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 LYONDELL CHEMICAL COMPANY

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

Rules and Statutes

Other Authorities

I. INTRODUCTION

Class representatives Plaintiffs Seegott Holdings Inc., Quabaug Corporation and Industrial Polymers, Inc. submit this Memorandum in support of their Motion seeking preliminary approval of a class settlement with defendant Lyondell Chemical Company ("Lyondell") and authorization to disseminate notice to Class members. A copy of the Settlement Agreement, dated March 1, 2011 ("SA"), is attached hereto as Exhibit A. *See* Fed. R. Civ. P. 23(e)(3).

In early 2009, just as the parties were fully engaging in merits discovery, Lyondell and certain of its affiliates filed for Chapter 11 bankruptcy in the United States Bankruptcy Court for the Southern District of New York ("Bankruptcy Court"). Since that time and continuing through today, the automatic stay triggered by Lyondell's bankruptcy filing has precluded Plaintiffs from conducting discovery of Lyondell or otherwise prosecuting their antitrust claims against Lyondell in this Court. Plaintiffs properly filed proofs of claims in the bankruptcy and have monitored those proceedings.

In April 2010, the Bankruptcy Court confirmed Lyondell's plan of reorganization. Under the terms of the plan, the value of Plaintiffs' claims has been reduced to a mere fraction of any judgment they might obtain were they to prevail on the merits. Indeed, after accounting for the significant costs of litigating this case against Lyondell – an endeavor that, due to the bankruptcy stay, Plaintiffs would have to undertake from square one – continuing this litigation against Lyondell in the Bankruptcy Court would likely result in little or no monetary recovery, even if victory on the merits were assured.

In light of these difficulties, Plaintiffs were faced with a tremendously difficult choice between less-than-perfect options: pursue expensive, complicated and protracted litigation

against Lyondell with little hope of obtaining meaningful monetary recovery, or obtain a nonmonetary settlement that may substantially advance the claims of the Class against the remaining Defendants.

Class Plaintiffs believe the proposed Settlement Agreement is the better strategy for the Class. It releases Lyondell from liability while providing that Lyondell will pay the administrative costs associated with notice to the Class. In addition, Lyondell agrees to provide access to documents and witnesses that, because of the bankruptcy stay, have been unavailable to Plaintiffs.

The Settlement Agreement also provides that Lyondell's sales will remain in the case for purposes of computing Plaintiffs' treble-damages claims against the non-settling Defendants. As a consequence, the Class retains its ability to recover from the remaining Defendants the entire damages caused by the alleged conspiracy, even those attributable to Lyondell, less only the amounts paid by any settling defendants.[1]

Plaintiffs respectfully submit that the proposed 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. Accordingly, Plaintiffs' motion should be granted, and notice of the proposed settlement should be disseminated to the Class.

II. RELEVANT PROCEDURAL BACKGROUND OF THE CASE

Plaintiffs filed their initial complaints in 2004, alleging that Defendants Lyondell, Bayer, BASF, Huntsman, and Dow violated the Sherman Antitrust Act, 15 U.S.C. § 1, *et seq.*, by engaging in an unlawful conspiracy to artificially fix and/or inflate the price of Polyether Polyol

[1] The remaining Defendants are BASF Corporation, BASF SE (collectively, "BASF"), and The Dow Chemical Company ("Dow"). Class Plaintiffs also have reached a settlement with Huntsman International, LLC ("Huntsman"), which today is being presented for preliminary approval in a separate filing.

Products[2] in the United States.

Class Plaintiffs reached a settlement with defendant Bayer, which this Court approved on August 30, 2006. *See* Dkt. No. 425. Following a period of class certification discovery, the Court certified a litigation class. *See* Dkt. No. 708. The Court approved the form of proposed notice of pendency and authorized its dissemination soon thereafter. *See* Dkt. No. 725.

From September 2008 through December 2010, Plaintiffs and defendants BASF, Dow and Huntsman engaged in extensive merits discovery, exchanging millions of pages of documents; responding to dozens of interrogatories; and deposing more than 100 witnesses. But for a few outstanding items, merits discovery is now closed. *See* Scheduling Order No. 7, Dkt. No. 1952. The parties recently embarked on expert discovery and are moving toward a September 2012 trial. *See id.*

Early in the merits discovery phase of this litigation, Lyondell filed for Chapter 11 bankruptcy, thereby automatically staying all action against it. On January 7, 2009, the Bankruptcy Court issued an order confirming the protections of the automatic stay and prohibition of all actions against Lyondell, pursuant to sections 105(a), 362 and 365 of the Bankruptcy Code. *See* Order, *In re Lyondell Chem. Co.* No. 09-10023 (Bankr. S.D.N.Y. Jan. 7, 2009) (Ex. B). The order enjoined all parties from "commencing or continuing . . . any judicial, administrative or other action or proceeding against [Lyondell] that was or could have been commenced before the commencement of [Lyondell's] Chapter 11 cases or recovering a claim against [Lyondell] that arose before the commencement of [Lyondell's] Chapter 11 cases." *Id.* at 2, ¶ (a).

On April 23, 2010, the Bankruptcy Court entered an order confirming Lyondell's plan for

[2] "Polyether Polyol Products" are defined below in section III.A.

reorganization. *In re Lyondell Chem. Co.*, No. 09-10023 (Bankr. S.D.N.Y. Apr. 23, 2010) (Ex. C). The plan provides that the stay remains in effect until the bankruptcy case is closed or dismissed. *See* Third Amended and Restated Joint Chapter 11 Plan of Reorganization for the LyondellBasell Debtors § 11.5(a) (hereafter, "Lyondell Plan") (relevant excerpts at Ex. D); 11 U.S.C. § 362(c)(2).

Plaintiffs filed proofs of claim as unsecured creditors in the Bankruptcy Court and, accordingly, preserved their right to assert their antitrust claims against Lyondell in the Bankruptcy Court.[3] However, under the terms of Lyondell's confirmed plan, Plaintiffs are Class 7-A general unsecured creditors, and thus are entitled only to their pro rata share of "Settlement Consideration," estimated in March 2010 to be limited to approximately 16.8 percent of their Allowed Claim. *See* Third Amended Disclosure Statement Accompanying Joint Chapter 11 Plan of Reorganization for the LyondellBasell Debtors, at 9-10 (hereafter, "Lyondell Disclosure Statement") (relevant portions at Ex. F). Yet, Plaintiffs' claims are disputed by Lyondell, and have been valued in the bankruptcy at $0 until such time as they are determined. Even if Plaintiffs were to prevail on the merits of their case, any recovery must be obtained from the Settlement Consideration, which is being reduced on an ongoing basis as other claims are paid. *See* Lyondell Plan § 7.2.

III. THE BASIC TERMS OF THE SETTLEMENT AGREEMENT

The Lyondell settlement arises from extensive arms'-length, good faith negotiations in an effort to obtain a fair settlement for the Class in view of Lyondell's financial distress and the obstacles to recovery in the Bankruptcy Court. Counsel participated in numerous meetings and communications over several months. In light of Lyondell's bankruptcy, Class Counsel

[3] Relevant portions of Plaintiffs' proofs of claim are attached hereto as Ex. E.

recognized that the costs and risks associated with further litigation outweighed any potential recovery that could be obtained from Lyondell, and therefore that the settlement outlined below was in the best interest of the Class.

A. The Parties and the Settlement Products

The Agreement is binding on Lyondell,[4] the plaintiffs,[5] and the Class, which includes all persons and entities who 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"). Excluded from the Class are defendants, their respective parents, employees, subsidiaries and affiliates, and all government entities. SA at 1. This Class definition encompasses the same litigation Class that the Court certified. *See* Dkt. No. 708, Mem. and Order (July 29, 2008), at 8.

B. Production of Documents and Witnesses

Lyondell agrees to provide the Class Plaintiffs with documents and access to witnesses. SA ¶¶ 20-21. Specifically, Lyondell will produce documents its attorneys collected before the bankruptcy and that it would have produced to Class Plaintiffs during merits discovery, but that previously were unavailable to Plaintiffs because of the bankruptcy stay. Additionally, Lyondell's counsel will provide information about Lyondell's documents and assist with

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[4] "Lyondell" is defined in the settlement agreement as "Lyondell Chemical Company, each entity owned or controlled by Lyondell, and each of Lyondell's past, present, predecessor, successor or successor in interest subsidiaries, and related, affiliated and parent entities." SA ¶ 1.

[5] "Plaintiffs" are defined in the settlement agreement as "Seegott Holdings Inc., Quabaug Corporation and Industrial Polymers, Inc." SA ¶ 6.

establishing their admissibility. Finally, Lyondell will use reasonable efforts to make current and former employees available for interviews, depositions, and trial testimony.

C. Released Claims

The Agreement releases only Lyondell (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 Lyondell'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. SA ¶ 17.

D. Cost of Class Notice

The Agreement requires Lyondell to pay all administrative expenses associated with providing notice of the settlement to the Class, subject to a cap of $35,000, which Class Counsel do not anticipate exceeding. SA ¶ 13.

IV. ARGUMENT

A. Standards Governing Preliminary Approval of a Settlement

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) ("*Motor Fuel Temp.*"); *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) ("*AMA*").

The trial 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); *accord*, *Gottlieb v. Wiles*, 11 F.3d 1004, 1014 (10th Cir. 1993), *overruled in part on other grounds*, *Devlin v. Scardeletti*, 536 U.S. 1 (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). The Lyondell 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] (2005). *See also 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 the class action context). 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 Benefits of the Settlement Agreement Outweigh the Substantial Risks and Costs of Pursuing a Speculative, De Minimis Recovery in the Lyondell Bankruptcy

The bankruptcy stay and confirmation of Lyondell's plan of reorganization greatly enhanced the obstacles to Plaintiffs' obtaining relief from Lyondell while significantly reducing the value of any potential monetary recovery. These circumstances presented Plaintiffs with the prospect of expending substantial time and resources to pursue relatively small, but still uncertain monetary recovery. Alternatively, Plaintiffs could obtain the maximum benefit available in the context of the Lyondell bankruptcy – the proposed settlement – and focus the entirety of the Class's finite resources on pursuit of their antitrust claims against the remaining

defendants. As explained below, Plaintiffs reasonably have concluded that the proposed settlement is the best path forward.

If the Class is to recover damages from Lyondell through further litigation, it must liquidate the claims filed in the Bankruptcy Court by obtaining a judgment of liability and a determination of the measure of damages. To do so, Plaintiffs either must litigate the merits of their antitrust allegations in the Bankruptcy Court or, alternatively, move the Bankruptcy Court to lift the stay and allow the claims to be litigated to a judgment in this Court.

Alternatively, either Plaintiffs or Lyondell could move the Bankruptcy Court to estimate the value of Plaintiffs' claims pursuant to 11 U.S.C. § 502(c) – a time-consuming procedure that would be akin to a mini-trial on the issues of liability and damages, featuring experts, extensive briefing, pre-trial discovery, and hearings before the Bankruptcy Court. In fairly short order, the procedural complications already inherent in an antitrust class action would multiply were such parallel proceedings in the bankruptcy court required. *See In re Linerboard Antitrust Litig.*, 292 F. Supp. 2d 631, 639 (E.D. Pa. 2003) ("An antitrust class action is arguably the most complex action to prosecute."); *In re Safety Components, Inc. Sec. Litig.*, 166 F. Supp. 2d 72, 98 (D.N.J. 2001) ("[T]he fact that [defendant] filed a Chapter 11 bankruptcy petition significantly increased the complexity of the matter.").

Even assuming Plaintiffs were to prevail on the merits and liquidate their claims, upon submission to the Bankruptcy Court the dollar value of those claims still could be challenged and reduced on the basis that they are "Subordinated Claims" under the Lyondell Plan. Any portion of a judgment that consists of treble damages or amounts reflecting joint and several liability for another defendant's conduct may qualify as a Subordinated Claim, which receive $0 under the Lyondell Plan. *See* Lyondell Disclosure Statement at 20, 79-80 ("Holders of Subordinated

Claims will not receive or retain any interest or property under the Plan on account of such Claims."). If Lyondell sought to reclassify any portion of Plaintiffs' claims as Subordinated Claims, Plaintiffs would need to participate in yet further proceedings that would include preparation of pleadings, possible discovery and attendance at hearings.

Were Plaintiffs to clear all of these Bankruptcy Court hurdles, the funds available to satisfy their liquidated claim – known under the Lyondell Plan as "Settlement Consideration" – would be extremely limited and subject to dilution on an ongoing basis. *See* Disclosure Statement at 10 (unsecured allowed claims are paid a pro rata share of "Settlement Consideration," defined therein). As of March 2010, when the latest Lyondell Disclosure Statement issued, the estimated total recovery percentage was 16.8% based on the estimated value of claims at that time. *See id*. As time passes, ongoing payments to satisfy other unsecured claims are diminishing the available Settlement Consideration, resulting in progressively smaller percentage recoveries for future claims. Plaintiffs understand that the current estimated distributions have been diminished to approximately 15.4% of the claimed amount.

It bears emphasis that Plaintiffs probably could not obtain any litigated recovery in less than two years' time, and certainly not without a huge investment of resources. Indeed, pursuing such claims likely would require expenditure of hundreds of thousands of dollars in costs and many hundreds of hours of attorney time, including extensive briefing in this Court and the Bankruptcy Court, working with experts, attending hearings and defending any appeal. In light of the very significant resources necessary to obtain a recovery, any "victory" against Lyondell

would be pyrrhic, because in all likelihood litigating the claims would consume more money than Plaintiffs could hope to recover.[6]

Weighed against these difficult circumstances, the proposed settlement is a superior outcome. First, receiving assistance from Lyondell in prosecuting this case against the remaining defendants is a material benefit to the Class. *See Linerboard*, 292 F. Supp. 2d at 643 ("The provision of such [cooperation] is a substantial benefit to the classes and strongly militates toward approval of the Settlement Agreement."). Such assistance affords the Class access to documents and witnesses without protracted and expensive discovery.

Second, the Settlement Agreement also 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 Lyondell. SA ¶ 17. In *Corrugated Container*, the district court approved numerous settlements that "explicitly preserved plaintiffs' right to litigate against all remaining defendants for the *entire* amount of plaintiffs' damages, on the basis of joint and several liability, for *all* the injury caused by the conspiracy." *In re Corrugated Container Antitrust Litig.*, MDL No. 310, 1981 WL 2093, at *17 (S.D. Tex. June 4, 1981) (emphases in original), *aff'd*, 659 F.2d 1322 (5th Cir. 1981). The district court "considered this to be a valuable provision supporting the approval of the settlement." *Id*. Here, too, the Class members will be able to recover their full damages against the non-settling (and solvent) defendants, offset only by the amount of the Bayer and (proposed) Huntsman monetary settlements, but with no other diminution.

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[6] Numerous courts recognize that inherent risks of litigation, coupled with the difficulty of recovering any judgment from a bankrupt or financially distressed defendant, weigh heavily in favor of settlement approval. *See In re OCA, Inc. Sec. & Derivative Litig.*, No. 05-cv-2165, 2009 WL 512081, at *15 (E.D. La. Mar. 2, 2009); *New England Health Care Employees Pension Fund v. Fruit of the Loom, Inc.*, 234 F.R.D. 627, 631 (W.D. Ky. 2006); *In re Am. Bank Note Holographics, Inc.*, 127 F. Supp. 2d 418, 424 (S.D.N.Y. 2001); *In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 297, 324 (N.D. Ga. 1993).

Third, Lyondell has agreed to pay the administrative costs associated with providing notice to the Class, up to a cap of $35,000 (which Plaintiffs do not anticipate exceeding).

2. The Settlement Was Fairly and Honestly Negotiated

This settlement is the result of extensive negotiations with Lyondell's counsel over several months. Following confirmation of Lyondell's plan of reorganization, Plaintiffs reviewed the plan and discussed at length with Plaintiffs' and Lyondell's bankruptcy counsel its implications for Plaintiffs' antitrust claims. In the course of that review and analysis, it became clear that the very limited assets available under Lyondell's plan of reorganization to satisfy a judgment meant that any meaningful monetary recovery from Lyondell would be extremely unlikely and prohibitively expensive to obtain.

Accordingly, during several meetings through 2010 and into the winter of 2011, Plaintiffs pressed for and successfully extracted non-monetary benefits for the Class, including access to documents and information that had been shielded from discovery by the bankruptcy stay, as well as Lyondell's underwriting of the settlement notice program. Courts in the Tenth Circuit routinely cite such considerations in determining whether a settlement was fairly and honestly negotiated. *See, e.g.*, *Lucas*, 234 F.R.D. at 693 (finding agreement was fairly negotiated over a period of months, after multiple meetings of the parties, represented by multiple counsel with expertise in complex class action litigation). *See also* 4 *Newberg on Class Actions* § 11.41 (4th ed. 2002) ("There is usually 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.").

3. Class Counsel Believes 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 v. Kansas Dept. of Revenue*, 209 F. Supp. 2d 1179, 1183 (D. Kan. 2002)); *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.").

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.

4. Conclusion

Because the Lyondell settlement agreement satisfies each of the Tenth Circuit's stated criteria for preliminary approval, the Court should grant preliminary approval.

B. <u>Notice Should Be Disseminated to the Class</u>

Rule 23(e) requires that court-approved notice of the proposed settlement be distributed to all reasonably identifiable members of the Class. *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 by the proposal."

Here, 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. *See* Dkt. No. 911,

Order Authorizing Notice to the Class (Apr. 22, 2009). Specifically, Plaintiffs propose individual notice via first-class mail to those class members who were previously identified in connection with the May 2009 mailing.[7] To the extent that the mailing list has been updated since that time, those added persons or addresses will also receive the mailed notice.[8]

The proposed form of notice includes information concerning both the proposed Lyondell settlement and the proposed Huntsman settlement. Class Plaintiffs believe that distributing a joint notice of the two settlements, as opposed to multiple notices, will be the cleanest and most efficient way to educate Class members about their rights under the settlements, as they will receive one notice, rather than piecemeal notices, that sets forth everything they need to know about their rights under both settlements.

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 (Part III), provides notice of the fairness hearing and how to object to the proposed settlements (Part IV), and explains how Class members may obtain additional information, including a copy of the Settlement Agreement (Part V).

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*

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[7] *See* Dkt. No. 962-2, Mailing Affidavit of Richard L. Sartory Re: Mailing of Notice (describing mailing of the notices).

[8] Plaintiffs do not propose publication notice in connection with the instant settlement. Publication notice already has been provided twice in this litigation – first, in connection with the 2006 notice of the Bayer settlement and, second, in connection with the Court's order certifying the litigation class. *See* Dkt. Nos. 389, 397 & 775-2 (describing notice programs). Moreover, there was an additional notice program – approved without a publication component – in connection with the proposed allocation of the Bayer settlement. *See* Dkt. No. 911. Class Counsel believe these substantial (and expensive) efforts have provided effective notice to the class, and that it is highly unlikely that any significant number of *additional* class members will be notified by a third publication notice. In short, it would not be an efficient use of resources to repeat publication notice a third time.

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).[9]

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

[9] 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 v. Civil Service Comm'n of City & County of San Francisco*, 688 F.2d 615, 635 (9th Cir. 1982). *See also 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 the Lyondell settlement without providing Class members a second opportunity to opt out.

V. CONCLUSION

For the reasons stated herein, Class Plaintiffs respectfully request that the Court grant the motion for preliminary approval of the settlement with Lyondell, 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: June 2, 2011

Respectfully submitted,

/s/

Robert W. Coykendall, #10137
Roger N. Walter, #08620
Morris, Laing, Evans, Brock & Kennedy, Chartered
Old Town Square
300 North Mead - Suite 200
Wichita, KS 67202
Tel: (316) 262-2671
Fax: (316) 262-5991

Class Plaintiffs' Liaison Counsel

Allen D. Black
Roberta D. Liebenberg
Donald L. Perelman
Gerard A. Dever
Paul Costa
Fine, Kaplan and Black, R.P.C.
1835 Market Street, 28th Floor
Philadelphia, PA 19103
Tel: (215) 567-6565
Fax: (215) 568-5872

Richard A. Koffman
Christopher J. Cormier
Sharon K. Robertson
Cohen Milstein Sellers & Toll PLLC
1100 New York Avenue, N.W.
Suite 500, West Tower
Washington, DC 20005
Tel: (202) 408-4600
Fax: (202) 408-4699

Class Plaintiffs' Co-Lead Counsel