

II Approve the “Notice of Proposed Settlement of Class Action, Plaintiffs’ Counsels’ Motion for Attorneys’ Fees, and Hearing Regarding Settlement” (the “Notice”) and Proof of Claim and Release, substantially in the form attached hereto as Exhibit 2;

III Direct that the Notice be disseminated in the form and manner described in the accompanying Memorandum;

IV Establish a deadline for filing objections to the proposed settlement and Plaintiffs’ response to any such objections;

V Establish a date for submission of Plaintiffs’ Counsels’ motion for final approval of the proposed settlement, application for attorneys’ fees and expenses, and application for incentive awards for Plaintiffs; and

VI. Establish a date for a hearing on final approval of the proposed settlement and its terms.

A proposed Order is attached hereto as Exhibit 3 for the Court’s convenience.

Dated: January 15, 2010

Respectfully submitted,

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LAW OFFICE OF ALFRED G. YATES JR.
PC

Natchitoches Parish Hospital Service District and JM Smith Corporation d/b/a Smith Drug Company (“Plaintiffs”) respectfully submit this Memorandum of Law in Support of Plaintiffs’ Motion for Preliminary Approval of Settlement, Approval of Form of Notice and Setting of Final Settlement Hearing.

After over four years of protracted hard-fought litigation, including thirteen days of trial by jury, Plaintiffs and Defendants Tyco International, Ltd., Tyco International (U.S.), Inc., Covidien, Inc. (formerly known as Tyco HealthCare Group, L.P), and the Kendall Healthcare Products Company (“Tyco”) have entered into a proposed settlement (the “Settlement”) providing for the payment of \$32.5 million in cash to Plaintiffs and members of the class (“the Class”).¹ This Settlement provides an excellent result for the Class.

This class action litigation was brought by direct purchasers of sharps containers from Tyco. Among other things, Plaintiffs claimed that Tyco violated Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, by allegedly entering into: (a) exclusionary agreements with purchasers of sharps containers which required customers to purchase sharps containers almost exclusively from Tyco, as well as (b) exclusive dealing arrangements with Group Purchasing Organizations (“GPOs”) under which GPOs agreed not to broker sharps container sales by Tyco’s competitors, all of which caused Plaintiffs and members of the Class to incur significant overcharge damages. This action is being resolved as to all Defendants, together with their

¹ Pursuant to this Court’s August 29, 2008 Order, the Class is comprised of:

All persons who purchased sharps containers directly from Covidien, or its predecessor, Tyco Healthcare, at any time between October 4, 2001 and August 29, 2008. Excluded from the Class are Tyco, Tyco’s parents, subsidiaries and affiliates.

present and former parents, predecessors, subsidiaries, divisions, affiliates, stockholders, officers, directors, employees, agents and any of their legal representatives.

The Settlement was entered into after weeks of contentious arm's-length negotiations involving experienced and highly-skilled antitrust counsel. The parties were also assisted in this process by Prof. Eric Green, one of the most respected mediators in the country. Despite his capable assistance, it was not until two days before closing arguments were scheduled that the two sides reached a satisfactory resolution.

The present motion seeks preliminary approval of the Settlement and requests that the Court set in motion the process to determine whether final approval of the Settlement should be granted, after notice to the Class, and a subsequent hearing on final approval ("Fairness Hearing") to be held by the Court.² This motion for preliminary approval, which is supported by Tyco, is unopposed.

I. BACKGROUND

Plaintiffs in this Class Action allege that Tyco violated Sections 1 and 2 of the Sherman Act by allegedly: (1) imposing market-share purchase requirements obligating customers to purchase substantially all of their sharps container needs from Tyco, (2) bundling sharps containers with unrelated products, and (3) agreeing with GPOs to impose exclusionary contracts on member hospitals. Plaintiffs allege that these antitrust violations substantially foreclosed competition in the nationwide market for sharps containers, thereby forcing members of the Class to pay artificially inflated prices for sharps containers.

² As detailed below, preliminary approvals of proposed class action settlements are procedural in nature and do not involve determinations on the merits of the proposed settlement, as long as the settlement falls within the range of possible approval. *Mehling v. New York Life Ins. Co.*, 246 F.R.D. 467, 472 (E.D. Pa. 2008)(granting preliminary approval in class action litigation regarding life insurance policies).

Tyco denies Plaintiffs' allegations and maintains, among other things, that: (1) its market-share discounts are lawful and did not cause substantial market foreclosure, (2) its bundled programs are not unreasonable restraints of trade or anticompetitive, (3) it does not have monopoly power or market power in the sharps containers market, (4) its conduct did not cause antitrust injury, and (5) to the extent Tyco charged higher prices while maintaining more than a 50% market share from 2001-2007, it was because Tyco produced a superior product and service as compared with its competitors.

Prior to agreeing (subject to the Court's approval) to settle its claims against Defendants, Plaintiffs, on behalf of the Class:

- Engaged in substantial fact discovery, which included, *inter alia*, the inspection of millions of pages of documents;
- Took 18 depositions of Defendants' current and former employees, in locations ranging from Boston to San Diego and points between;
- Served 12 third-party document subpoenas, with accompanying negotiations for production;
- Took 12 third-party depositions, including depositions of the national GPOs (Novation, Premier, Consorta, HealthTrust, Amerinet, Broadlane, and MedAssets) and several of Tyco's competitors (Becton Dickinson, Daniels, Stericycle/Biosystems);
- Engaged in substantial work with experts, which included, *inter alia*, consultation with economic experts for liability and damages purposes. This case was unique in that each party's liability expert was explicitly recognized by the Court as a "titan of antitrust," as the Court fairly recognized the standing in the academic and litigation communities of Prof. Einer Elhauge (Plaintiffs' liability expert) and Prof. Janusz Ordover (Defendants' liability expert). Each side submitted numerous expert reports relating to liability, and each side took and defended liability-expert depositions;
- Retained Dr. Hal Singer to opine on damages, with Defendants' retaining Ms. Margaret Guerin-Calvert. Plaintiffs deposed Ms. Guerin-Calvert and defended the deposition of Dr. Singer. Plaintiffs also deposed Tyco's industry expert, Mr.

Thomas Hughes, and challenged his opinions (with partial success) pursuant to a *Daubert* challenge;

- Fought off Defendants' *Daubert* strategy, by which Defendants also retained Nobel-prize winning economist Dr. Daniel McFadden as part of the *Daubert* process. Plaintiffs responded to Dr. McFadden's *Daubert* declarations, and also deposed Dr. McFadden;
- Engaged in a two-day *Daubert* hearing, at which Professors Elhauge, Ordovery, and McFadden all testified live, subject to direct and cross-exam by Plaintiffs' counsel;
- Assisted in the selection and retention of Dr. Orley Ashenfelter as the Court's independent expert in this matter, and briefed issues as requested by Dr. Ashenfelter;
- Successfully certified the class in this case, a process which took multiple expert reports, multiple rounds of briefing (14 briefs were submitted on issues relating to class certification in this case), and resulted in close to 100 pages of written judicial opinions in an area of the law where the First Circuit was creating new standards contemporaneously with this Court's attempts to implement them, particularly with regard to proof of common impact;
- Successfully defeated Tyco's motion for summary judgment;
- Engaged in multiple mediation sessions, as well as individualized negotiations over a period of many weeks, all under the direction of mediator Prof. Eric Green;
- Provided the Court with an in-person damages tutorial during the middle of trial to clarify issues relating to Dr. Singer's implementation of the NEIO model; and
- Prepared to try and actually tried the case for 13 days.

The Settlement, which is attached to Plaintiffs' Motion as Exhibit 1, provides for a cash payment of \$32.5 million to Plaintiffs and the Class in exchange for a full and complete settlement and release of all claims that the Plaintiffs have asserted or could have asserted in the Class Action relating to the purchase of sharps containers.³

³ The release, as set forth in Paragraphs 10 and 12 of the Settlement Agreement, specifically excludes all claims arising in the ordinary course of business between Class

The step contemplated by this motion is submission of the proposed Settlement to the Court for preliminary approval and then communication of the terms of the Settlement to the Class for its consideration. If the Court grants the instant motion, the terms of the Settlement will be communicated to the Class through a Court-approved form of notice to be sent directly to Class members whose addresses are known via U.S. mail, and also by publication in Modern Healthcare. This Court previously has approved direct mail notice in connection with its August 29, 2008 Order certifying the Class as a litigation class. The proposed form of notice is attached to Plaintiffs' Motion as Exhibit 2 (direct mail notice).

Accordingly, the instant motion seeks: (i) preliminary approval of the proposed Settlement by the Court, (ii) approval of the proposed form and manner of notice, and (iii) approval of the proposed schedule leading up to and including the March 10, 2010 Fairness Hearing.

II. PRELIMINARY APPROVAL OF THE PROPOSED SETTLEMENT IS WARRANTED

Before the final approval hearing, district courts typically give preliminary approval to class settlements and determine the method of communicating the terms of the settlement to the proposed class. *Hawkins v. Comm'r of the N.H. Dept. of HHS*, 2004 U.S. Dist. LEXIS 807, *14-15 (D.N.H. Jan. 23, 2004) (“In response to the parties’ motion for preliminary approval...the court ordered the Department to provide notice [to] class members...”); *In re Pharm. Indus. AWP Litig.*, 2008 U.S. Dist. LEXIS 111818, *77 (D. Mass. Dec. 15, 2008) (noting that notice was given to class in manner approved by court in preliminary approval order); *In re Relafen Antitrust Litig.*, 231 F.R.D. 52, 58-

members and the “Released Parties” concerning product liability, breach of contract (except breach of contract based in whole or in part of any conduct challenged by any plaintiff in this Class Action), breach of warranty or personal injury.

59 (D. Mass. 2005)(same).

In determining whether to grant preliminary approval to a settlement, courts conduct an “initial evaluation” of the fairness of the proposed settlement. *Clark v. Ecolab, Inc.*, 2009 U.S. Dist. LEXIS 108736, *14 (S.D.N.Y. Nov. 17, 2009)(citing Herbert B. Newberg & Alba Conte, *Newberg on Class Actions* § 11.25 (4th ed. 2002)). If, after preliminary evaluation of a proposed settlement, a court finds that it “appears to fall within the range of possible approval,” the court should grant preliminary approval and order that class members receive notice. *Id.* (citing Newberg at § 11.25).

Accordingly, in considering whether to grant preliminary approval, the Court is *not* required to make a final determination of the adequacy of the settlement or to delve extensively into the merits of the settlement. *See In re Relafen*, 231 F.R.D. at 57 (final decision on approval is made after the fairness hearing) (citing Manual For Complex Litigation (Fourth) § 13.14 at 171). Both of these inquiries are reserved for the final approval stage. *Id.* (engaging in final approval analysis). Nor will any class member’s substantive rights be prejudiced by preliminary approval, since preliminary approval is solely to obtain authority for notifying the class of the terms of the settlement and to set the stage for the final approval of the settlement. *See Clark*, 2009 U.S. Dist. LEXIS at 14 (“Preliminary approval...is the first step in the settlement process. It simply allows notice to issue to the class.”); Newberg at § 11.25.

Preliminary approval is granted “when the court finds that: (1) the parties’ negotiations occurred at arm’s-length; (2) there was sufficient discovery; (3) the proponents of the settlement are experienced in similar litigations, and (4) only a small fraction of the class objected.” *Smith v. Professional Billing & Management Services, Inc.*, 2007 WL 4191749, *1 (D.N.J. Nov. 21, 2007).

This Court itself has acknowledged that it has “an unusually detailed level of knowledge about this case,” having written four major opinions totaling over two hundred pages throughout the

litigation and presided over a jury trial that had been in progress for thirteen days when the Settlement was reached. *See* Jan. 8, 2010 Trial Tran. at 3, 11. There can be no question that the proposed Settlement should be preliminarily approved and notice should be sent to the Class.

A. The Proposed Settlement Is Substantial

The proposed \$32.5 million cash Settlement is substantial in both absolute terms and in light of the circumstances of this litigation.

Plaintiffs presented evidence at trial that damages in this case could run to as much as \$184 million, while Defendants intended to present evidence that damages were zero. Recovery of Plaintiffs' damage figure by the Class was far from certain. Aside from the inherent uncertainty accompanying any jury trial, Defendants had already filed a detailed motion for Judgment as a Matter of Law (JMOL). Even partial success on that motion would have halved Plaintiffs' damages calculation. Moreover, even if a full recovery was obtained from the jury, Plaintiffs faced an uncertain road in post-trial motions and appeals, as the seemingly favorable legal landscape resulting from the Ninth Circuit's *Masimo v. Tyco* opinion was upended with the issuance, during trial, of the Ninth Circuit's contradictory opinion in *Allied Orthopedic*.⁴ If either the trial court, during a JNOV/JMOL process, or the First Circuit on appeal, gave great weight to the recent *Allied Orthopedic* opinion, Plaintiffs faced the possibility of no recovery at all. Of course, recovery after appeals, if any, would have only been obtained after several years of appellate litigation.

⁴ During the course of the trial, this Court had expressed some reservations as to the appropriateness of a jury award of \$184 million and had suggested that the Court could potentially lower that award, if made at all.

Plaintiffs respectfully submit that, when compared to the significant and enduring risk of litigation to final resolution, the certain receipt now of \$32,500,000 in cash is more than sufficient to establish an initial presumption of fairness of the Settlement. *Clark*, 2009 U.S. Dist. LEXIS 108736, *14.

B. The Proposed Settlement Is The Product Of Good Faith, Extensive, Arm's-Length Negotiations

The proposed Settlement resulted from extensive arm's-length negotiations undertaken in good faith between Plaintiffs and Defendants, and assisted by mediator Prof. Eric Green. Settlement negotiations were not completed until after more than four and a half years of intense and aggressive litigation, the end of fact and expert discovery, completion of all pre-trial matters, and thirteen days of trial. By that time, the parties were intimately aware of the strengths and weaknesses of their respective positions. The narrowing of issues that naturally occurred during pretrial motion practice and discovery enabled the parties to finally reach a settlement in this lengthy case. The parties scrutinized the strengths and weaknesses of the pending claims, including consideration of – among other issues – liability, causation and damages. The parties engaged in intensive bargaining over the merits and value of Plaintiffs' claims, and the merits of Tyco's defenses. Because of the extensive, arm's-length bargaining involved, there is no issue (or even a suggestion) of any collusive aspect to the proposed Settlement.

C. There Was More Than Sufficient Discovery and Investigation For Class Counsel To Make An Informed Decision

Class Counsel spent considerable time investigating the facts of this case prior to filing suit on October 5, 2005. This investigation included, among other things, conducting extensive industry and economic research on: (1) the interactions between medical device manufacturers, such as Tyco, with GPOs, and (2) single manufacturer and multi-manufacturer bundling practices.

Discovery in this case spanned approximately two years, and was extremely comprehensive, involving over thirty fact and expert depositions and numerous interrogatories and document requests. In all, Class Counsel reviewed and analyzed approximately four million pages of documents made available by Defendants and various non-parties. Class Counsel and the Class's expert also obtained (from Defendants and non-parties) and analyzed electronic sales databases. Class Counsel also assisted the named Plaintiffs in answering extensive interrogatories, producing purchase and other records to the Defendants, and sitting for depositions.

Armed with this discovery, Class Counsel deposed numerous current and former executives and employees of Defendants, as well as third/non-parties, on issues involving: the scope and effect of the challenged contracts; the purpose of such contracting arrangements; Tyco's alleged monopoly power in the relevant market; product quality issues, and complex economic issues involving the fact of injury and quantum of damages. Class Counsel also retained and worked with several expert witnesses in evaluating various issues relating to liability, causation and damages, and these experts produced numerous reports. Class Counsel and the Class's experts also reviewed, analyzed and responded to reports served by Defendants' experts, all of whom were also deposed. In total, the parties produced 21 expert reports and/or declarations in this matter relating to issues of class certification, liability, *Daubert* and damages.

Finally, the thirteen days of trial enabled Class Counsel to intimately evaluate the strengths and weaknesses of each party's position.

As a result, issues relating to liability, causation and damages were fully developed, allowing Class Counsel to make an informed decision regarding the proposed Settlement.

D. The Proponents Of The Settlement Are Highly Experienced In Antitrust Litigation

The Class is represented by lawyers who have extensive antitrust class action experience.

Class Counsel have been on the forefront of medical device and pharmaceutical antitrust litigation for many years, and also have vast experience with complex litigation generally. Indeed, over the past many years, Class Counsel have represented certified classes of direct purchasers in numerous antitrust cases relating to the exclusion of rival manufacturers in both the medical device and pharmaceutical industries. For example,

- *In re Hypodermic Products Direct Purchaser Antitrust Litig.*, MDL No. 1730 (JLL)(D.N.J. filed March 23, 2005);
- *In re Cardizem CD Antitrust Litig.*, No. 99-md-1278 (NGE) (E.D. Mich. filed June 15, 1999) (certifying class of direct purchasers of Cardizem CD; finally approving settlement);
- *In re Bupirone Patent & Antitrust Litig.*, No. 01-cv-7951 (JGK) (S.D.N.Y. filed Aug. 24, 2001) (certifying class of direct purchasers of Buspar; finally approving settlement);
- *In re Relafen Antitrust Litig.*, No. 01-cv-12239 (WGY) (D. Mass. filed Dec. 18, 2001) (certifying class of direct purchases of Relafen; finally approving settlement);
- *In re Terazosin Hydrochloride Antitrust Litig.*, No. 99-md-1317 (PAS) (S.D. Fla. filed Feb. 25, 2005) (certifying class of direct purchasers of Hytrin; finally approving settlement);
- *In re Remeron Antitrust Litig.*, No. 03-cv-0085 (FSH) (D.N.J. filed Jan. 8, 2003) (certifying class of direct purchasers of mirtazapine; finally approving settlement);
- *In re Tricor Direct Purchaser Antitrust Litig.*, No. 05-cv-00340 (SLR) (D. Del. filed May 27, 2005), Docs. 529, 543 (certifying class of direct purchasers of Tricor; finally approving settlement);
- *In re Nifedipine Antitrust Litig.*, No 03-223 (D.D.C. filed June 30, 2003) (certifying class of direct purchasers of generic Adalat);
- *In re Ciprofloxacin Direct Purchaser Antitrust Litig.*, MDL No. 00-1383 (E.D.N.Y. filed Dec. 18, 2006);
- *In re K-Dur Direct Purchaser Antitrust Litig.*, No. 01-1652 (D.N.J. filed April 4, 2001);

- *In re Norvir Direct Purchaser Antitrust Litig.*, No. 07-5985 (N.D. Cal. filed Nov. 27, 2007);
- *In re Modafinil Direct Purchaser Antitrust Litig.*, No. 06-1797 (E.D. Pa. filed April 27, 2006).

Thus, Class Counsel are well versed in both the prosecution and settlement of this type of antitrust litigation.

Courts have repeatedly and explicitly deferred to the judgment of experienced counsel who have conducted arm's-length negotiations in approving proposed class settlements. *See, e.g., Varacallo v. Mass. Mut. Life Ins. Co.*, 226 F.R.D. 207, 240 (D.N.J. 2005) (“Class Counsel’s approval of the Settlement also weighs in favor of the Settlement’s fairness.”) (citations omitted); *In re Lupron Mktg & Sales Practices Litig.*, 228 F.R.D. 75, 98 (D. Mass. 2005)(considering “opinions of MDL counsel” in determining whether to approve class action settlement); *In re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions*, 410 F. Supp. 659, 667 (D. Minn. 1974) (“[t]he recommendation of experienced antitrust counsel is entitled to great weight”). The presumption in favor of such settlements reflects the understanding that vigorous, skilled negotiation protects against collusion and advances the fairness interests of Rule 23(e).

E. Initial Reaction Of Class Members Is Fully Supportive Of The Settlement

Although formal notice of settlement has not yet been sent, Class Counsel has communicated with the Class Representatives regarding the proposed Settlement and has received their explicit approval and support. Furthermore, each Class Member will have an opportunity to make any objection to the proposed Settlement prior to and/or at the Fairness Hearing. Accordingly, based on the above factors, this Court should grant preliminary approval of the proposed Settlement.

III. APPROVAL OF THE PROPOSED FORM AND MANNER OF NOTICE AND THE PROPOSED FINAL SETTLEMENT SCHEDULE LEADING UP TO THE FAIRNESS HEARING IS APPROPRIATE

Rule 23(e)(1) provides that “[t]he court must direct notice in a reasonable manner to all class members who would be bound by the proposal.” FED. R. CIV. P. 23(e)(1). Notice must fairly inform class members of the settlement and their options. *Nilsen v. New York County*, 382 F.Supp.2d 206, 210 (D. Me. 2005)(notice must inform members of existence and opportunity to object to the settlement). The proposed notice program clearly meets this standard, providing clear and detailed instructions to Class members. Indeed, the proposed form of Notice is similar to the one approved by this Court following class certification. A proposed form of Notice to the Class, and Proof of Claim and Release, are attached to Plaintiffs’ Motion as Exhibit 2.

Plaintiffs propose, as they did with the Notice of Pendency, first-class mailing of the Notice to each entity that purchased sharps containers directly from Covidien, or its predecessor, Tyco Healthcare, during the Class Period at its last known address (for whom such address is known). Given that Tyco has produced its sales records in this case, including detailed customer lists, the direct mail method will be sufficient to reach all Class Members. In addition, Plaintiffs plan on an additional publication notice in *Modern Healthcare*. Accordingly, the form and manner of notice Plaintiffs propose will satisfy by the notice requirements of Rule 23(e), and due process requirements which must be met in order to bind each member of the Class. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

Further, it is respectfully suggested that the content of the Notice satisfies the requirements of Rule 23(e). The proposed Notice provides a description of the Class, the procedural status of the litigation, a brief description of the plan of allocation that Plaintiffs intend to propose, and advises Class members of their rights under Rule 23, including the right to object to the Settlement, and be heard as to the reasonableness and fairness of the Settlement. The Notice also sets forth the significant terms of the Settlement and the total amount of money Defendants have agreed to pay to

the Class. Finally, the Notice outlines the Court approval process for the proposed Settlement, counsel's request for attorneys' fees and reimbursement of expenses, and proposed incentive awards for each of the two Class Representatives.

Consistent with the Federal Rules and due process, the parties believe that, under the circumstances of this case, there is no need for a second opportunity for Class Members to opt-out in light of the Settlement. As noted above, this case was certified after extensive discovery and motion practice. The Notice of Pendency, which was sent on May 22, 2009, made clear to the Class that unless Class Members excluded themselves pursuant to the instructions in the Notice of Pendency by the stated deadline of July 21, 2009, they would "give up any right to sue Defendants for the claims presented in this lawsuit." Hence, each of the Class Members, all of whom are sophisticated business entities, were fully apprised of their rights and given a full opportunity to opt-out. Only three did. Although it is unlikely, given the substantial nature of the Settlement, that there could be additional opt-outs, it would be clearly prejudicial to the remaining Class Members to put at risk a settlement obtained during trial because certain other Class Members would choose to belatedly opt out. Moreover, there has been no change in circumstances in the approximately five and a half months that have elapsed since the expiration of the opt-out period. Consequently, the Court should exercise its discretion in permitting Plaintiffs to forego a second opt-out period. *See* Advisory Committee Notes to 2003 Amendments to Rule 23(e)(4).

Foregoing a second opt-out period is common practice with regard to antitrust actions in this and other Circuits. *See, e.g., In re Carbon Black Antitrust Litig.*, No. 03-10191 (D. Mass. Nov. 29, 2006)(preliminarily approving settlement and explaining that "[i]n light of the previous notice to Class Members of the pendency of this action and the certification of the class, which complied fully with the requirements of Rule 23 and due process, there is no need for an additional opt-out

opportunity pursuant to Rule 23(e)[(4)].”); *Denney v. Deutsche Bank AG*, 443 F.3d 253, 262, 271 (2nd Cir. 2006)(holding that courts are “under no obligation” to provide second-opt period and finding that district court’s refusal to do so was not abuse of discretion); *In re OSB Antitrust Litig.*, No. 06-826 (E.D. Pa. Aug. 7, 2008); *In re MCC Antitrust Litig.*, No. 01-0111 (E.D. Pa. Nov. 7, 2006)(ordering that no second-opt out opportunity was warranted); *In re Ovcon Antitrust Litig.*, No. 05-2195 (D.D.C. filed Nov. 9, 2005)(preliminarily approving settlement and ordering that no second opt-out opportunity was needed); *In re Auto Refinishing Paint Antitrust Litig.*, 2004 U.S. Dist. LEXIS 29163, *8-9 (E.D. Pa. May 10, 2004) (holding that second opt-out opportunity is not needed where there has been no change in circumstances since class certification and class members could still object to settlement); *In re Linerboard Antitrust Litig.*, MDL No. 1261 (E.D. Pa. Jan. 6, 2004)(same) In view of all of the above, an additional opt-out provision is unnecessary.

Under the circumstances, the Notice fairly describes the proposed Settlement and its legal significance, thereby satisfying the notice requirements of Rule 23(e). *See, e.g., Twigg v. Sears, Roebuck & Co.*, 153 F.3d 1222, 1227 (11th Cir. 1990) (“[The notice] must also contain an adequate description of the proceedings written in objective, neutral terms, that, in so far as possible, may be understood by the average absentee class member[.]”) (quoting *In re Nissan Motor Corp. Antitrust Litig.*, 552 F.2d 1088 (5th Cir. 1977)); *Bennett v. Behring Corp.*, 96F.R.D. 343, 353 (S.D. Fla. 1982) (“It is not the function of the settlement notice to fully inform the class of all the details of the settlement, but merely to put class members on notice of the general parameters of the settlement and to inform them of where information as to specifics may be obtained.”).

As set out in the proposed Order, Plaintiffs propose the following schedule for completing the approval process:

a. Dissemination of Notice to the Class via First-Class Mail 10 (ten) days following entry of the preliminary approval order;

b. February 23, 2010: submission of Plaintiffs' Counsel's motion for final approval of the settlement, application for attorneys' fees and expenses and application for incentive awards for Plaintiffs;

c. March 1, 2010: deadline for objecting to the proposed Settlement;

d. March 5, 2010: deadline for Plaintiffs' Counsel to respond to any objections

e. March 10, 2010: Fairness Hearing

IV. CONCLUSION

For the foregoing reasons, the Court should preliminarily approve the proposed Settlement, the proposed Notice, and the proposed schedule (or any other schedule satisfactory to the Court). A proposed Order is attached to Plaintiffs' Motion as Exhibit 3 for the Court's convenience.

Dated: January 15, 2010

Respectfully submitted,

/s/ Elena K. Chan

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CERTIFICATE OF SERVICE

I hereby certify that this document(s) filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non registered participants on January 15, 2010.

_____/s/ *Elena K. Chan*____