 (N.D. Okla. 1977) (geographic diversity among potential claimants adds to impracticality of joinder).

b. Commonality

Certification requires common issues of law or fact. Fed. R. Civ. P. 23(a)(2). This prerequisite is readily satisfied, because "antitrust price-fixing conspiracy cases, by their nature, deal with common legal and factual questions about the existence, scope and effect of the alleged conspiracy." *Aluminum Phosphide*, 160 F.R.D. at 613 (quoting *In re Sugar Indus. Antitrust Litig.*, 73 F.R.D. 322, 335 (E.D. Pa. 1976)); *see also In re Monosodium Glutamate Antitrust Litig.*, 205 F.R.D. 229, 232 (D. Minn. 2001) (commonality routinely found in antitrust price-fixing cases); *In re Playmobil Antitrust Litig.*, 35 F. Supp. 2d 231, 240 (E.D.N.Y. 1998) (collecting cases, and explaining that courts generally find commonality in price-fixing cases); 7A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice & Procedure*: Civil 3d § 1763 (2005) (same).

Here, plaintiffs have identified the following issues common to the class:

- Whether defendants engaged in a combination and conspiracy to fix, raise, maintain or stabilize prices of the Products sold in the United States or sold for delivery in the United States;
- Whether defendants engaged in a combination and conspiracy to allocate customers and the markets for the Products sold in the United States or sold for delivery in the United States;
- Whether the conduct of the defendants caused injury to the business or property of the members of the class; and
- The appropriate measure of damages.

Any one of these issues would, standing alone, establish the requisite commonality under Rule 23(a)(2). *See Universal Serv. Fund*, 219 F.R.D. at 666 (noting that commonality "requires

only a single issue common to the class").

c. Typicality

Rule 23(a)(3) requires that "the claims or defenses of the representative parties" be "typical of the claims or defenses of the class." Typicality does not require identical claims among class members. *Milonas v. Williams*, 691 F.2d 931, 938 (10th Cir. 1982); *In re Community Bank of N. Va.*, 418 F.3d 277, 303 (3d Cir. 2005). Rather, the class representatives must simply have the "same interests and suffer the same injuries as the proposed class." *Heartland Communications, Inc. v. Sprint Corp.*, 161 F.R.D. 111, 116 (D. Kan. 1995). The typicality requirement is rarely at issue in price-fixing litigation. *See Universal Serv. Fund*, 219 F.R.D. at 667 (citing *In re Linerboard Antitrust Litig.*, 203 F.R.D. 197, 207 (E.D. Pa. 2001), *aff'd* 305 F.3d 145 (3d Cir. 2002)) (noting that typicality requirement is generally satisfied in antitrust cases because the named plaintiffs must prove a conspiracy, its effectuation, and damages, which is precisely what all class members must prove).

The named plaintiffs and the members of the Settlement Class were all victims of the same conspiracy to fix prices and allocate markets and customers. *See In re Catfish Antitrust Litig.*, 826 F. Supp. 1019, 1035 (N.D. Miss. 1993) (where "it is alleged that the defendants engaged in a common scheme relative to all members of the class, there is a strong assumption that the claims of the representative parties will be typical of the absent class members"); *In re Carbon Black Antitrust Litig.*, 2005 WL 102966, at *12 (D. Mass. Jan. 18, 2005) (citing 1 *ABA Section of Antitrust Law, Antitrust Law Developments* 932 (5th ed. 2002)) (noting that typicality is normally satisfied in price-fixing conspiracy case "even though the plaintiff followed different purchasing procedures, purchased in different quantities or at different prices, or purchased a different mix of products than did the members of the class").

d. Adequacy of Representation

The Rule 23(a)(4) requirement of fair and adequate representation involves two inquiries: (1) whether any conflicts exist between named plaintiffs and their counsel and the class; and (2) whether counsel has the requisite skill to ensure vigorous prosecution of the case on behalf of the class. *See Rutter & Wilbanks*, 314 F.3d at 1187-88; *Marcus*, 206 F.R.D. at 512.

There are no known conflicts, or even potential conflicts, among class members. Furthermore, plaintiffs are represented by counsel with extensive experience in antitrust and class action litigation. *See* Section III.C., *supra*. They have and will vigorously prosecute the class claims through all phases of litigation, including trial. *See Marcus*, 206 F.R.D. at 512 ("In the absence of evidence to the contrary, courts will presume proposed class counsel is adequately competent to conduct the proposed litigation.").

2. The Requirements of Rule 23(b) Are Satisfied.

a. Rule 23(b)(3) Predominance

Common questions of law or fact predominate over any individual questions. Indeed, the Supreme Court has recognized that "predominance is a test readily met in certain cases . . . alleging . . . violations of the antitrust laws." *Amchem*, 521 U.S. at 625. In the price-fixing context, whether defendants violated the antitrust laws is not only a common question, it also predominates over any individual issues. *See, e.g., In re NASDAQ Market-Makers Antitrust Litig.*, 169 F.R.D. 493, 518 (S.D.N.Y. 1996) ("courts repeatedly have held that the existence of a conspiracy is the predominant issue in price fixing cases, warranting certification of the class"); *In re Flat Glass Antitrust Litig.*, 191 F.R.D. 472, 480 (W.D. Pa.1999) (same); *In re Potash Antitrust Litig.*, 159 F.R.D 682, 693 (D. Minn.1995) (same).

The fact of damage or impact flowing from the alleged conspiracy also raises a common

predominant issue. Many courts, including this Court, have found that impact from the existence of a conspiracy can be presumed on a class-wide basis. *See Universal Serv. Fund.*, 219 F.R.D. at 674; *Aluminum Phosphide*, 160 F.R.D. at 615 (collecting cases on presumed impact of price fixing); *Catfish*, 826 F. Supp. at 1041 (same).

b. Rule 23(b)(3) Superiority

Rule 23(b)(3) also requires that a class action be superior to other available methods of fairly adjudicating the controversy. *See Aluminum Phosphide*, 160 F.R.D. at 614. Courts consistently hold that class actions are a superior method of resolving antitrust claims. *See Universal Serv. Fund*, 219 F.R.D. at 679 (noting that individual litigation of antitrust claims would be "grossly inefficient, costly and time consuming . . ."). Cases affirming this principle are legion. *See De Loach v. Phillip Morris*, 206 F.R.D. 551, 566 (M.D.N.C. 2002); *Linerboard*, 203 F.R.D. at 223; *Lease Oil*, 186 F.R.D. at 428-29; *In re Polypropylene Carpet Antitrust Litig.*, 996 F. Supp. 18 (N.D. Ga. 1997); *NASDAQ*, 172 F.R.D. at 129; *Catfish*, 826 F. Supp. at 1044-45.[7]

IV. CONCLUSION

The proposed Settlement Agreement represents a substantial recovery for the class and was reached after arm's-length negotiations between experienced antitrust class-action counsel. Its value to the class is particularly significant in light of the explicit cooperation provisions and the settlement's potential to serve as an icebreaker. The proposed class, to which Bayer does not

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[7] Another criterion of Rule 23(b)(3) is manageability. The Supreme Court has made clear that manageability need not be considered where, as here, a class is being certified for settlement purposes. *Amchem*, 521 U.S. at 620 ("Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems, see Fed. R. Civ. P. 23(b)(3)(D), for the proposal is that there be no trial.")

object, easily meets the requirements for class certification. This settlement satisfies Rule 23(e), and should be preliminarily approved.

Moreover, since the relevant criteria of Rules 23(a) and (b) are satisfied, the class should be conditionally certified for settlement purposes. In addition, plaintiffs respectfully submit that the Notice should be approved and disseminated to the members of the class by mail and by publication and that further class proceedings as to Bayer be stayed.

Respectfully submitted,

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