UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

IN RE PACKAGED ICE ANTITRUST LITIGATION	Case Number: 08-MD-01952 Honorable Paul D. Borman
THIS DOCUMENT RELATES TO: INDIRECT PURCHASER ACTIONS	

INDIRECT PURCHASER PLAINTIFFS' MOTION FOR PRELIMINARY APPROVAL OF PROPOSED SETTLEMENT WITH THE HOME CITY ICE COMPANY AND FOR AUTHORIZATION TO DISSEMINATE NOTICE

Indirect Purchaser Plaintiffs hereby move the Court, pursuant to Rule 23(e)(1) of the Federal Rules of Civil Procedure, for an order granting preliminary approval of the proposed settlement of this litigation with defendant The Home City Ice Company ("HCI"), appointing Plaintiffs' Interim Class and Liaison Counsel as Class Counsel and the Plaintiffs as Class Representatives for the proposed Settlement Classes, and authorizing Class Counsel to disseminate notice of the proposed settlement. The settlement agreement, proposed short form notice and proposed long form notice are annexed hereto at Tabs 2-4, respectively.

In support of this motion, Plaintiffs rely upon the accompanying memorandum of law.

HCI consents to the relief sought.

Dated: April 9, 2012

Respectfully submitted,

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

IN RE PACKAGED ICE ANTITRUST LITIGATION THIS DOCUMENT RELATES TO: INDIRECT PURCHASER ACTIONS	2:10-cv-11689-PDB-RSW Judge: Hon. Paul D. Borman Magistrate Judge: Hon. R. Steven Whalen

INDIRECT PURCHASER PLAINTIFFS' BRIEF IN SUPPORT OF THEIR MOTION FOR PELIMINARY APPROVAL OF THEIR SETTLEMENT WITH DEFENDANT THE HOME CITY ICE COMPANY AND AUTHORIZATION TO DISSEMINATE NOTICE

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Mirfasihi v. Fleet Mortg. Corp., 356 F.3d 781 (7th Cir. 2004)

Moulton v. U.S. Steel Corp., 581 F.3d 344 (6th Cir. 2009)

ISSUES PRESENTED

I. Whether Settlement Class I should be certified under Fed. R. Civ. P. 23(b)(2).

II. Whether Settlement Class II should be certified under Fed. R. Civ. P. 23(b)(3).

III. Whether the Indirect Purchaser Plaintiffs' settlement with The Home City Ice Company is fair, reasonable and adequate and should be approved.

IV. Whether creation of a $750,000 fund for future case costs should be approved.

V. Whether the publication notice is the best and most practicable notice under the circumstances and should be approved.

VI. Whether the forms of notice should be approved.

PRELIMINARY STATEMENT

The Indirect Purchaser Plaintiffs respectfully submit this brief in support of their motion for approval of their settlement agreement with Defendant The Home City Ice Company (the "Agreement"). The Agreement provides for (1) a settlement payment of $2,700,000 (which represents more than two percent of The Home City Ice Company's ("HCI") sales in the states covered by monetary portion of the Agreement); (2) injunctive relief; and (3) HCI's cooperation against the remaining defendants. The Agreement thus offers similar or greater benefits to the Indirect Purchaser class than the class action settlement agreements on behalf of the Direct Purchaser class, previously approved by this Court. *See, e.g., In re Packaged Ice Antitrust Litig.*, 08-MD-01952, 2011 WL 717519 at *9-10 (E.D. Mich. Feb. 22, 2011) (approving settlement with HCI that recovered 2.5% of sales and required Home City's cooperation, but had no injunction).

The Agreement has two classes: (1) a nationwide class for injunctive relief and (2) a multi-state class of indirect purchasers who have a monetary claim under the state law in which they made their packaged ice purchases. The former class will benefit from the injunction and cooperation. Because those class members do not share in the settlement proceeds, they do not release any monetary claims. (Tab 2 at ¶ 23) The latter class will share in the settlement fund and thus, release their monetary claims against HCI. (*Id.* at ¶ 24)

Plaintiffs seek an order preliminarily approving the Agreement, under Rules 23(b)(2) and 23(b)(3), and authorizing dissemination of notice.

STATMEMENT OF FACTS

Procedural Posture

A number of indirect purchaser class actions were commenced in or about March 2008. On June 1, 2009, the Court appointed Matthew Wild, Max Wild and Richard Levitt, as interim lead counsel, and John Perrin, as liaison counsel. (Dkt. # 175) On March 11, 2010, the Court substituted the Wild Law Group PLLC as interim lead and liaison counsel with whom Messrs. Wild, Wild and Perrin are affiliated, and permitted Mr. Levitt to withdraw. (Dkt. # 241)

On September 15, 2009, Plaintiffs Lawrence J. Acker, Brian W. Buttars, Linda Desmond, James Feeney, Ainello Mancusi, Ron Miastkowski, Perry Peka, Patrick Simasko and Wayne Stanford (the "Original Plaintiffs") filed the Amended Class Action Complaint. (Dkt. # 199) The Court granted in part, and denied in part, Defendants' motions to dismiss, holding, *inter alia*, that Plaintiffs only have standing to raise claims under the laws of the states in which they reside or purchased packaged ice and that the allegations that Plaintiffs purchased packaged ice in California, Florida, Michigan and New York were sufficient to confer standing. *In re Packaged Ice Antitrust Litig.*, 779 F. Supp. 2d 642, 657 (E.D. Mich. 2011). The Court also upheld the claim for injunctive relief under § 16 of the Clayton Act (15 U.S.C. § 26), (*id*. at 668), and dismissed the claim under the Florida Deceptive Trade Practices Act. With respect to the Florida claim, the Court held that heightened pleading, under Fed. R. Civ. P. 9(b), applied and the allegations were insufficient under that higher standard. *Id*. at 665.

On May 25, 2011, the Original Plaintiffs filed the Consolidated Class Action Complaint in which they alleged that they purchased packaged ice in four states, in addition to their home states, and added plaintiffs and claims on behalf of Brandi Palombella, Lehoma Goode, Beverly Herron, Robert DeLoss, Karen Prentice, Ian Groves, Lynn Strauss, Nathan Croom, Joe Sweeney,

John Spellmeyer and Samuel Winnig (the "New Plaintiffs"). (Dkt. # 367) The Court granted in part, and denied in part, Defendants' motions to dismiss the Consolidated Class Action Complaint, permitting the Original Plaintiffs to add new claims under state laws in which they had purchased packaged ice before the lawsuit was commenced, but not permiting the addition of New Plaintiffs in a consolidated class action complaint. *In re Packaged Ice Antitrust Litig.*, 08-md-1952, 2011 WL 6178891 at *607 (E.D. Mich. Dec. 12, 2011). Each of the New Plaintiffs is now a party to an action commenced in a United States District Court in which each of the New Plaintiffs raises the claims that he sought to raise in the Consolidated Class Action Complaint. The Judicial Panel on Multidistrict Litigation has consolidated each of these actions in this Court, pursuant to 28 U.S.C. § 1407. (Dkt. # 423, 432 & 437) Each Plaintiff and the states in which he purchased packaged ice are set forth in Tab 5.

Negotiations

Plaintiffs and HCI have been in settlement negotiations since February, 2010. Counsel met in Cincinnati and New York. Matthew S. Wild, Esq., was the principal negotiator for Plaintiffs, and Sanford T. Litvack, Esq., was the principal negotiator for HCI.

Summary Of Settlement Terms

The parties executed the Agreement on or about March 7, 2012, several months after they reached a settlement in principle. The Agreement provides, *inter alia*,

a) Settlement Classes (¶ 16) - There are two settlement classes:

Class I: all indirect purchasers of packaged ice from the Defendants or their subsidiaries or affiliates at any time between January 1, 2001 and March 6, 2008.

Class II: all indirect purchasers of packaged ice in Arizona, Arkansas, California, District of Columbia, Florida, Illinois, Iowa, Kansas, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, North Dakota, South Dakota, Tennessee, Utah, Vermont, West Virginia, Wisconsin and Wyoming from the

Defendants or their subsidiaries or affiliates at any time between January 1, 2001 and March 6, 2008.

Excluded from both classes are government entities and Defendants, including their parents, subsidiaries, predecessors, successors, co-conspirators or the Releasees.

In the event of a new indirect purchaser class action brought under the law of a state other than a Class II State, HCI has the right until Final Approval to add that state to the Class II States provided HCI makes a motion to dismiss the newly asserted claim, which is denied, and pays any increased notice costs. (¶ 32)

b) Settlement Amount (¶¶ 25 & 28) - $2,700,000. Only Class II Settlement Members will be entitled to a distribution from the Settlement Fund.

The Settlement Fund is on deposit in the escrow account of the Wild Law Group PLLC. The Federal Deposit Insurance Corporation provides unlimited insurance for non-interest bearing accounts.[1] Lead Counsel is also authorized to invest the proceeds in treasury bills not to exceed 26 weeks of duration. The parties needed to maintain flexibility while guaranteeing that the Settlement Fund is not at risk and also not imposing costs in excess of a risk-free return. Treasury bills of durations shorter than 26 weeks have yielded negative returns during the past year.

c) Injunction (¶ 26) - HCI consents to entry of an order enjoining it from committing a *per se* violation of § 1 of the Sherman Act.

d) Cooperation (¶¶ 37-47) - Upon execution, HCI agreed to provide Plaintiffs with assistance in prosecuting their claims against the non-settling Defendants and any other alleged co-conspirators. This cooperation includes, *inter alia*, providing access to all documents and data furnished to the Direct Purchaser Plaintiffs and documents in response to informal requests, making three current officers available for interviews, facilitating communications between Plaintiffs and former officers, and providing evidence that will assist Plaintiffs in laying the foundation for the admissibility of documents.

e) Cost Fund (¶ 35) - $750,000 of the Settlement Fund may be used to pay for future costs in connection with the prosecution of claims against the remaining Defendants.

[1] As a New York law firm, Wild Law Group PLLC is required to deposit all non-interest bearing escrow funds in a New York Interest on Lawyers Account. N.Y. Judiciary Law § 497. This type of bank account also receives unlimited FDIC insurance. FDIC Financial Institution Letter, FIL 2-2011 (Jan. 21, 2011). The firm's financial institution maintains the escrow funds in a separate sub-account for ease of accounting.

f) Release (¶¶ 23 & 24) - Class I Settlement Members release all claims for injunctive (non-monetary) relief. However, because they do not receive a distribution from the Settlement Fund, they do not release any monetary claims. Class II Settlement Members (who will share the Settlement Fund) release all claims – monetary and non-monetary – arising from purchases of packaged ice in the Class II States. Neither release covers direct purchases or product defects (including personal injury or property damage claims), and the release governing Class II Settlement Members also does not cover indirect purchases of packaged ice in states other than Class II States.

g) HCI's Sales Remain In Case Against Others (¶ 49) - HCI's sales of packaged ice may be used against its coconspirators to establish damages for which they may be jointly and severally liable.

h) Notice (¶¶ 19, 27 & 29) - Although the Agreement only requires publication in the Class II States, notice will be published throughout the country in 1,400 newspapers using advertisements in *Parade* and *USA Weekend*. In addition, notice will be provided on the internet and a website will be maintained, providing information and allowing Class II Members to sign up for information to file proofs of claim.

Up to $500,000 of the Settlement Fund may be used for notice costs. If the costs will exceed that amount, Plaintiffs may withdraw from the Agreement unless HCI agrees to increase the Settlement Fund by the amount that notice costs will exceed $500,000.

i) Class Certification (¶ 16) – The parties stipulate that the requirements of Fed. R. Civ. P. 23(a) and 23(b)(2) are met with respect to Class I, and Fed. R. Civ. P. 23(a) and 23(b)(3) are met with respect to Class II.

ARGUMENT

I. THE COURT SHOULD CERTIFY THE TWO SETTLEMENT CLASSES BECAUSE THEY SATISFY RULE 23

To approve settlement of a class action, Plaintiffs must satisfy the requirements of Rule 23(a), and one of the requirements of Rule 23(b). The Sixth Circuit explained,

> Rule 23(a) permits class actions when a class member demonstrates that the class members are numerous, that the members' claims share common questions of law or fact, that the representative's claims or defenses are typical of the class members' claims or defenses, and that the class representative will fairly and adequately protect the interests of the class.

Gooch v. Life Investors Ins. Co. of Am., 10-5003/5723, 2012 WL 410926 at *18 (6th Cir. Feb. 10, 2012).

Rule 23(b)(2) requires that HCI "has acted . . . on grounds that apply generally to the class, so that final injunctive relief . . . is appropriate respecting the class as whole." Fed. R. Civ. P. 23(b)(2). Rule 23(b)(3) requires that "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly adjudicating and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3).

Here, both classes satisfy Rule 23(a). Class I also satisfies Rule 23(b)(2), and Class II also satisfies Rules 23(b)(3).

A. Numerosity

The classes encompass millions of consumers. Thus, the Rule 23(a)(1) numerosity requirement is satisfied. *See Packaged Ice*, 2011 WL 717519 at *6.

B. Adequacy and Typicality

The Sixth Circuit observed, "[the] typicality and adequacy . . . requirements tend to merge." *Gooch*, 2012 WL 410926 at *18. Accordingly, it is appropriate to analyze typicality and adequacy "jointly." *Id.*

Here, Plaintiffs suffered the same injury, have identical interests as the class members and will receive compensation on the same basis as the class members. The nature of the releases eliminates any concern about conflicts because Plaintiffs' compensation mirrors the benefits the class members receive under the Agreement. Only Settlement Class II Members release monetary claims because only they receive compensation under the Agreement (and these releases are limited to indirect purchases in the Class II States). Settlement Class I

Members do not release any monetary claims they may have because they do not receive any financial remuneration. Their release is limited exactly to the benefit received – injunctive relief and cooperation.[2]

Although the relevant inquiry focuses on whether the class representatives have suffered a similar injury to the class, the Agreement ensures that to receive compensation, the class members have a claim of relief that arises from such injury. Membership in Class II requires a purchase of packaged ice in a state in which indirect purchasers have a colorable claim for relief, based on an antitrust violation and which does not require proof of deception as an element. (*See* Tab 6 setting forth the claims and authority to support them) Because each Class II representative purchased packaged ice in a Class II State, their claims are typical of the claims of the Class II members.

The Court may approve a settlement even if the complaint lacks allegations that any of the Plaintiffs purchased packaged ice in each and every Class II State. One court explained:

> To establish typicality, the plaintiffs need only demonstrate that the claims or defenses of the class and the class representative arise from the same event or pattern or practice and are based on the same legal theory. Here, it is clear that the claims of the Representative Plaintiffs are based on the same event . . . as the potential class members. The legal theories of recovery for the Representative Plaintiffs are typical of those of the class as a whole. . . . Although the

[2] Thus, the Agreement does not create a situation where the class representatives obtain benefits that are not shared by the classes they represent. *Cf. Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 785 (7th Cir. 2004). Only Settlement Class II Members (who share in the Settlement Fund) release all of their claims for indirect purchases in any of the Class II States. Although the Settlement Class I Members do not receive any financial compensation, they remain free to pursue those monetary claims (even as a class action). *See Gooch*, 2012 WL 410926 at *16 ("Because [plaintiff] cannot represent class members who settled their claims in [the prior class action], the current class certification is invalid to the extent that it overlaps with the [class in the prior class action] . . . . [Plaintiff] could serve as a class representative for some subset of the present class . . . for example, those who opted out of the [prior class action] and therefore did not have their claims settled").

> Representative Plaintiffs are not residents of each of the covered states, the consumer protection statutes in the states in which they reside appear to be typical of, and generally even more consumer-friendly than, consumer protection laws in the range of jurisdictions that they represent. Consequently, the Representative Plaintiffs satisfy the typicality requirement of Rule 23(a)(3).

In re M3 Power Razor Sys. Mktg. & Sales Practice Litig., 270 F.R.D. 45, 54-55 (D. Mass. 2010). *See also In re Warfarin Sodium Antitrust Litig.*, 212 F.R.D. 231, 250 (D. Del. 2002) (approving nationwide indirect purchaser settlement when only "[t]wo of the named consumer plaintiffs reside in 'indirect purchaser' states, . . . so potentially divergent interests on damages are also represented by named plaintiffs"), *aff'd,* 391 F.3d 516 (3d Cir. 2004); *In re Inter-Op Hip Prosthesis Liab. Litig.*, 204 F.R.D. 330, 341 (N.D. Ohio 2001) (five named class representatives were typical of nationwide mass tort settlement class).

The Court held that the Direct Purchaser Plaintiffs satisfied typicality "[b]ecause all Class Members' claims arise from the same course of conduct, i.e. a conspiracy to allocate markets in violation of the Sherman Act, are based on the same legal theory and the typicality requirement, which is not onerous, is met." *In re Packaged Ice Antitrust Litig.*, 2011 WL 717519 at *6. Class I members have the identical theory and claim. Class II members' claims arise from the same conduct and are based on similar legal theories. Thus, Class I and Class II representatives should also satisfy the typicality requirement.

C. Commonality and Predominance

The analysis of commonality under Rule 23(a)(2) and predominance under Rule 23(b)(3) tend to merge because "[p]arallel with Rule 23(a)(2)'s commonality element, which provides that a proposed class must share a common question of law or fact, Rule 23(b)(3)'s predominance requirement imposes a more rigorous obligation upon a reviewing court to ensure that issues common to the class predominate over those affecting only individual class members." *Sullivan*

v. DB Investments, Inc., 667 F.3d 273, 297 (3d Cir. 2011), *cert. denied,* 11-1111, 2012 WL 779996 (U.S. Apr. 2, 2012). Accordingly, courts may "consider the Rule 23(a) commonality requirement to be incorporated into the more stringent Rule 23(b)(3) predominance requirement, and . . . analyze the two factors together, with particular focus on the predominance requirement." *Id.* (citations omitted).

The Court held, "[t]he requirement of commonality requires only a common question of law or fact." *Packaged Ice*, 2011 WL 717519 at *6 (citations omitted). Classes I and II have the same common questions that the Court found existed for the Direct Purchaser Plaintiff Class:

> There exist common questions of law and fact to satisfy Rule 23(a)(2), i.e., whether Defendants conspired to allocate territories and customers, and whether their unlawful conduct caused Packaged Ice prices to be higher than they would have been absent such illegal behavior and whether the conduct caused injury to the Class Members.

Id.

Rules 23(b)(3) requires that "questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and a class action is superior to other available methods for the fair and efficient adjudication of the controversy." 2011 WL 717519 at *7 (quoting Fed. R. Civ. P. 23(b)(3)). The Court found the predominance test satisfied:

> Predominance is a test readily met in certain cases alleging violations of the antitrust laws, because proof of the conspiracy is a common question that is thought to predominate over the other issues of the case. The allegations of market and customer allocation will not vary among the class members and issues regarding the amount of damages do not destroy predominance. The evidence that will prove a violation as to one member will be sufficient to prove it as to all-the anticompetitive conduct is not dependent on the separate conduct of the individual Class Members.

Id. Those very same questions predominate for both Classes I and II.

Indeed, Class I has the same claim for relief as the Direct Purchaser Plaintiffs. With respect to Class II, the commonality and predominance analyses do not change when certifying an indirect purchaser settlement class under multiple states' laws. *See, e.g., In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 530 (3d Cir. 2004) (affirming approval of nationwide antitrust indirect purchaser settlement because, *inter alia*, "the fact that there may be variations in the rights and remedies available to injured class members under the various laws of the fifty states in this matter does not defeat commonality and predominance"). An indirect purchaser settlement (like the Agreement) – which limits compensation to class members who purchased in states that provide for a remedy – would satisfy Rule 23 under even the most cynical view.

For example, in *Sullivan*, 667 F.3d 273, the Third Circuit ***en banc*** considered an appeal challenging approval of a class action indirect purchaser settlement that compensated indirect purchasers nationwide. The majority held that the commonality and predominance requirements were met because "[t]he question is not what valid claims can plaintiffs assert; rather it is simply whether common issues of fact or law predominate." 667 F.3d at 305. The dissent emphasized it agreed with the majority that "where a defendant's singular conduct gives rise to one cause of action in one state, while providing for a different cause of action in another jurisdiction, the court may group both claims in a single cause of action." 667 F.3d at 341. The dissent nevertheless found that commonality and predominance required "all class members [to] . . . at least have some colorable legal claim." 667 F.3d at 344.[3]

[3] The predominance test is easier to satisfy for a settlement class because the Court "need not inquire whether the case, if tried, would present intractable management problems, *see* Fed. Rule Civ. Proc. 23(b)(3)(D), for the proposal is that there be no trial." *In re Cardizem CD Antitrust Litig.*, 218 F.R.D. 508, 517 (E.D. Mich. 2003) (quoting *Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 619 (1997).

Here, the Agreement meets even the dissent's narrower test. Financial compensation is limited to indirect purchasers in states that afford a monetary remedy under their antitrust or consumer protection statutes or for unjust enrichment. As demonstrated in Tab 6, precedent exists for recovery by indirect purchasers in each of the Class II States (and which do not require proof of deception as an element). Thus, there is at least a colorable claim, even if this Court were to conclude that such a claim ultimately lacked merit. Such a decision would not insulate HCI from liability in a different court or additional defense costs on appeal or liability thereafter if the Court of Appeals were to disagree. The very purpose of a settlement is to eliminate this risk and expense. *Cf. Mirfasihi*, 356 F.3d at 783 ("[a] colorable claim may have considerable settlement value (and not merely nuisance settlement value) because the defendant may no more want to assume a nontrivial risk of losing than the plaintiff does").

D. HCI Acted on Grounds Generally Applicable to the Class

The Sixth Circuit explained that to certify a class under Rule 23(b)(2),

> the challenged conduct or lack of conduct [must] be premised on a ground that is applicable to the entire class. It is sufficient if class members complain of a pattern or practice that is generally applicable to the class as a whole. Even if some class members have not been injured by the challenged practice, a class may nevertheless be appropriate. The key to the (b)(2) class is the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or to none of them.

Gooch, 2012 WL 410926 at *17. Plaintiffs, who seek injunctive relief to enjoin a nationwide conspiracy allegedly in violation of the antitrust laws, may pursue class actions under Rule 23(b)(2) and Rule 23(b)(3) if they also seek damages. *See, e.g., In re Static Random Access Memory (SRAM) Antitrust Litig.*, 264 F.R.D. 603, 611 (N.D. Cal. 2009) (certifying multi-state indirect purchaser classes for injunctive relief under Rule 23(b)(2) and damages under 23(b)(3)); *In re Currency Conversion Fee Antitrust Litig.*, 224 F.R.D. 555, 567 (S.D.N.Y. 2004) (same for

direct purchaser classes), *opinion modified on reconsideration,* 361 F. Supp. 2d 237 (S.D.N.Y. 2005), *appeal granted, order amended,* M 21-95, 2005 WL 1871012 (S.D.N.Y. Aug. 9, 2005); *In re Visa Check/Mastermoney Antitrust Litig.*, 192 F.R.D. 68, 88 (E.D.N.Y. 2000) (same), *aff'd,* 280 F.3d 124 (2d Cir. 2001); *In re Catfish Antitrust Litig.*, 826 F. Supp. 1019, 1046 (N.D. Miss. 1993) (same); *In re Domestic Air Transp. Litig.,* 137 F.R.D. 677, 696 (N.D. Ga. 1991) (same); *Northwestern Fruit Co. v. A. Levy & J. Zentner Co.,* 116 F.R.D. 384, 388 (E.D. Cal. 1986) (same).

Here, the Agreement enjoins HCI from committing any *per se* offense of § 1 of the Sherman Act without any geographic limitation. Assuming *arguendo* that HCI no longer participates in the conspiracy, this injunction still provides real value because many conditions that make the packaged ice industry vulnerable to collusion, such as, *inter alia*, price and customer transparency, commodity nature of packaged ice, limited number of competitors for regional and national contracts and opportunities to conspire, remain. *See In re Packaged Ice Antitrust Litig.*, 779 F. Supp. 2d at 668-669 ("The plea agreements do not meet Defendants' burden of establishing that the alleged harm will not be repeated.") The injunction claim would go forward even if damages were unavailable.

II. THE COURT SHOULD APPROVE THE RELEASES BECAUSE THEY SHARE FACTUAL PREDICATES WITH THE CLAIMS ALLEGED IN THE COMPLAINTS

The Court previously held that the Original Plaintiffs have standing to raise claims under the Clayton Act and the laws of California, Florida, Michigan and New York. *Id*. at 670. In addition, Plaintiffs – the Original Plaintiffs in the CCAC or other Plaintiffs in tag-along actions and who are parties to the Agreement – allege that they purchased packaged ice in (and therefore have standing to pursue claims under the laws of Arizona, Arkansas, Iowa, Kansas, Maine,

Massachusetts, Minnesota, Mississippi, Nebraska, Nevada, New Mexico, North Carolina, Wisconsin and Tennessee. While no class representative allegedly purchased packaged ice in ten Class II States,[4] the fact that the named class representatives themselves are not asserting claims under those ten state laws has no bearing on the Court's approval of the Agreement. This Court may approve a settlement that releases claims that "share a factual predicate with the claims pled in the complaint," *Moulton v. U.S. Steel Corp.*, 581 F.3d 344, 349 (6th Cir. 2009) (citation omitted), even if those claims are not pending in the case before it. In fact, such approval is desirable "to avoid protracted litigation and future relitigation of settled questions in federal and state courts across numerous jurisdictions." *Sullivan*, 667 F.3d at 310.

In *Moulton*, for example, the Sixth Circuit affirmed approval of a class action settlement that contained a release over claims that were not raised in the complaint. The Sixth Circuit held, "[t]he question is not whether the definition of the claim in the complaint and the definition of the claim in the release overlap perfectly; it is whether the released claims share a factual predicate with the claims pled in the complaint." *Moulton*, 581 F.3d at 349 (citation omitted). Here, as in other antitrust cases, all of the Released Claims share the same factual predicate – HCI's alleged conspiracy with Arctic Glacier and Reddy Ice in violation of various state and/or federal antitrust laws. Under such circumstances, courts may approve class action settlements in which the released claims arose under laws for which no named plaintiff asserted claims (and even if no named plaintiff had standing to bring such claims).[5] *See, e.g.*, *In re Corrugated*

[4] No class representative purchased packaged ice in the District of Columbia, Illinois, Missouri, New Hampshire, North Dakota, South Dakota, Utah, Vermont, West Virginia and Wyoming. (*See* Tab 3, which identifies each Plaintiff and the state(s) in which he purchased packaged ice)

[5] This principle applies even if the Court had no subject matter jurisdiction over those claims because it is well-established that a court may approve a settlement that includes the release of claims that were not, and could not have been, asserted before that court. For example, in

Container Antitrust Litig., 643 F.2d 195, 221 (5th Cir. 1981) (holding that federal court may release state antitrust claims as part of a federal antitrust settlement because "even when the court does not have power to adjudicate a claim, it may still approve release of that claim as a condition of settlement of an action before it") (citation omitted); *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 108 (2d Cir. 2005) (holding class action settlement's release of antitrust tying claims barred future horizontal boycott claims because "[c]lass actions may release claims, even if not pled, when such claims arise out of the same factual predicate as settled class claims"); *Sullivan*, 667 F.3d at 339 (in nationwide state indirect purchaser antitrust settlement, concurring opinion notes that "[s]o long as a sufficient factual predicate exists, a release can even bar later claims which could not have been brought in the court rendering the settlement judgment") (citation omitted).

As demonstrated above, numerous courts have certified classes and approved settlements analogous to the ones at issue here.

III. THE PROPOSED NOTICE IS THE BEST AND MOST PRACTICABLE UNDER THE CIRCUMSTANCES

Constitutionally sufficient notice of a class action settlement under Rule 23(b)(3) has two components: the manner and form.

A. Manner

The manner of providing notice has to be "reasonably calculated to reach the interested parties." *Gooch*, 2012 WL 410926 at *12. In applying this principle, Judge Posner explained,

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Mastsushita Elec. Indus. Co., Ltd. v. Epstein, 516 U.S. 367 (1996), the Supreme Court held that a state court class action settlement that released a claim that fell within the exclusive original jurisdiction of the federal courts was entitled to Full Faith and Credit. The Court held that the state court could approve a class action settlement if it "possessed subject matter jurisdiction of the underlying suit and over the defendants." *Id*. at 386.

> [w]hen individual notice is infeasible, notice by publication in a newspaper of national circulation . . . is an acceptable substitute. Something is better than nothing. But in this age of electronic communications, newspaper notice alone is not always an adequate alternative to individual notice. The World Wide Web is an increasingly important method of communication, and, of particular pertinence here, an increasingly important substitute for newspapers.

Mirfasihi, 356 F.3d at 786.

Here, individual notice to millions of consumers is also infeasible. Accordingly, Plaintiffs have a notice plan similar to that employed in *Mirfashi*. By advertising in *Parade* and *USA Weekend*, the notice will be published in more than 1,400 newspapers throughout the country with an aggregate circulation of more than 55,000,000 copies and will be expected to reach more than 117,000,000 readers. (*See* Tabs 7 & 8 for circulation information) In addition, Plaintiffs will maintain a website discoverable by search engines. Other courts in addition to *Mirfashi* approved notice plans similar to Plaintiffs'. *See, e.g., In re Kentucky Grilled Chicken Coupon Mktg. & Sales Practices Litig.*, MDL 2103, 2011 WL 5599129 (N.D. Ill. Nov. 16, 2011) (approving notice published only in *Parade* with internet advertising and a website); *In re Phenylpropanolamine (PPA) Products Liab. Litig.*, 227 F.R.D. 553, 565 (W.D. Wash. 2004) (*Parade*, *USA Today* and "30 local newspapers"). In addition, notice under the Class Action Fairness Act (28 U.S.C. § 1453) will be provided by HCI to the state attorneys general. This is another factor ensuring the adequacy of notice. *See, e.g., Kentucky Grilled Chicken*, at *6.

B. Form

The proposed form of notice is sufficient. The Sixth Circuit held,

> When a class has settled its claims, the contents of a . . . notice are sufficient if they inform the class members of the nature of the pending action, the general terms of the settlement, that complete and detailed information is available from the court files, that any class member may appear and be heard at the hearing, and information about the class members' right to exclude themselves and the results of failure to do so.

Gooch, 2012 WL 410926 at *17. Here, the notices satisfy that standard. The notice describes the nature of the action, the general terms of the settlement, directs members to a website with detailed information and pleadings, informs them of their right to object and be heard at the fairness hearing and with respect to the Class II members, informs them of their right to exclude themselves, and if they do not exclude themselves, that they will be bound.[6]

In addition, the notice directs class members to the website and advises them to provide their contact information if they wish to be to provided with instructions on how to file a proof of claim in the future or to be notified when a motion to approve an allocation plan or attorney fee or cost award is filed. Many courts have approved similar notices and procedures. *See, e.g.,* lcdclass.com; koreanairpassengercases.com; onlinedvdclass.com.

IV. THE SETTLEMENT IS FAIR, REASONABLE AND ADEQUATE

In approving the Direct Purchaser Plaintiffs' settlement with HCI, this Court held, "the law favors the settlement of class action lawsuits. This policy applies with equal force whether the settlement is partial, involving only some of the defendants. . . ." *Packaged Ice*, 2011 WL 717519 at *7 (citations omitted; collecting cases). The Court explained,

> a number of factors . . . are relevant in determining whether a settlement is fair, reasonable and adequate: (1) the likelihood of success on the merits weighed against the amount and form of relief in the settlement; (2) the complexity, expense and likely duration of the litigation; (3) the opinions of class counsel and class representatives; (4) the amount of discovery engaged in by the parties; (5) the reaction of absent class members; (6) the risk of fraud or collusion; and (7) the public interest. The Court may choose to consider only those factors that are

[6] Rule 23(b)(2) does not allow class members to exclude themselves and also does not require notice and an opportunity to object. Nevertheless, Plaintiffs want to provide Class I members with an opportunity to be heard if they have any objections. *See In re Visa Check/Mastermoney Antitrust Litig.*, 192 F.R.D. at 89 ("My inclination . . . is to provide general notice to the class, but to provide opt-out rights only as to the damages action").

> relevant to the settlement at hand and may weigh particular factors according to the demands of the case.

Id. at *8. Consideration of these factors renders approval of the settlement even more compelling than the Direct Purchaser Plaintiffs' settlement with HCI.

A. Plaintiffs' Likelihood Of Success On The Merits Weighed Against The Settlement's Benefits Supports Approval.

The Indirect Purchaser Plaintiffs' case is even more complex than the Direct Purchaser Plaintiffs' case. The Court's observation about the likelihood of success, thus, applies with even greater force to the Indirect Purchaser Plaintiffs:

> the Settlement Agreement with Home City seeks to resolve a legitimate legal and factual dispute over the alleged nationwide allocation of markets in the packaged ice industry. . . . [T]here is always a risk that Defendants could prevail with respect [to] certain legal or factual issues. [T]he Court notes, that the Department of Justice has closed its investigation of the Packaged Ice industry and, while certainly not dispositive of Plaintiffs' claims, this is a factor which favors settlement.

Id. at *9. The Court observed that the complexity involved with the Direct Purchaser Plaintiffs having to establish class wide proof of impact and damages favored settlement. The Indirect Purchaser Plaintiffs' case is even more complex because they also have to establish (under most of the state statutes) the amount of the overcharge passed on to them.

When weighed against the settlement payment, injunctive relief and cooperation, the Settlement should be readily approved. In approving the Direct Purchaser Plaintiffs' settlement with HCI, this Court held that a settlement amount of 2.5 percent of HCI's sales "is on par with other antitrust class action settlements that have been approved by other courts." *Id.* (citing cases approving settlements with **direct purchaser plaintiffs** that ranged from 1.5% to 2.0% of settling defendants' sales). Indirect purchaser cases generally settle for substantially less. Here, although the settlement amount is $2,700,000 compared to the Direct Purchaser Plaintiffs'

$13,500,000 settlement, the indirect purchaser settlement represents 2% of HCI's sales in the Class II States – or 80% of the Direct Purchaser Plaintiffs' recovery on the basis of HCI's sales. Such a result in an indirect purchaser case is remarkable.

In addition, the Agreement provides injunctive relief, which is not present in the Direct Purchaser Plaintiffs' settlement, and benefits all purchasers of packaged ice in the nation. HCI has also agreed to provide Plaintiffs with cooperation, and the Agreement is an "ice breaker." Each of these elements weighs in favor of approval.

B. The Complexity, Expense And Likely Duration Of The Litigation Favor Approval

The Court held that the complexity, expense and duration of the litigation favored approval for the Direct Purchaser Plaintiffs' settlement. *Id.* at *10. Approval is even more compelling for the Indirect Purchaser Plaintiffs' settlement.

As explained above, the Indirect Purchaser Plaintiffs' case is more complex. They must establish not only the same elements as the Direct Purchaser Plaintiffs, but (under most of the state laws) they will also have to establish the amount of the overcharge absorbed by them.

The concern about the financial health of the Defendants is likewise more significant now. Before the Settlement, HCI has paid more than $23,000,000 in a fine and settlements. It is unclear how much more HCI can continue to pay to the Class or in defense costs. Arctic Glacier Income Fund and Arctic Glacier Inc. filed for protection from creditors in Canada and Arctic Glacier International Inc. filed for bankruptcy in federal court in Delaware. Reddy Ice was delisted from the New York Stock Exchange, and just threatened that it might need to file for bankruptcy protection. (*See* Form NT 10-K for period ending 12/31/12) ("In the event we are able to reach an agreement with our stakeholders, a 'prepackaged' bankruptcy may provide the most expeditious manner in which to affect our plan of reorganization.") Thus, "the real

possibility that Plaintiffs could ultimately be left with nothing at all" is greater now than it was when the Court approved the Direct Purchaser Plaintiffs' settlement with HCI, favoring approval. *Id.* at *11.

C. The Evidence Available To Lead Counsel Favors Approval

Before entering into the Agreement, Lead Counsel's investigation included, *inter alia*, reviewing the documents produced in connection with, and the transcript of, Keith Corbin's deposition; reviewing all publicly available information about the investigation and the Defendants (including statements from the state attorneys general and Department of Justice concerning the scope of the investigation); coordinating with the lawyer for the two government informants (Martin McNulty and Gary Mowery) in the criminal cases and learning what they have to say; consulting with a leading economist; analyzing information provided by HCI's counsel in the negotiations; and conducting their own independent factual investigation. The information available to the Indirect Purchaser Plaintiffs' Lead Counsel has been even more extensive than the information available to the Direct Purchaser Plaintiffs' Lead Counsel that the Court found sufficient to permit approval. *Id.* at *11-12.

D. The Agreement Was Negotiated At Arm's Length and Lead Counsel Believes That It Is An Excellent Result

Negotiations with HCI took more than one year, and were at arm's length. Lead Counsel and other counsel for the Indirect Purchaser Plaintiffs are highly satisfied with the result.[7] These views have been formed after the extensive investigation set forth above. There is also no basis to suspect collusion. Accordingly, these factors favor approval. *Id*.

[7] Indeed, Gustafson Gluek and Reinhardt, Wendorf & Blanchfield, who have been appointed lead counsel in other antitrust class actions, represent Plaintiffs in this case, and support the Agreement.

E. The Public Interest

The public interest is served by settling these "class actions suits because they are notoriously difficult and unpredictable and settlement conserves judicial resources." *Id.* at *12 (citation omitted).

F. The Court Should Approve The $750,000 Fund To Cover Costs

As with the Direct Purchaser Plaintiffs' settlement, the Agreement provides for a $750,000 fund to cover costs going forward. Courts have repeatedly approved this type of fund as "of obvious benefit to the class" because it "will insure adequate funding for the vigorous ongoing prosecution of the case." *In re M.D.C. Holdings Sec. Litig.*, CV89-0090 E (M), 1990 WL 454747 (S.D. Cal. Aug. 30, 1990). *See also Packaged Ice*, 2011 WL 717519 at *13 ("[s]uch requests are not unusual") (collecting cases). The creation of the fund to cover costs will benefit the Indirect Purchaser Plaintiffs just as it has benefitted other classes, and therefore, should be approved.

CONCLUSION

For the reasons stated, the Court should preliminarily approve the Agreement and authorize dissemination of notice.

Dated: April 9, 2012

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CERTIFICATE OF SERVICE

I hereby certify that on April 10, 2012, I electronically filed the within Motion, Brief and Exhibits with the Clerk of the Court using the ECF system, which will send notification of such filing to all counsel of record.

s/ Matthew S. Wild